



Safety Concerns Related to Diabetes in the Workplace: An Analysis of Federal Law

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I. Introduction

People with diabetes successfully perform an almost endless range of jobs in our nation's economy, including some of the most difficult and dangerous. Advances in diabetes care technology over the past few decades have made the management of the disease, and the avoidance of its negative effects on the job, much easier for most people with the disease. In many instances, an employer need not even know that an employee has diabetes. However, employers may still have safety concerns about diabetes, and sometimes these concerns lead to improper decisions to terminate or restrict an employee from certain jobs because of diabetes. This paper addresses the legal standards applicable to claims that an employer discriminated by taking an adverse employment action against an individual with diabetes based on (real or imagined) safety concerns.

Individualized consideration of a particular person's abilities and condition, including any safety risk they may be thought to pose, is at the heart of the protections provided by federal law. Diabetes affects each individual differently. This is a critical point, as too often employers (and others) make decisions based on generalized assumptions or stereotypes about safety. As will be emphasized throughout this paper, properly addressing safety concerns requires an individualized assessment of the applicant or employee, and cannot be based on generalized assumptions about diabetes, insulin use, or other aspects of the condition. The practice of banning people with diabetes (or those using insulin) from certain jobs, once relatively common, is today medically and legally unsupportable.

When considering safety threats, employers too often take action based on ignorance or a lack of adequate information about diabetes and how it affects the individual at issue, and it is important that attorneys representing people with diabetes be familiar with the disease and the ways it does (and does not) impact safety, and that they educate employers and courts when necessary. Having good medical testimony (from a diabetes expert when necessary) is critical.

Courts generally analyze employer safety concerns under provisions of the Americans with Disabilities Act (ADA) addressing direct threat to health or safety or whether a challenged employment standard relating to safety is a business necessity. Most courts consider these provisions to be affirmative defenses, and they should require employers to meet a high burden of proof in order to ensure that decisions are based on actual risk rather than ignorance and stereotypes. Attorneys representing plaintiffs should focus in discovery on what information the employer used in making its decision, what the employer actually knew about the risks of the condition, and whether the employer is requiring people with diabetes to meet a higher burden to show they are safe than those who fall into other risk groups (like being overweight or smoking).

This paper begins with basic information on diabetes and hypoglycemia (the main short-term safety risk associated with the disease) and how they can affect different individuals. Next, the legal standards for determining who actually poses a significant safety threat are considered, along with how courts have analyzed the risks of diabetes.¹ Finally, the paper discusses how

¹ While this paper focuses on diabetes-related safety risks, it draws upon cases about other medical conditions as well, particularly those conditions which can lead to loss of consciousness or impaired cognition, as these are the

courts evaluate the adequacy of such an assessment, including the role and importance of medical testimony.

The American Diabetes Association frequently assists attorneys handling diabetes discrimination cases. For instance, the Association can help develop arguments and legal strategies, assist with finding medical experts, and, in certain cases, can file amicus briefs. In addition, the Association provides extensive resources on diabetes-related discrimination litigation on its website at <http://www.diabetes.org/attorneymaterials>. This site includes case lists, articles like this one discussing relevant legal issues, and pleadings and other materials from key cases that have addressed these issues. Lawyers with questions about a specific case are encouraged to contact our legal advocacy staff by emailing legaladvocate@diabetes.org.

II. The Science and Medicine of Diabetes

To address diabetes-related safety concerns in a legal setting, it is critical to understand the safety risks that can be posed by individuals with the disease, and how to properly assess when a particular person poses a risk. When employers do take improper actions based on safety concerns, they almost always do so either out of ignorance of diabetes and its effects or because improper or insufficient medical evidence was considered in making the decision. Therefore, knowledge of the medicine and science of diabetes is critical in evaluating an employer's action.²

A. Basic Information on Diabetes

Diabetes is a disorder of the endocrine system which affects over 29 million Americans³ and is characterized by high blood glucose (sugar) levels resulting from defects in insulin secretion, insulin action or both. The pancreas is responsible for making (in specialized cells called beta cells) and secreting insulin, a hormone that is used to regulate the level of glucose in the blood. In diabetes, the pancreas has trouble producing sufficient insulin, limiting the body's ability to regulate glucose and convert it into energy.

Normally, during digestion, the body changes sugars, starches, and other foods into a form of sugar called glucose. The blood then carries this glucose to cells throughout the body. There, with the help of insulin, glucose enters the cells and is changed into quick energy for the cells to use or store for future needs. Even in people without diabetes, blood glucose levels go up and down throughout the day in response to food and the needs of the body. However, in the person

risks most often presented by diabetes in the employment context. This paper also focuses on the federal ADA and Rehabilitation Act. However, because state laws that prohibit discrimination against people with disabilities generally use similar standards, the analysis contained in this paper is generally applicable to state law as well.

² This section is not intended as a comprehensive primer on diabetes; much more information about the disease can be found on the American Diabetes Association's web site at <http://www.diabetes.org>.

³ *National Diabetes Statistics Report 2014*. Atlanta, GA, U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, 2014, available at <http://www.cdc.gov/diabetes/pubs/statsreport14/national-diabetes-report-web.pdf>.

without diabetes, this is a finely tuned system that keeps blood glucose levels within the normal, healthy range.

In diabetes, this process is disrupted because insulin is not present or cannot be used properly. There are two main types of diabetes: type 1 diabetes and type 2 diabetes.⁴ In type 1 diabetes, the pancreas stops making insulin or makes only a tiny amount. Type 1 develops when the body's immune system destroys beta cells in the pancreas, the only cells in the body that make insulin. Thus, the body is no longer able to produce significant amounts of insulin, and a person with type 1 diabetes must receive insulin from an outside source (typically through injections or use of an insulin pump) in order to survive.

In type 2 diabetes, the body retains the ability to make insulin, but cannot make enough to meet its needs. It is generally believed that in people with type 2 diabetes the body's cells cannot recognize insulin or use it as effectively as in people without diabetes (a condition known as insulin resistance). This causes the body to need more insulin to process the same amount of glucose. Generally over time the strain on the pancreas will decrease its ability to produce insulin and cause blood glucose levels to rise. Some people with type 2 (particularly in the early stages of the disease) can control their diabetes solely through diet and exercise. Others must take various types of medications, while still others use insulin much as those with type 1 do.⁵

When insulin is absent or ineffective, the glucose in the bloodstream cannot be used by the cells to make energy. Instead, glucose collects in the blood, leading to the hyperglycemia (high glucose levels) that is the defining characteristic of untreated diabetes. The symptoms of mild to moderate hyperglycemia include hunger, thirst, headache, nausea, fatigue, blurry vision, frequent urination, and itchy and dry skin. In addition to these short-term consequences of acute hyperglycemia, high blood glucose levels cause a number of very serious long-term complications, such as heart disease and blindness.

B. Hypoglycemia

Insulin and oral medications which lower blood glucose levels are used to treat diabetes. Type 1 diabetes must be treated with insulin, while type 2 diabetes can be treated with insulin, oral medications, or simply with diet and exercise. All types of insulin and some oral medications (sulfonylureas) can lower blood glucose levels too much, leading to a potentially dangerous condition known as hypoglycemia (low blood glucose levels). Insulin directly lowers the body's blood glucose level, while sulfonylureas lower blood glucose by stimulating the pancreas to produce and release more insulin. Other oral medications, if not taken in conjunction with sulfonylureas, do not cause hypoglycemia because they do not act to increase native insulin activity.⁶ Symptoms of mild to moderate hypoglycemia include tremors, sweating,

⁴ Type 1 diabetes is sometimes still referred to as "juvenile diabetes" or "insulin-dependent diabetes," while type 2 diabetes is sometimes referred to as "adult-onset diabetes" or "non-insulin dependent diabetes." However, these terms should be avoided, as they are ambiguous and no longer favored by the diabetes health care community.

⁵ A third type of diabetes, gestational diabetes, occurs during pregnancy, and usually ends when the pregnancy does. As this type of diabetes rarely leads to safety-related employment decisions because of its limited duration, it is not further discussed in this paper.

⁶ Other classes of diabetes drugs include those that keep the liver from releasing too much glucose (biguanides), slow the digestion of starches (alpha-glucosidase inhibitors), or make muscle cells more sensitive to insulin

lightheadedness, irritability, confusion, and drowsiness. Hypoglycemia usually can be treated easily and effectively. If it is not treated promptly, however, hypoglycemia can become severe and potentially life-threatening. Symptoms of severe hypoglycemia include inability to swallow, convulsions or unconsciousness.

Severe hypoglycemia is the main source of safety concerns for people with diabetes in the workplace. While severe hyperglycemia (high blood glucose) can cause similar symptoms, and can eventually also lead to unconsciousness, hyperglycemia develops much more slowly, and should not develop at all if adequate insulin and/or oral medications are taken. As stated in the Association's position statement on Diabetes and Employment:

The symptoms of hyperglycemia generally develop over hours or days and do not occur suddenly. Therefore, hyperglycemia does not pose an immediate risk of sudden incapacitation. While over years or decades, high blood glucose may cause long-term complications to the nerves (neuropathy), eyes (retinopathy), or heart, not all individuals with diabetes develop these long-term complications. Such complications become relevant in employment decisions only when they are established and interfere with the performance of the actual job being considered.⁷

It is important to distinguish between severe hypoglycemia and its milder forms. All people with type 1 diabetes, and some people with type 2 (those who are taking insulin or oral medications which lower blood glucose levels) will experience hypoglycemia. It is simply not possible with current diabetes treatment to regulate blood glucose levels as tightly as people without diabetes do naturally. However, many people with diabetes will rarely, or never, experience severe hypoglycemia or lose consciousness. Severe hypoglycemia occurs when the individual is unable to treat himself or herself, either due to unconsciousness or cognitive impairment, and must be assisted by others in order to receive treatment to raise blood glucose levels. Severe hypoglycemia is a serious medical problem, and will impair an individual's ability to perform almost any job (although impaired performance may not in fact pose a safety risk to anyone). However, severe hypoglycemia does not develop instantaneously. When blood glucose levels drop, individuals with diabetes first experience milder hypoglycemia, which can become severe if untreated. Most people with diabetes are able to recognize the signs and symptoms of mild hypoglycemia, and will be able to easily treat the condition to keep it from becoming severe (provided, of course, that the employer permits them to self-treat). Thus, not everyone with diabetes poses the same risk of severe hypoglycemia.

However, some individuals over time lose the ability to recognize the early warning signs of hypoglycemia. These individuals are at increased risk for a sudden episode of severe hypoglycemia because they may not recognize the milder hypoglycemia that precedes it and may not be able to treat appropriately. Some of these individuals may be able to lessen this risk by

(thiazolidinediones). Like sulfonylureas, meglitinides also stimulate insulin release by the pancreas, but do not typically cause hypoglycemia. For more information about oral diabetes medications, see *American Diabetes Association Complete Guide to Diabetes*, at 169-180. 5th ed. Alexandria, VA, American Diabetes Association, 2011.

⁷ American Diabetes Association, Position Statement: Diabetes and Employment, 37 *Diabetes Care* S112 (2014), available at http://care.diabetesjournals.org/content/37/Supplement_1/S112.full.pdf+html (hereafter "Employment Position Statement").

modifying their diabetes management regimen (for example, more frequent blood glucose testing or frequent meals). However, the presence of this condition, known as hypoglycemia unawareness, may be relevant in assessing the safety of an individual employee or applicant.

Also, as noted earlier, not all people with diabetes are subject to hypoglycemia, severe or otherwise. Individuals who are not taking insulin or oral medications known as sulfonylureas (in other words, those who have type 2 diabetes treated with diet and exercise, or with other classes of oral medications) are not subject to any of the risks of hypoglycemia.

C. Assessment of Diabetes

Employers often attempt to base safety decisions on a conclusory statement that an individual's diabetes is "uncontrolled." However, as explained further in section V.F.5 below, this term has no accepted medical definition, and can be based on subjective judgments about the effects of diabetes or even myths and stereotypes about the disease. Therefore, an assessment of diabetes should not focus simply on whether the condition is "controlled," but needs to look at specific evidence about the risks posed by the individual's diabetes in the workplace.

Employers also sometimes focus on tests or other assessments that, according to experts in the field (as discussed in the Association's Employment Position Statement, *supra*) are outdated or are not useful indicators of safety risk in the employment setting. Several tests are used to measure the effect of diabetes on an individual and the effectiveness of that individual's diabetes treatment regimen. For example, blood glucose monitoring involves drawing a drop of blood with a fingerstick and using a blood glucose meter and test strip to determine the person's blood glucose level at a particular moment in time. Most currently available blood glucose meters store past blood glucose test results so that they can be analyzed by the individual with diabetes and a health care professional to improve the treatment regimen. The hemoglobin A1C test is a blood test that gives a measurement of average blood glucose values over a three-month period. Tests can also be performed to detect the presence of diabetes-related complications.

As discussed below (*see* section VI.E), the medical community has made clear that some of these tests are not properly part of an individualized assessment, at least when used as the sole or primary basis for making a decision. There is simply no one test, and no one factor, that determines what, if any, risk an individual poses for severe hypoglycemia; multiple factors need to be considered. Also, there are some tests still in use (including the urine glucose test) which yield no useful data and have no place in a proper individualized assessment. For more information on the components of a medically proper individualized assessment, *see* the Employment Position Statement.

III. Analyzing Safety Concerns under the ADA and Rehabilitation Act

Advocates, employers and courts generally all agree that the ADA and Rehabilitation Act, while protecting the rights of disabled individuals, do not require employers to hire workers who are unsafe. But determining who is “unsafe” and thus can legally be denied employment opportunities presents some challenging questions: What legal standards apply to determining who poses an unacceptable safety risk? When does a determination need to be made about acceptable risk, who makes that decision, and when can an employer rely on that decision? These questions have given rise to frequent litigation, but have not been fully resolved.

What is well settled is the fundamental principle that employment decisions under federal disability discrimination laws, and safety decisions in particular, should be made based on evidence and factual inquiry, not on fears, stereotypes, or generalizations about a condition. “The thesis of the [ADA] is simply this: That people with disabilities ought to be judged on the basis of their abilities; they should not be judged nor discriminated against based on unfounded fear, prejudice, ignorance, or mythologies; people ought to be judged on the relevant medical evidence and the abilities they have.” *Smith v. Chrysler Corp.*, 155 F.3d 799, 805 (6th Cir. 1998) (quoting 136 Cong. Rec. S 7422-03, 7347 (daily ed. June 6, 1990) (statement of Sen. Harkin)). The ADA’s purpose is therefore to “prohibit employers from making adverse employment decisions based on stereotypes and generalizations associated with the individual’s disability rather than on the individual’s actual characteristics.” *EEOC v. Prevo’s Family Mkt., Inc.*, 135 F.3d 1089, 1097 (6th Cir. 1998). Employers must therefore look beyond assumptions (even those widely held) about what people with disabilities can do. As one district court recently noted, “It seems counterintuitive to conclude that a one-handed person could perform the essential functions of a jail officer, but the ADA was intended to move society beyond stereotypes and into evidence of a disabled person’s actual abilities.” *Taylor v. Hampton Roads Reg’l. Jail Auth.*, 550 F. Supp. 2d 614, 617 (E.D. Va. 2008). The legal provisions governing how safety may be considered by employers help to ensure that fears and stereotypes do not play a role in employer decisions.

A. The Statutory Framework

There are several different safety-related provisions in the ADA’s text. The ADA bans discrimination against qualified individuals on the basis of disability. 42 U.S.C. § 12112(a). Being qualified includes the ability to perform the essential functions of the position with or without reasonable accommodations. 42 U.S.C. § 12111(8). The statute defines “discrimination” to include:

[U]sing qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

42 U.S.C. § 12112(b)(6). The statute also contains a similar provision in a section entitled “Defenses,” which provides:

It may be a defense to a charge of discrimination under this Act that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this title.

42 U.S.C. § 12113(a). Such qualification standards “may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.” 42 U.S.C. § 12113(b). The EEOC regulations implementing Title I of the ADA elaborate somewhat on these statutory provisions. Qualification standards are defined to include the physical, medical or safety standards “established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.” 29 C.F.R. § 1630.2(q). A direct threat is defined as “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” 29 C.F.R. § 1630.2(r).

The direct threat defense was first recognized by the Supreme Court in a case under the Rehabilitation Act, prior to the ADA’s passage. *See Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987). This case, discussed further below, arose in the context of an infectious disease (tuberculosis), and while the Rehabilitation Act was subsequently amended to contain a direct threat defense, it applies only to infectious or contagious diseases and is not directly applicable in diabetes cases. 29 U.S.C. § 705(20)(D). The Act also does not have a specific defense relating to qualification standards. However, the Act (at 29 U.S.C. § 794(d)) does state that the standards used to determine when a violation has occurred in the employment context are those applied under Title I of the ADA, and courts have held that ADA direct threat/qualification standards analysis and case law are applicable under the Rehabilitation Act. *Branham v. Snow*, 392 F. 3d 896, 902 (7th Cir. 2004); *Wilkerson v. Shinseki*, 606 F. 3d 1256, 1262 (10th Cir. 2010).⁸ Case law under the Rehabilitation Act has also been used in analyzing claims under the ADA. *Bosket v. Long Island R.R.*, 2004 U.S. Dist. Lexis 10851 at *30 n. 8 (E.D. N.Y. June 4, 2004). Therefore, this paper will discuss cases under the ADA and the Rehabilitation Act interchangeably.

B. What Standard Governs Safety-Related Decisions?

A key question, then, is how safety concerns should be analyzed within the structure of the ADA. In general, an employer may argue that an employment action was justified because of safety concerns in one of three ways:

- **Essential functions/otherwise qualified:** First, the employer may argue that the individual is not otherwise qualified for the position because he or she cannot perform the

⁸ One court has held, with little analysis, that Section 501 of the Rehabilitation Act (governing federal employees) may impose a higher standard, at least as to the amount of information that must be gathered in making a determination that an individual poses a safety risk. *LaChance v. Duffy’s Draft House*, 146 F. 3d 832, 836 (11th Cir. 1998) (rejecting reliance on Section 501 case requiring employer to gather safety information). The court’s reasoning has arguably been undermined by subsequent Supreme Court precedent emphasizing the importance of an individualized inquiry in making safety determinations, as discussed further below.

essential functions of the job safely.⁹ Often the employer argues that safe job performance is in itself an essential function of the position in question, or of all jobs.¹⁰ In other cases, defendants focus on the ability to remain conscious or alert as an essential function.¹¹ An employer may also focus on more specific job duties that the employee allegedly cannot perform because of safety concerns related to diabetes or another disability.¹²

- **Qualification Standards:** An employer may assert that it has a qualification standard which it uses to screen out those individuals for safety reasons. This defense is usually invoked where there is a specific, previously set standard excluding all individuals with a disability or some identifiable subgroup of such individuals. However, an employer apparently may also have a more vague standard that employees be safe on the job or that they not pose a direct threat.
- **Direct threat:** Finally, the employer may argue that an individual poses a direct threat to the health and safety of himself or others which cannot be eliminated by reasonable accommodations.

Clearly, many circumstances where an adverse employment action is taken based on safety concerns can be analyzed in more than one of these ways. This overlap has caused confusion in

⁹ Of course, employees can be considered unable to perform essential functions for other reasons as well. For example, an individual might not be able to climb ladders or meet lifting requirements due to neuropathy. However, issues with performing essential functions that do not involve safety are beyond the scope of this paper.

¹⁰ See, e.g., *DiPol v. N. Y. C. Transit Auth.*, 999 F. Supp. 309, 315 (E.D. N.Y. 1998) (considering whether plaintiff with diabetes could safely perform essential functions, without specifying further which functions he could not perform); *Brown v. City of Long Branch*, 380 Fed. Appx. 235, 239 (3rd Cir. 2010) (analyzing whether plaintiff could safely perform the functions of a law enforcement officer); *McKenzie v. Benton*, 388 F. 3d 1342, 1354 (10th Cir. 2004) (considering whether plaintiff's erratic behavior and improper use of firearm rendered her unable to safely perform essential functions of a police officer); *McGee v. City of Greenville*, 2007 U.S. Dist. Lexis 9686, *7-*8 (D. S.C. Feb. 7, 2007) (plaintiff was not otherwise qualified because he could not perform the job's essential functions without posing a significant risk to the health and safety of himself and others).

¹¹ See, e.g., *Rednour v. Wayne Township*, 2014 U.S. Dist. Lexis 134319, *32 (S.D. Ind. Sept. 24, 2014) (essential functions of a paramedic included the ability to maintain patient care and safety during transport and to safely operate emergency vehicles); *LaCorte v. O'Neill*, 139 F. Supp. 2d 45, 49 (D.D.C. 2001) (Secret Service officer with diabetes must be able to maintain a "constant state of readiness" for long periods of time); *EEOC v. Murray, Inc.*, 175 F. Supp. 2d 1053, 1064 (M.D. Tenn. 2001) (forklift operator must "stay alert and maintain total awareness of his surroundings"); *Olsen v. Capital Region Medical Ctr.*, 713 F. 3d 1149, 1154 (8th Cir. 2013) (mammography technician unable to perform essential function of maintaining patient safety during her seizures).

¹² See, e.g., *Kapche v. City of San Antonio*, 176 F. 3d 840, 844 (5th Cir. 1999) (driving); *Gonzales v. City of New Braunfels*, 176 F. 3d 834, 838 (5th Cir. 1999) (driving and using firearm); *Branham v. Snow*, 392 F. 3d 896, 904 (7th Cir. 2004) (working long, irregular shifts); *Rorrer v. City of Stow*, 743 F.3d 1025, 1041 (6th Cir. 2014) (driving a fire department emergency vehicle); *Eldredge v. City of St. Paul*, 809 F. Supp. 2d 1011, 1031 (D. Minn. 2011) (same); *Fahey v. Twin City Fan Cos.*, 994 F. Supp. 2D 1064, 1072 (D. S.D. 2014) (driving a forklift); *EEOC v. Chrysler Corp.*, 917 F. Supp. 1164, 1169 (E.D. Mich. 1996); *rev'd on other grounds*, 1998 U.S. App. Lexis 30607 (6th Cir. Nov. 25, 1998) (working at heights); *Amick v. Visiting Nurse and Hospice Home*, 2006 U.S. Dist. Lexis 76326, *26 (N.D. Ind. Oct. 18, 2006) (driving and working in client homes); *Nelson v. City of N.Y.*, 2013 U.S. Dist. Lexis 117742, *28 (S.D. N.Y. Aug. 17, 2013) (ability to tolerate the stress of police work); *EEOC v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724 (5th Cir. 2007) (ability to evacuate in an emergency); *Emerson v. Northern States Power Co.*, 256 F. 3d 506, 512-513 (7th Cir. 2001) (ability to handle safety-sensitive calls as customer service representative for utility company); *Wilson v. Phillips Petroleum Co.*, 1998 U.S. Dist. LEXIS 19784, *7 (N.D. Tex. Dec. 8, 1998) (need to respond properly to safety emergencies that might occur while working at an oil refinery).

the courts as to how these claims should be addressed and who bears the burden of proof in such cases. Logically, it would make the most sense if all safety-related concerns in the workplace were evaluated under the direct threat standard. This standard provides the most detailed guidance on how to determine whether an individual poses a risk that is sufficiently substantial to justify an adverse employment action. The EEOC took this position in its interpretive guidance issued with the Title I regulations. This guidance says that “an employer must demonstrate that the requirement, as applied to the individual, satisfies the ‘direct threat’ standard . . . in order to show that the requirement is job related and consistent with business necessity.” 29 C.F.R. App. 1630.1(b),(c) (2004); *see also EEOC v. Amego, Inc.*, 110 F. 3d 135, 142 (1st Cir. 1997) (“The EEOC argues further that whenever an issue of threats to the safety or health of others is involved in a Title I case, it must be analyzed under the ‘direct threat’ provision of § 12113(b) as an affirmative defense”); *Verzeni v. Potter*, 109 Fed. Appx. 485, 490-91 (3rd Cir. 2004). Courts have generally rejected the EEOC’s view, finding nothing in the language or structure of the ADA that requires that the direct threat standard be employed when the business necessity defense or essential functions analysis can also be used. The Third Circuit explained its reasoning as follows:

[I]t is fairly clear that the statute does not require that the direct threat defense be used across-the-board when considering a safety qualification. 42 U.S.C. § 12113 (2004) lays out the defenses available to safety qualifications: “It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards . . . has been shown to be job-related and consistent with business necessity.” . . . Clearly, by the use of the word “may,” Congress intended to include the direct threat defense as a permissive factor to consider. That permissive inclusion does not, however, require that it always be invoked when considering safety-related qualification standards.

Verzeni, supra, 100 Fed. Appx. at 491; *see also Amego, supra*, 110 F. 3d at 144 (lower court did not commit error by analyzing risk posed to others in terms of whether plaintiff was qualified to perform job’s essential functions, rather than under direct threat). While the Supreme Court has not ruled on the issue, it has suggested in dicta that the EEOC’s approach is incorrect. *See Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555, 569 n. 15 (1999) (“it might be questioned whether the Government’s interpretation, which might impose a higher burden on employers to justify safety-related qualification standards than other job requirements, is a sound one”).

Courts generally analyze the safety issues as defendant has framed them, either as a question of essential functions, qualification standards, or direct threat. However, courts in several circuits have attempted to draw a line between the direct threat analysis and the business necessity standard. Most courts that have decided this issue have concluded that the business necessity defense applies when a standard is applied across the board to all applicants or employees, while direct threat is appropriate where action is taken against an individual in the absence of an across-the-board standard. For example, in *EEOC v. Exxon Corp.*, 203 F. 3d 871 (5th Cir. 2000), the Fifth Circuit determined that the direct threat and business necessity provisions use different approaches and serve different purposes. According to the court, the latter focuses on standards that screen out groups, while the former deals with decisions made more specifically about an individual employee’s capabilities. The court then discerned in the derivation of the direct threat standard from *Arline* and the focus in legislative history on communicable diseases and mental

illness an intent to focus the direct threat inquiry on individual conditions which did not directly relate to performance standards established for the job. The court then concluded:

We have found nothing in the statutory language, legislative history or case law that persuades that the direct threat provision addresses safety-based qualification standards in cases where an employer has developed a standard applicable to all employees of a given class. We hold that an employer need not proceed under the direct threat provision of § 12113(b) in such cases but rather may defend the standard as a business necessity. The direct threat test applies in cases in which an employer responds to an individual employee's supposed risk that is not addressed by an existing qualification standard.

Id. at 875. While this reasoning is not entirely persuasive, it has been accepted by several other courts.¹³ Not all courts, however, make this distinction.¹⁴

Fortunately, whether a claim is analyzed in terms of essential functions, business necessity or direct threat may have little practical significance, as courts generally require similar kinds of evidence regardless of the analytical framework used. For example, courts often analyze an essential functions claim based on safety concerns using direct threat standards. *See, e.g., Amick v. Visiting Nurse and Hospice Home*, 2006 U.S. Dist. Lexis 76326, *25 (N.D. Ind. Oct. 18, 2006) (“[Defendant] ostensibly incorporates the ‘direct threat’ defense into its ‘essential functions’ argument, because its concern regarding Amick's alleged inability to perform the essential functions of her job is due to its fear that Amick would pose a safety risk to herself and others if she suffered another severe hypoglycemic episode.”); *EEOC v. Amego, Inc.*, 110 F. 3d 135, 143-44 (1st Cir. 1997) (question of whether plaintiff is qualified cannot be separated from analysis of whether she poses a direct threat); *Williams v. Phila. Housing Auth. Police Dept.*, 380 F. 3d 751, 770 n. 15 (3rd Cir. 2004) (although defendant failed to raise direct threat defense, analysis of that

¹³ *See EEOC v. Murray, Inc.*, 175 F. Supp. 2d 1053, 1065 n. 14 (M.D. Tenn. 2001) (“The direct threat provision is inapplicable in this case because the defendant did not engage in an individualized assessment of employees with the specified medical conditions before removing them from their positions as forklift operators. Instead, the defendant employed a general safety standard, as in *Exxon Corp.*, that must be analyzed under the general defense of business necessity and job-relatedness.”); *Huffman v. Turner Indus. Group LLC*, 2013 U.S. Dist. Lexis 71842, *47 (E.D. La. May 21, 2013) (relying on *Exxon* to hold that employer did not have to prove direct threat where it had a policy about use of certain prescription drugs in the workplace); *Siederbaum v. City of N. Y.*, 309 F. Supp. 2d 618, 629 (S.D. N.Y. 2004) (disqualification based on city transit authority’s medical standards properly analyzed under business necessity); *Bosket v. Long Island R.R.*, 2004 U.S. Dist. Lexis 10851 at *33 (E.D. N.Y. June 4, 2004) (direct threat inapplicable to case involving railroad hearing standards); *Doe v. An Oregon Resort*, 2001 U.S. Dist. Lexis 17449, *14 (D. Ore. May 10, 2001) (direct threat, not business necessity, was appropriate test where ski resort terminated employee due to HIV status).

¹⁴ For example, the Ninth Circuit has drawn a different distinction between the two standards. *See Morton v. United Parcel Serv., Inc.*, 272 F.3d 1249, 1259 (9th Cir. 2001) (“The direct threat defense was meant as a very narrow permission to employers to exclude individuals with disabilities not for reasons related to their performance of their jobs, but because their mere presence could endanger others with whom they work and whom they serve.”). However, this distinction is difficult to draw in practice, and after the Ninth Circuit’s subsequent decision in *Bates v. United Parcel Serv.*, 511 F. 3d 974 (9th Cir. 2007), which rejected much of *Morton*’s reasoning regarding the business necessity defense, its continuing validity is open to question. Other courts make no attempt to draw a line between the two standards. Also, the Fifth Circuit itself in a recent case used a business necessity analysis when examining a qualification standard screening out individuals with uncontrolled or unstable diabetes) that was allegedly based on individualized consideration by a medical review board of whether the plaintiff’s diabetes was uncontrolled. *Atkins v. Salazar*, 677 F. 3d 667, 679 (5th Cir. 2011) .

defense would have been identical to essential functions/qualified analysis); *Nelson v. City of N.Y.*, 2013 U.S. Dist. Lexis 117742, *29 (S.D. N.Y. Aug. 17, 2013) (issue of whether plaintiff could perform the essential functions of police work was intertwined with whether she was a direct threat, and court looked to direct threat factors in its analysis). And, as discussed further in section IV.B, courts have held that analysis of the direct threat factors for determining risk of harm is also needed in business necessity cases. *EEOC v. Houston Area Sheet Metal Joint Apprenticeship Comm.*, 2002 U.S. Dist. Lexis 10393, *25 (S.D. Tex. May 31, 2002) (business necessity defense includes consideration of direct threat factors such as magnitude of harm and probability of occurrence); Fifth Circuit Pattern Jury Instruction 11.7.4 (ADA – Business Necessity Defense) (2009) (available at <http://www.lb5.uscourts.gov/juryinstructions/fifth/2009Changes.pdf>) (in analyzing risks under the business necessity standard, jury should consider the magnitude and probability of possible harm).

Attorneys should focus the court’s attention on the need to consider specific evidence of the risk of harm, such as that required under the direct threat standard, regardless of how a safety-related case is analyzed.

IV. Qualification Standards and Individualized Assessment

A. Individualized Assessment and “Blanket Bans”

Regardless of how safety concerns are framed in a case, attorneys need to bear in mind that one of the chief goals of the ADA (and the Rehabilitation Act) was to ensure that people with disabilities are evaluated on their merits and capabilities, not based on generalized stereotypes or assumptions about their condition. The ADA thus in most cases requires that an employer perform an individualized assessment of the employee’s present ability to perform the job and of any safety risk the employer believes the employee poses. The employer must make an inquiry that is both *individualized*—in that it focuses on the impact of the disease on the individual rather than on generalities about the diagnosis or condition or how it affects others—and a proper *assessment*—which looks at relevant objective evidence rather than subjective opinion. What constitutes a proper assessment can be complex and fact-dependent, and this issue is discussed later in this paper. This section focuses on the need for individualized inquiry, and how the focus on individualized assessment interacts with the ability of employers to set qualification standards, including physical and medical criteria, that apply across the board to all employees.

Diabetes, like many conditions, has widely varying impacts on individuals. The type of diabetes, the medications used to treat it, the presence of complications, and the individual’s history in managing the disease all have a significant impact on the risk someone with the disease might pose. Therefore, across-the-board qualification standards relating to diabetes usually do not adequately take into account the individual variability of the disease. It is conceivable that a proper diabetes-related standard could be developed for a particular job (such as one screening out from a safety-sensitive job those who have had multiple, unexplained instances of severe hypoglycemia within a recent time period). But in practice most such standards (often called “blanket bans”) sweep far too broadly. Typical bans include those which exclude all individuals with diabetes, or all those using insulin, from certain jobs. It is the position of the American Diabetes Association that such bans (often formalized as a medical standard, but sometimes

enforced more informally) are never appropriate. See Employment Position Statement, *supra* note 7, at S112 (“Such ‘blanket bans’ are medically inappropriate and ignore the many advancements in diabetes management that range from the types of medications used to the tools used to administer them and to monitor blood glucose levels.”) When such a standard is in place, there is no individualized consideration of what the employee or applicant can actually do; there is only the assumption (sometimes disguised as medical opinion) that no one with diabetes can safely perform that job.

Historically, blanket bans were quite common, especially in fields like law enforcement and transportation. Before the passage of federal civil rights laws, there was little that people with diabetes could do to challenge such bans. And even with the laws in place, blanket bans were often upheld in the 1980s and 1990s. For example, courts upheld bans on individuals using insulin holding positions as special agents or investigators with the FBI (*Davis v. Meese*, 692 F. Supp. 505 (E.D. Pa. 1988), *aff’d*, 865 F. 2d 592 (3rd Cir. 1989)), individuals using insulin who were “poorly controlled” from driving city sanitation trucks (*Serrapica v. City of N. Y.*, 708 F. Supp. 64 (S.D. N.Y. 1989)), and individuals with uncontrolled diabetes as train conductors (*Amariglio v. Amtrak*, 941 F. Supp. 173 (D.D.C. 1996)). The Fifth Circuit even held that individuals using insulin were not qualified, as a matter of law, for jobs that required driving, such as police officers and bus drivers. *Chandler v. City of Dallas*, 2 F. 3d 1385 (5th Cir. 1993); *Daugherty v. City of El Paso*, 56 F. 3d 695 (5th Cir. 1995). The following quote from the *Chandler* court sums up the attitude, at that time, of many courts toward individuals with diabetes:

We hold that, as a matter of law, a driver with insulin dependent diabetes . . . presents a genuine substantial risk that he or she could be injured or could injure others. . . . Woe unto the employer who puts such an employee behind the wheel of a vehicle owned by the employer which was involved in a vehicular accident.

Chandler, supra, 2 F. 3d at 1395 (internal quotations omitted); see also *Turco v. Hoechst Celanese Chem. Group*, 101 F. 3d 1090, 1094 (5th Cir. 1996) (describing employee with diabetes as a “walking time bomb” because of the possibility of hypoglycemia).

However, these cases were in obvious tension with the ADA’s individualized assessment requirement. The focus on individualized assessment dates at least to *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987), where the Supreme Court, in considering whether a teacher with tuberculosis was otherwise qualified under Section 504, stated that making this sort of determination would generally require the court to conduct an individualized inquiry and make appropriate findings of fact. “Such an inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks.” *Id.*; see also *Albertson’s Inc. v. Kirkingburg*, 527 U.S. 555, 569 (1999) (same requirement applies under ADA).

The legislative history of the ADA includes several references to the need to make employment decisions based on individual characteristics, rather than stereotypes or group affiliations. See, e.g., H. R. Rep. No. 101-485, at 74 (“Generalized fear about risks from the employment

environment, such as exacerbation of the disability caused by stress, cannot be used by an employer to disqualify a person with a disability”); S. Rep. No. 101-116, p. 28 (1989) (“It would also be a violation to deny employment to an applicant based on generalized fears about the safety of the applicant By definition, such fears are based on averages and group-based predictions. This legislation requires individualized assessments.”) The EEOC regulations implementing Title I of the ADA provide that “[t]he determination that an individual poses a ‘direct threat’ shall be based on an individualized assessment of the individual’s present ability to safely perform the essential functions of the job.” 29 C.F.R. § 1630.2(r). The Supreme Court has also more recently acknowledged the importance of individualized assessment. In *Chevron, U.S.A. v. Echazabal*, 536 U.S. 73, 86 (2002), the Court considered the validity of an EEOC regulation that the direct threat inquiry could consider threats posed by the employee to himself or herself, rather than merely threats to others, and stated:

Congress had paternalism in its sights when it passed the ADA, *see* § 12101(a)(5) (recognizing “overprotective rules and policies” as a form of discrimination). But the EEOC has taken this to mean that Congress was not aiming at an employer’s refusal to place disabled workers at a specifically demonstrated risk, but was trying to get at refusals to give an even break to classes of disabled people, while claiming to act for their own good in reliance on untested and pretextual stereotypes. Its regulation disallows just this sort of sham protection, through demands for a particularized enquiry into the harms the employee would probably face. The direct threat defense must be “based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence,” and upon an expressly “individualized assessment of the individual’s present ability to safely perform the essential functions of the job,” reached after considering, among other things, the imminence of the risk and the severity of the harm portended.¹⁵

B. The Business Necessity Defense

Given the importance of such individualized inquiry, questions might be raised about how it interacts with the business necessity defense, which by its terms would permit the use of qualification standards, without the need for individualized assessment of the capabilities of each employee or applicant, so long as those standards are shown to be job related and consistent with business necessity. 42 U.S.C. §§ 12112(b)(6), 12113(a); 29 C.F.R. § 1630.10; Fifth Circuit Pattern Jury Instruction 11.7.4 (ADA – Business Necessity Defense) (2009) (available at <http://www.lb5.uscourts.gov/juryinstructions/fifth/2009Changes.pdf>) (listing elements of the defense).

¹⁵ The Court has also stressed the need for individualized assessment in other contexts. *See Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 199 (2002) (in determining whether an individual has a disability, “[a]n individualized assessment of the effect of an impairment is particularly necessary when the impairment is one whose symptoms vary widely from person to person”); *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001) (individualized inquiry needed to determine whether suggested modification is reasonable); *Albertson’s, supra*, 527 U.S. at 565-66 (existence of disabilities must be determined on a case by case basis); *Sutton v. United Air Lines*, 527 U.S. 471, 483 (1999) (same).

At the outset, it should be noted that the business necessity defense applies to standards that are uniformly applied, not to situations where decisions are made on an ad hoc basis, which should be analyzed under the direct threat standard. *See Kellogg v. Energy Safety Svcs.*, 544 F. 3d 1121, 1127 (10th Cir. 2008) (standards must be uniformly applied, in addition to being job-related and consistent with business necessity); *EEOC v. Exxon Corp.*, 203 F. 3d 871 (5th Cir. 2000) (business necessity standard applies to across-the-board requirements); Fifth Circuit Pattern Jury Instruction 11.7.4 (ADA – Business Necessity Defense), *supra* (listing uniform applicability as an element of the business necessity defense). The defense should not apply to guidelines, as opposed to standards. Employers sometimes describe their screening criteria as guidelines, which trigger a further assessment of medical data for those applicants or employees who do not meet them, as opposed to standards which simply screen out such individuals. The use of guidelines rather than standards is commendable if the assessment is genuine and individualized, rather than a sham that routinely upholds decisions based on the guideline. However, where individual factors are considered the direct threat analysis, rather than business necessity, should be used, because these guidelines cannot really be said to have uniform applicability and because subjective opinions and stereotypes can still enter into the assessment. Courts do not always appreciate the distinction between guidelines and standards. For example, in *Bender v. Norfolk Southern Corp.*, 2014 U.S. Dist. Lexis 92364 (M.D. Pa. July 8, 2014), a court faced with such a guideline first rejected plaintiff's argument that the guideline as a blanket ban, since it provided for the consideration of further individualized medical data and opinion for applicants who could not meet it, but then stated that the existence of the guideline justified a jury instruction on the business necessity defense. *Id.* at *22, *24; *see also Coleman v. Pennsylvania State Police*, 2013 U.S. Dist. Lexis 99609, *57 (W.D. Pa. July 17, 2013), *aff'd*, 561 Fed. Appx. 138 (3rd Cir. 2014) (suggesting, without deciding, that defendant's seizure protocol could be upheld under the business necessity defense even though the protocol stated that the defendant's physician could make exceptions to the protocol in individual cases).

A brief discussion of the concepts of job relatedness and business necessity is in order. These concepts are used for all screening standards, not just those related to medical conditions or safety; they are also used to measure the appropriateness of employer actions in other areas of the statute, such as medical inquiries and evaluations.¹⁶ Job-relatedness generally means that the qualification standard fairly and accurately measures the individual's actual ability to perform the essential functions of the job. *See Bates v. United Parcel Serv.*, 511 F. 3d 974, 996 (9th Cir. 2007).¹⁷ A showing of consistency with business necessity requires that the qualification

¹⁶ These concepts were originally developed in case law under Title VII to address standards which were neutral on their face but had a disparate impact on racial minorities or women. Employers often analogize disability cases to those under Title VII, but courts should hold employers to a higher standard under the ADA business necessity defense where standards are explicitly based on medical conditions and there is far more concern that misconceptions and stereotypes will infect the standard setting process.

¹⁷ Most applications of the job-related/business necessity standard in the safety context do not focus on job relatedness. Since it is generally conceded that safe performance relates to most job functions, the focus in challenging a qualification standard is usually on showing that it is inconsistent with business necessity because it is not based on adequate evidence or is too broadly drawn. In diabetes, for example, where the key concern is generally loss of consciousness or alertness due to hypoglycemia or hyperglycemia, it is hard to challenge the idea that being conscious and alert are related to nearly all functions of any job. *But see Bates, supra*, 511 F. 3d at 996 (“When every person excluded by the qualification standard is a member of a protected class—that is, disabled persons—an employer must demonstrate a predictive or significant correlation between the qualification and

standard substantially promote the business's needs; the standard is quite high, and should not be confused with mere expediency.¹⁸ *Id*; see also *EEOC v. Exxon Corp.*, 203 F.3d 871, 875 (5th Cir. 2000).¹⁹

Business necessity is an affirmative defense, on which the employer bears the burden of proof. *Bates, supra*. 511 F. 3d at 993; *Allmond v. Akal Security*, 558 F. 3d 1312, 1316 (11th Cir. 2009); *Andrews v. State of Ohio*, 104 F.3d 803, 807-08 (6th Cir. 1997); *Leverett v. City of Indianapolis*, 51 F. Supp. 2d 949, 957 (S.D. Ind. 1999).

While qualification standards, if upheld, would eliminate the need for any individualized assessment, in practice courts apply many of the same principles underlying the individualized assessment requirement when evaluating these standards. The Fifth Circuit, after holding that business necessity was the proper standard to be applied to across-the-board screening criteria, discussed the relationship between the two defenses:

In so holding, we note that direct threat and business necessity do not present hurdles that comparatively are inevitably higher or lower but rather require different types of proof. ... Either way, the proofs will ensure that the risks are real and not the product of stereotypical assumptions. In evaluating whether the risks addressed by a safety-based qualification standard constitute a business necessity, the court should take into account the magnitude of possible harm as well as the probability of occurrence.

EEOC v. Exxon Corp., 203 F. 3d 871, 875 (5th Cir. 2000). Similarly, the Third Circuit stated that the factors to be considered in the direct threat context are also appropriate in a business necessity analysis:

An employer does not necessarily have to use the direct threat defense anytime it is imposing a qualification standard that may have an adverse impact on an employee with a disability. However, many of the same concerns, which led the Supreme Court to formulate its four-part test in *Arline*, also arise in business necessity defense cases. A jury must take heed of these concerns, and the jury's instructions ... should ensure that its decision is based on an assessment of the objective medical facts about the disability.

performance of the job's essential functions.”) For this reason, this paper will focus on the business necessity prong of the defense.

¹⁸ However, at least one court has held that “[a]lthough this burden is generally quite high, it is significantly lowered when . . . ‘the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great.’” *Allmond v. Akal Sec. Inc.*, 558 F. 3d 1312, 1317 (11th Cir. 2009). It should be noted that the only case relied on by *Allmond* for this holding, *Hamer v. City of Atlanta*, 872 F.2d 1521, 1535 (11th Cir. 1989), is a race discrimination case challenging a written promotion examination, and should have little relevance in evaluating medical standards under the ADA. See *infra* at section IV.D.

¹⁹ The business necessity standard also requires consideration of the possibility of reasonable accommodation. If the standard can be met by offering a reasonable accommodation, such accommodation must be made. For individuals with diabetes, there are few possible accommodations that can help them pass a screening test related to the disease. While accommodations such as permitting more frequent monitoring of blood glucose levels and treatment of symptoms are useful and often necessary, these are accommodations needed to perform the job, not to pass the qualification standard.

Verzeni v. Potter, 109 Fed. Appx. 485, 488 (3rd Cir. 2004); *see also* Fifth Circuit Pattern Jury Instruction 11.7.4 (ADA – Business Necessity Defense), *supra* (in analyzing the risks addressed by the standard, juries should consider the magnitude of possible harm and the probability of occurrence, both of which are factors in the direct threat analysis).²⁰ Thus, proving business necessity entails a showing that the affected class of individuals poses a reasonable probability of substantial harm. *See Knapp v. Northwestern Univ.*, 101 F. 3d 473, 483 (7th Cir. 1996) (citing *Mantolete v. Bolger*, 767 F. 2d 1416, 1422 (9th Cir. 1985)).

These cases importing direct threat standards into the business necessity inquiry make sense, given that the two inquiries have the same practical effect on an individual with diabetes facing discrimination; it matters little to the individual whether his or her disqualification is based on a previously adopted medical standard or ad hoc consideration by the employer. An employer should not be able to justify its actions using a lower standard of review simply because it has chosen to formalize its decisions through a generally applicable medical standard. Therefore, such a standard should not be justified under the business necessity defense unless all (or nearly all) individuals who cannot meet the standard will pose a significant risk of substantial harm. This requires not only a close fit between the screened-for ability and the job in question, but also a showing that the standard does not discriminatorily screen out significant numbers of individuals who can perform the job safely. In analyzing a blanket ban on individuals using insulin driving forklifts, the court in *EEOC v. Murray, Inc.*, 175 F. Supp. 2d 1053, 1064 (M.D. Tenn. 2001) said:

The defendant's policy does appear, on its face, to be based on improper stereotypes and generalizations about individuals with the specified medical conditions. In order to disprove this inference, the defendant must establish that these medical conditions always cause specific physical or mental limitations that prevent the individuals from operating forklifts safely. Otherwise, the defendant is engaging in precisely the type of behavior that the ADA was designed to prevent: making employment decisions based on generalized assumptions about physical and mental impairments without determining the individual capabilities of each employee with the specific impairment.

C. Decisions Requiring Individualized Assessment

With the increasing focus by courts on the need to make individualized assessments and on the need to consider factors such as the significance of the risk and the probability of harm in the analysis of blanket bans, it is hardly surprising that a number of courts have struck down medical standards that screen out people with diabetes. One of the more significant cases challenging such a standard is that of Jeff Kapche, who has type 1 diabetes and wanted to be a police officer with the city of San Antonio. Recall that the Fifth Circuit had established a rule that people with diabetes using insulin pose a significant risk when driving as a matter of law, and thus are not

²⁰ *See also Fraterrigo v. Akal Security, Inc.*, 2008 U.S. Dist. Lexis 87451, *28 (S.D. N.Y. Oct. 29, 2008) (considering whether hearing standards adopted by U. S. Marshals Service had an adequate medical basis); *EEOC v. Houston Area Sheet Metal Joint Apprenticeship Comm.*, 2002 U.S. Dist. Lexis 10393, *23 (S.D. Tex. May 31, 2002) (business necessity defense includes consideration of magnitude of harm and probability of occurrence).

qualified as a matter of law for positions involving driving, in *Chandler v. City of Dallas* and *Daugherty v. City of El Paso*, *supra*. Relying on these cases and its own medical guidelines, the city of San Antonio refused to hire Kapche. But the *Chandler* court had left open the possibility that its legal conclusion might someday be overturned with adequate medical evidence of the changing nature of diabetes treatment,²¹ and when Kapche’s case reached the Fifth Circuit that time had come.

The *Kapche* court first noted that neither *Chandler* nor *Daugherty* had acknowledged the ADA’s requirement for and focus on individualized assessment. While concluding that some exception to the individualized assessment rule may be permissible, the court found that it was necessary to reevaluate whether the *Chandler/Daugherty* per se rule regarding drivers with diabetes using insulin could still be justified. *Kapche v. City of San Antonio*, 176 F. 3d 840, 845-46 (5th Cir. 1999) (*Kapche* I). The court concluded that a reevaluation of the rule was necessary, for two primary reasons. First, changes in the U.S. Department of Transportation’s medical standards for commercial drivers had removed the absolute ban on such drivers using insulin, which had been in place when *Chandler* was decided.²² The second reason was the changing nature of diabetes management, and advances in technology which made the disease easier to treat, and which undermined the holdings of other courts on which the *Chandler* court had relied.²³ The court concluded, “In light of this evidence, we find there to be a genuine dispute of material fact regarding the safety risk posed by insulin-dependent drivers with diabetes mellitus.” *Id.* at 847. It remanded the case to the trial court for a determination of “whether today there exists new or improved technology . . . that could now permit insulin-dependent diabetic drivers in general, and Kapche in particular, to operate a vehicle safely.” *Id.*

Jeff Kapche’s fight was not over, however. The Fifth Circuit had not determined that individualized assessment was necessary, only that the issue needed to be revisited. The trial court on remand again granted summary judgment, and the appeals court again reversed, this time doing what it had not explicitly done before—ruling as a matter of law that individualized assessment of people with diabetes was required by the ADA. The court again criticized *Chandler* and *Daugherty* for failing to acknowledge the concept of individualized assessment, and noted both the presence of intervening Supreme Court decisions emphasizing individualized assessment and the absence of any rule similar to *Chandler/Daugherty* in other circuits. *Kapche v. City of San Antonio*, 304 F. 3d 493, 499 (5th Cir. 2002) (*Kapche* II). Finally, the court reviewed again the evidence that advances in diabetes treatment, including “such medical advancements as portable glucose monitors, routine hemoglobin testing, improved insulin delivery systems, and improved insulin,” as well as evidence that Kapche had successfully

²¹ “We nonetheless share the hope of the court in *Davis* that medical science will soon progress to the point that ‘exclusions on a case by case basis will be the only permissible procedure; or, hopefully, methods of control may become so exact that insulin-dependent diabetics will present no risk of ever having a severe hypoglycemic episode.’” *Chandler*, *supra*, 2 F. 3d at 1395 n. 52 (quoting *Davis v. Meese*, 692 F. Supp. 505, 520 (E.D. Pa. 1988)).

²² These medical standards are discussed *infra*.

²³ On this second point, the court acknowledged the role of the American Diabetes Association, which filed an amicus brief that “offers cogent support for this position. The Association highlights several recent studies and reports which demonstrate that drivers with insulin-dependent diabetes pose no greater danger than do drivers without the disease and the dependency. In addition, the Association points to technological improvements which have significantly increased the ability of diabetics to monitor blood sugar levels and thereby prevent hypoglycemic reactions.” *Id.* at 847.

managed his condition, and concluded that this evidence supported striking down the blanket ban. *Id.* at 500. In conclusion, the court held “that an individualized assessment of Kapche's present ability to safely perform the essential functions of an SAPD police officer is required.” *Id.*

The *Kapche* court did not consider whether the city's ban could satisfy the business necessity defense, and thus did not necessarily hold that an employer could never justify a diabetes-related screening standard under that defense. This may be because the city did not develop any medical basis for its standard, and simply relied on existing federal regulations and generalized assumptions about the disease. However, the court's emphasis on individualized assessment should demonstrate that such screening standards should face a high degree of scrutiny regardless of the legal theory employed to defend them, and its reliance on evidence about the advances in diabetes treatment should preclude any employer from adopting an exclusionary standard as broad (categorically excluding anyone using insulin) as that adopted by the city.

The *Kapche* court is not alone in striking down such blanket bans. In *Bombrys v. City of Toledo*, 849 F. Supp. 1210 (N.D. Ohio 1993), the city had a similar ban on all individuals using insulin becoming police officers. The court identified the city's primary concern as the possibility that the plaintiff would experience severe hypoglycemia and would either become unconscious or incapacitated and unable to perform his job duties. The court acknowledged the harm that could result if this happened, and expressed its recognition of the serious nature of the city's concerns. However, the court noted that other conditions could also cause a risk of incapacitation (such as risk of heart attacks) and that all individuals pose some level of risk. This made the city's exclusion of those with diabetes untenable:

The best that the City of Toledo can do is evaluate each police officer candidate on a case-by-case basis and determine what risks that individual presents to him/herself and the public. ... In short, before the City may determine that an individual poses a threat to the health or safety of others, it must develop and apply an evaluation process that will comply with the ... Americans With Disabilities Act. ... At the very best, the City's policies in these respects seem inconsistent with a blanket policy that excludes all applicants with insulin-dependent diabetes. At worst, the City's blanket exclusion is impermissibly based upon generalizations and stereotypes.

Id. at 1219. Similarly, in *Millage v. City of Sioux City*, 258 F. Supp. 2d 976 (N.D. Iowa 2003), the court considered the case of an individual with insulin-treated diabetes who was excluded from a job as a city bus driver, and found that individualized assessment was required. The court stated, “This court agrees with the reasoning in *Kapche* to hold that determination of whether or not a claimant under the ADA can perform the essential functions of a particular job must be based upon an ‘individualized assessment’ of his or her ability to perform the job safely, and cannot be based simply on a blanket exclusion.” *Id.* at 992.

Operation of forklifts was at issue in *EEOC v. Murray, Inc.*, 175 F. Supp. 2d 1053 (M.D. Tenn. 2001). The employer excluded all those using insulin from driving forklifts, and the EEOC argued that this blanket ban was unjustified and that the employer was required to individually

assess the qualifications of people with diabetes to drive forklifts. Since this case did not involve driving of over-the-road vehicles, the employer did not simply rely on federal rules about commercial vehicle drivers, but attempted to provide independent justification for the rule. Its attempt, however, failed to convince the court:

In support of its argument that all insulin-dependent diabetics should be precluded from operating forklifts, the defendant relies on “the inherent danger of forklifts coupled with the potential for individuals with certain medical conditions to lose control of these large, heavy, forked, mobile pieces of machinery.” The defendant has offered no evidence, however, of the actual potential for individuals with insulin-dependent diabetes to lose control of forklifts or otherwise suffer from lapses of attention or awareness. Instead, the defendant offers statistics on the general hazards of forklift operation. ... Without either sufficient background information to put the statistics in proper context or a comparison to other activities, such as driving a car or a commercial motor vehicle, these statistics are wholly insufficient to allow the court to conclude that all insulin-dependent diabetics pose such a substantial risk of attention lapses that the defendant is justified under the ADA in barring them, as a class, from the operation of forklifts.

Id. at 1065. This point bears emphasis: to justify excluding individuals with disabilities from a job (particularly in the context of a screening standard, but also when based on ad hoc decisionmaking) the employer needs to do more than prove that the activity is dangerous in a general sense. There must be proof that the individuals to be excluded pose a higher risk of harm when doing that activity than the general population. Employers should not be permitted to assume that certain occupations are too risky for individuals with certain conditions, without evidence that those individuals are actually at increased risk, or to assume that “any additional risk is too much risk.” *See also Bombrys, supra*, 849 F. Supp. at 1219 (employer did not exclude other categories of individuals who were at increased risk, but singled out individuals with diabetes); *Bosket v. Long Island R.R.*, 2004 U.S. Dist. Lexis 10851 (E.D. N.Y. June 4, 2004) (standard excluding hearing impaired individuals from railroad jobs could not be justified based solely on evidence of the dangerousness of the jobs; evidence about how those with hearing impairments posed additional risk was required).

In addition to disputing the defense’s evidence that a policy or standard is job related and consistent with business necessity, it is very useful (and perhaps necessary) for the plaintiff to introduce proof that he or she can safely perform the job. It may not be enough simply to challenge the existence of a blanket ban and to request that the court order individualized assessment, without making any effort to convince the court that plaintiff himself is a safe worker. In all the cases described here, plaintiffs also introduced such evidence, in addition to attacking the basis for the policy or standard. In *Bates v. United Parcel Serv.*, 511 F. 3d 974 (9th Cir. 2007), the court held that plaintiffs challenging a safety-based standard prohibiting hearing impaired individuals from driving company vehicles had the burden to show that they were safe drivers, through evidence such as a clean driving record and the ability to pass a driving test. The employer then had the burden to show that its standard was job related and consistent with business necessity. While the proof required of plaintiffs in this situation should not be onerous,

the court should not be left with no basis to find that the plaintiff is in fact safe, even when the focus is on defendant's standard.

Blanket bans screening out other disability groups have also been struck down. In *Bates v. Dura Auto. Sys.*, 650 F. Supp. 2d 754 (M.D. Tenn. 2009), *rev'd and remanded on other grounds*, 625 F. 3d 283 (6th Cir. 2010), the court denied summary judgment to an employer with an inflexible policy of removing from the workplace any individual taking certain legal prescription drugs which contain warnings about the operation of heavy equipment. The court rejected defendant's argument that this rule was consistent with business necessity, because it was not sufficiently narrowly tailored to serve the legitimate interest of promoting a safe workplace. Defendant refused to consider any evidence, either from the entity conducting the test or an individual employee's treating physician, that the substances found in a drug test were medically necessary or that the individual could still safely perform the job despite taking the medication. The court held that such an inflexible policy could violate the ADA. A similar policy regarding prescription pain medications was at issue in *Huffman v. Turner Indus. Group LLC*, 2013 U.S. Dist. Lexis 71842, *50 (E.D. La. May 21, 2013), where the court denied summary judgment on whether the policy was justified as a business necessity based on evidence presented by the plaintiff that the percentage of individuals taking the covered medications who experienced side effects was low, and that relatively few industrial accidents were related to medication use. Likewise, in *Gaus v. Norfolk Southern Railway Co.*, 2011 U.S. Dist. Lexis 111089, *97 (W.D. Pa. Sept. 28, 2011), where the court held that the policy could not be justified on business necessity grounds because not all individuals taking the medications experienced harmful side effects, and the guidelines failed to take into account individual circumstances or variations. In *Stillwell v. Kansas City Bd. of Police Comm'rs*, 872 F. Supp. 682 (W.D. Mo. 1995), the court granted summary judgment to a plaintiff with one hand where the city's police board admitted that it refused to license him as a private security guard without any individualized assessment and based solely on his disability, holding that such a blanket exclusion violates the ADA.

In *Bosket v. Long Island R.R.*, 2004 U.S. Dist. Lexis 10851 (E.D. N.Y. June 4, 2004), the court considered a challenge to a railroad's hearing standard for signalman positions, and particularly the requirement that the hearing test be passed without the use of a hearing aid. While both sides agreed that adequate hearing was necessary to perform the job, and that the standard was job-related, the court found that the railroad had not presented sufficient evidence to show that the standard was consistent with business necessity. The court held:

In this case, the defendant offers only the most general, conclusory arguments concerning safety to justify its reliance on the [hearing] standard. The LIRR argues that "clearly, the Assistant Signalmen [sic] position is a safety-sensitive position. It takes little imagination to envision the safety risks to the public, co-workers and Bosket himself posed by an Assistant Signalmen [sic] who is hearing impaired. The courts recognize the disastrous consequences that may ensue." Aside from this comment, defendant offers no evidence concerning the methodology behind the standard, the reason for choosing that particular rule, or the risks requiring the prohibition on hearing aids. While defendant's understandable concerns for safety at the job site are laudable, the concerns

themselves are not a substitute for admissible evidence supporting the all-or-nothing standard suggested.

Id. at *30-*31. As in *Murray*, generalized evidence about the risks of the position’s duties, without evidence connecting the screened-out disability to those safety concerns, was not enough to support summary judgment for the employer.²⁴ And in *EEOC v. Houston Area Sheet Metal Joint Apprenticeship Comm.*, 2002 U.S. Dist. LEXIS 10393 (S.D. Tex. May 31, 2002), an applicant to a sheet metal apprenticeship program was rejected because he was deaf and unable to speak, which defendant believed limited his ability to communicate on the job. The court rejected the business necessity defense, holding that the Committee had not “demonstrated that the qualification standard ... [was] justifiable as an ‘across-the-board’ requirement.” *Id.* at *24.²⁵

D. Decisions Upholding Blanket Bans

These cases, as well as the overall trend of the law in recent years, should not be allowed to suggest that across-the-board qualification standards are never upheld. Such standards can be upheld, whether they screen for diabetes or other disabilities, if the plaintiff fails to introduce adequate evidence to challenge the basis for the standard. A recent 10th Circuit case illustrates the willingness of some courts to rely on the safety sensitive nature of a job to justify unquestioningly accepting an employer’s generalized assertions of harm that can result from a disability. In *Wilkerson v. Shinseki*, 606 F. 3d 1256 (10th Cir. 2010), plaintiff worked for several years as a boiler room operator at a VA hospital before a VA physician, during a routine medical examination, determined that his diabetes was “uncontrolled.” He was then disqualified from his duties in the boiler room, because of VA employment standards that restricted any individuals with “uncontrolled or poorly controlled” diabetes from positions as boiler room operators.²⁶ That court granted summary judgment to the VA, and the 10th Circuit affirmed, holding that the VA’s exclusionary standard was consistent with business necessity:

The requirements are minimal physical standards that a boiler room operator must meet. ... The VA was within its power when it passed these guidelines and it is understandable for administrative ease and to ensure the uniformity of standards that it would desire to have guidelines that establish a limited class of individuals who do not qualify to work in boiler rooms at their facilities. ... The record indicates that Mr. Wilkerson would pose a danger to himself and others should he

²⁴ Plaintiff also introduced evidence that the test lacked medical basis (because there was no scientifically proven method to measure hearing loss as the test did) and that it was arbitrary because it was applied only to applicants, not to current employees. “The LIRR offers no argument—much less, evidence—that addresses these concerns or justifies preventing applicants from using a hearing aid to pass the medical examination.” *Id.* at *31-*32.

²⁵ The court also found significant that the committee had adopted its hearing standard immediately after the applicant had been interviewed, thus casting doubt on its basis and the intent behind it. *Id.* Any such evidence that a diabetes-related policy was adopted in response to an application by an individual with diabetes should of course be explored and brought to the attention of the court.

²⁶ As will be discussed further below, terms like “uncontrolled” and “poorly controlled” diabetes have no precise medical definition and no relationship to the safety risks posed by severe hypoglycemia or hyperglycemia. Such terms are of little use in making safety determinations, because they do not convey whether an individual poses any higher risk than others with diabetes or in the general population. But none of this information, or indeed any expert medical testimony, was presented to the district court.

fall from a ladder. It also warns of potentially disastrous effects if he was unable to shut down a boiler if it malfunctions, leading to a possible explosion. ...

Id. at 1264. This case is disturbing in the way it places the employer's administrative convenience and the need for "uniform standards" above the right of disabled individuals to have their actual capabilities measured and assessed before being denied a job. A few other recent cases have taken a similar approach. For instance, in *Allmond v. Akal Security*, 558 F. 3d 1312 (11th Cir. 2009), the court, affirming summary judgment, upheld a medical standard of the U.S. Marshals Service requiring court security officers to pass its hearing test without the use of a hearing aid. In rejecting the challenge, the court focused on the demands of the job rather than the capabilities of individuals:

Because hearing aids may malfunction, break, or become dislodged, the Marshals Service adopted the ban to ensure that all officers can perform their jobs safely and effectively in the event they must rely on their unaided hearing. When considered in the light of the tremendous harm that could result if a security officer could not perform the essential hearing functions of his job at a given moment, we accept this justification as legitimate and wholly consistent with business necessity.

Id. at 1317; *see also Fraterrigo v. Akal Security, Inc.*, 2008 U.S. Dist. Lexis 87451 (S.D. N.Y. Oct. 29, 2008) (rejecting a challenge to the same policy regarding hearing aids based on similar reasoning).

In *Atkins v. Salazar*, 677 F. 3d 667 (5th Cir. 2011), the court affirmed summary judgment to the National Park Service (NPS), finding that its medical standard excluding from law enforcement jobs individuals with diabetes that the NPS deemed to be uncontrolled or unstable is job related and consistent with business necessity. The NPS in developing and defending its medical standards relied on a number of generalizations about diabetes and its risks; for example, it argued that missed meals could cause fluctuations in blood glucose levels, and that individuals who had lived with diabetes for a number of years could lose the ability to detect the warning signs of oncoming hypoglycemia. The court's very cursory legal analysis did not question these assumptions or require the NPS to present any evidence to support them. The court concluded that "NPS is not required to wait until after there is an emergency to take action protective of the public and its employees." *Id.* at 683. However, the court also noted that the decision to disqualify the plaintiff under this standard was made only after an established process that provided for individualized assessment of the plaintiff's diabetes and its possible effects, and justified its affirmance of NPS' decision based on evidence about the plaintiff's diabetes, including a history of hypoglycemia on the job. *Id.*

Several cases have upheld a variety of medical standards adopted by the New York City Transit Authority against challenges that they were inconsistent with business necessity, stressing the severe potential harm that would result if a crash occurred and the city's duty to protect public safety and concerns about massive liability—without any evidence that the conditions at issue actually significantly increased the risk of a crash. *Shannon v. N.Y.C. Transit Auth.*, 332 F.3d 95 (2d Cir. 2003) (color blindness); *Siederbaum v. City of N. Y.*, 309 F. Supp. 2d 618 (S.D. N.Y.

2004) (bipolar disorder); *Burton v. Metropolitan Transp. Auth.*, 244 F. Supp. 2d 252 (S.D. N.Y. 2003) (anticoagulant medication which increased the risk of heart attack). And a recent district court indicated its belief that a seizure protocol adopted by the Pennsylvania State Police was justified by medical evidence that individuals who had experienced seizures were at increased risk of recurrent seizures for a period of up to five years (although it did not rely on business necessity analysis). *Coleman v. Pennsylvania State Police*, 2013 U.S. Dist. Lexis 99609, *37-*38 (W.D. Pa. July 17, 2013), *aff'd*, 561 Fed. Appx. 138 (3rd Cir. 2014).

Several aspects of these cases are worth noting. First, they deal with medical standards formally adopted by a government agency after a formal study of the position and its duties. While these studies often do not adequately assess diabetes and its impacts on individuals, as opposed to the physical demands of the job in question, they can be quite persuasive to courts, who might be less willing to defer to standards imposed by a private employer without such study. Also, plaintiffs often do not present any evidence that they are safer than the group of individuals with diabetes (or other disabilities) as a whole. Instead, they often rely on the fact that they have not experienced any ill effects on the job in the past. *See Atkins, supra*, A677 F. 3d at 683. But as discussed in section V.F.1, even under direct threat analysis, the lack of past incidents on the job is often not by itself enough to defeat summary judgment in a safety-sensitive job. Plaintiffs in these cases need to present detailed medical evidence undermining the assumptions on which defendant's medical standards are based and showing that not all people with diabetes pose equal risk. *Cf. Rodriguez v. Alcoa Inc.*, 805 F. Supp. 2d 310, 321 (S.D. Tex. 2011) (upholding employer's decision to withdraw job offer based on plaintiff's failure to meet hearing standards where the plaintiff did not challenge the validity of the hearing requirement, but merely argued that he was qualified for the position despite the standard).

More fundamentally, these cases focus on the latitude supposedly granted to employers to set standards and decide what the job requires. "Employers formulate jobs to fit the needs of their enterprises, and cannot fill jobs without deciding what attributes are essential to those needs. The essential character of a particular job qualification is therefore a matter of judgment and opinion. No reasonable jury could find that NYCTA exceeded the broad bounds necessarily afforded it under the ADA to decide as an employer whether color vision is an essential qualification for driving a NYCTA bus." *Shannon, supra*, 332 F. 3d at 102-103; *see also Siederbaum, supra*, 309 F. Supp. 2d at 629. However, while employers do have some latitude to set general qualifications for a job, such as what education or skills are required to perform it, this should not extend to the right to set arbitrary medical standards. These courts, in evaluating the business necessity defense, often focus almost exclusively on what the employer knows about the functions of the position, rather than what it knows about the disability or the risk that it poses.²⁷ The logic used by *Shannon* and the other cases noted above, if widely applied, would eviscerate the ADA by permitting any employer to exclude individuals with disabilities by specifying the absence of such conditions as essential functions of the job. Courts should require employers to justify their medical standards with objective evidence, rather than deferring to their business choices. *See Justice v. Crown Cork & Seal*, 527 F. 3d 1080, 1092 (10th Cir. 2008) ("to hold that

²⁷ *See Fraterrigo, supra*, 2008 U.S. Dist. Lexis 87451 at *29 (justifying the Marshals Service hearing standard based on the agency's conclusions about the duties of the position rather than the specifics of the disability at issue); *Allmond, supra*, 558 F. 3d at 1318 ((focusing on the importance of the duties of a court security officer rather than whether the use of a hearing aid actually impedes the ability to perform these duties).

one cannot second-guess an employer's conclusion regarding the safety risks posed by an employee would eviscerate the ADA's protections by permitting the employer to assert in nearly every case that it believed the employee's medical limitations posed a credible threat to his safety or the safety of others.”)

E. Use of Government or Industry Standards

Employers sometimes base their medical standards on standards or guidelines adopted by outside groups. Sometimes these are government agencies, such as the U.S. Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA), while in other cases, standards are based on guidelines developed by private groups such as industry associations. The source of the guidelines is critical to determining how much weight they should be given. Employers may rely on government standards specifying minimum safety-related qualifications for certain jobs, even when these standards screen out individuals with disabilities, so long as those standards are directly applicable to the factual situation at issue. The implementing regulations of Title I of the ADA recognize a defense to liability that "a challenged action is required or necessitated by another Federal law or regulation," 29 C.F.R. § 1630.15(e). The Supreme Court has held that an employer could exclude an individual who could not meet FMCSA medical certification standards for commercial drivers from a commercial driving position. The employer did not need to put forward evidence justifying the standard, and it was not required to accept a waiver of the standards which was part of an experimental government program to examine the safety of drivers with certain conditions.²⁸ Employers may not, however, use government regulations as a shield from liability in situations where the regulations do not apply. *See Nichols v. City of Mitchell*, 914 F. Supp. 2d 1052, 1060 (D. S.D. 2012) (employer could not apply blanket exclusion in FMCSA diabetes standards to intrastate bus drivers who were not covered by it, and instead had to perform individualized assessments of those drivers). In *Bates v. United Parcel Serv.*, 511 F. 3d 974 (9th Cir. 2007), the court considered UPS' decision to apply federal medical standards for commercial drivers to employees driving vehicles which were explicitly excluded from the federal standards. The court held that UPS could not rely on these standards to defeat liability, though it could introduce evidence that the rationale behind federal adoption of the standards should also apply to the vehicles at issue in the case (and plaintiffs could argue the opposite, that the differences between the classes of vehicles were such that the regulations should be given no weight). *Id.* at 998.²⁹

²⁸ *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 577 (1999); cf. *Shields v. Robinson-Van Vuren Assocs.*, 2000 U.S. Dist. LEXIS 6234 (S.D. N.Y. May 8, 2000) (employer had to abide by Federal Aviation Administration regulations specifying medical criteria for those employed as air traffic controllers; these regulations excluded any individuals with diabetes using insulin or oral medications which cause hypoglycemia); *Shiplett v. Amtrak*, 1999 U.S. App. Lexis 14004, *25 (6th Cir. Jun. 17, 1999) (deferring to judgment of Federal Railroad Administration and National Transportation Safety Board that side effects of the drug Xanax preclude its use by locomotive engineers). Government standards, however, do not merit such deference if they are adopted as guidelines, and not as formal regulations. *See Fraterrigo v. Akal Security, Inc.*, 2008 U.S. Dist. Lexis 87451 (S.D. N.Y. Oct. 29, 2008) (evaluating Marshals Service hearing guidelines, and finding that they were medically justified, without deferring to their mere existence).

²⁹ Issues of when these commercial driving regulations do and do not apply are beyond the scope of this paper, but should be considered by an attorney facing a claim that an individual with diabetes or another disability is being excluded from a job based on the application of these standards, as they are frequently applied beyond their scope.

Employers and courts sometimes look to such government safety standards to support the decision to exclude a worker on safety grounds, even when the standards had not been adopted by the employer. In *Shelton v. City of Cincinnati*, 2012 U.S. Dist. Lexis 156595, *35-*36 (S.D. Ohio Nov. 1, 2012), defendant claimed that plaintiff firefighter was not qualified because, according to its doctor, plaintiff had experienced hypoglycemia and therefore could not meet FMCSA requirements for commercial driving (even though it did not appear that the city actually adopted such requirements for firefighters). Here the appeal to the diabetes FMCSA standards was unsuccessful; the court did not rely on, or even directly address, the standards, which clearly did not apply in this situation, but instead analyzed whether plaintiff posed a direct threat, and denied summary judgment on this basis. See also *Backhaus v. General Motors LLC*, 2014 U.S. Dist. Lexis 132266, *19 (E.D. Mich. Sept. 22, 2014) (company's reliance on failure of applicant for a forklift driver position with monocular vision to pass FMCSA standards rejected because those standards did not apply to forklift drivers and did not represent an adequate individualized assessment of the plaintiff). But in *Coleman v. Pennsylvania State Police*, 2013 U.S. Dist. Lexis 99609 (W.D. Pa. July 17, 2013), *aff'd*, 561 Fed. Appx. 138 (3rd Cir. 2014), the court looked to the FMCSA epilepsy standards, even though they had not been adopted by and were different from the seizure protocol adopted by the employer, as strong evidence that the employer's seizure protocol was reasonable and a business necessity.

Where standards are adopted by private groups, the employer may not merely rely on the existence of the standard but must provide evidence supporting the standard, just as if it had been developed by the employer. For example, people with diabetes may be affected by standards adopted for firefighters by the National Fire Protection Association (NFPA) or for law enforcement officers by the American College of Occupational and Environmental Medicine.³⁰ In *Bosket v. Long Island R.R.*, 2004 U.S. Dist. Lexis 10851 (E.D. N.Y. June 4, 2004), the court denied summary judgment to a railroad that attempted to justify its disqualification of an individual with a hearing impairment based on standards adopted by the American Association of Railroads (AAR). The court held that the defendant had failed to introduce adequate evidence to support its use of the standard, pointing to the lack of evidence as to how the standard was devised and chosen and plaintiff's numerous objections to the effect and applicability of the standard.³¹

As with any safety standard, defendants may not rely on the standard as a defense to liability if it has not in fact adopted it or does not apply it uniformly. In *Rorrer v. City of Stow*, 743 F.3d 1025, 1041 (6th Cir. 2014), the court reversed summary judgment for the employer based on the use of the NFPA guidelines where extensive record evidence showed that the city did not rely on these guidelines, did not conduct the annual physicals they required, and city doctors were not familiar with their provisions. And in *Garr v. Union Pacific R. R. Co.*, 2013 U.S. Dist. LEXIS 1274, *19-*20 (N.D. Ill. Jan. 4, 2013), a railroad denied plaintiff a position as a locomotive engineer because of heart problems which it claimed rendered him unable to meet FMCSA cardiovascular standards governing commercial drivers. The court declined to grant summary judgment, finding no evidence in the record that the company had actually adopted the FMCSA

³⁰ For more information on these standards, see <http://www.diabetes.org/assets/pdfs/know-your-rights-for-lawyers/employment/atty-diabetes-employment-standards.pdf>

³¹ But see *Cremeens v. City of Montgomery*, 2010 U.S. Dist. LEXIS 80132 (M.D. Ala. Aug. 9, 2010) (upholding the application of firefighting standards adopted by the NFPA).

guidelines, since its written medical policies did not specifically do so, and also finding evidence that defendant had employed other workers who were unable to meet the same standards in safety-sensitive positions.

V. Direct Threat: Proving the Significance of Risk

A. Overview

Since very few, if any, across-the-board medical standards related to diabetes can be justified for the reasons discussed in the previous section, the question of what constitutes a sufficient safety risk on an individual basis will be critical in most cases involving diabetes and safety. This will normally involve consideration of whether the individual with diabetes poses a direct threat to the health and safety of himself or others, and consideration of the factors articulated in the direct threat standard. As noted above, courts tend to apply the direct threat standard when employment decisions are made about a specific individual without the use of any predefined screening criteria or medical standards, and to look to business necessity where the employer has such criteria or standards which are applied to all employees. But in cases decided based on business necessity or where the direct threat standard is not explicitly invoked, the considerations underlying direct threat are still relevant to analyzing safety. This section, therefore, will discuss how courts analyze direct threat cases and what evidence is necessary to prove that an individual is a safety risk.

Direct threat is defined as “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” 29 C.F.R. § 1630.2(r). The appropriate question is not whether any risk exists, but whether that risk is significant. *Branham v. Snow*, 392 F. 3d 896, 906 (7th Cir. 2004) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998)). The defendant is not entitled to a guarantee that no injury or incident will ever happen, and a slight or remote risk is not sufficient to support a direct threat determination. In *Jackson v. City of N.Y.*, 2011 U.S. Dist. LEXIS 43861 (E.D. N.Y. Mar. 3, 2011), the court found insufficient defendant’s claim that plaintiff might experience seizures related to her diabetes in the future. “While the defendants are correct that ‘there is no guarantee that [plaintiff] will continue to be seizure free,’ ... more than a remote risk is required to constitute a ‘direct threat’ within the meaning of the ADA.” *Id.* at *52. See also *Backhaus v. General Motors LLC*, 2014 U.S. Dist. Lexis 132266, *22 (E.D. Mich. Sept. 22, 2014) (“an employer can not disqualify an applicant simply because of a slightly increased risk of harm”); *Hatzakos v. Acme American Refrigeration*, 2007 U.S. Dist. Lexis 49034, *25-*26 (E.D. N.Y. July 6, 2007) (rejecting employer’s claim that its direct threat determination was valid because plaintiff’s doctor could not guarantee the absence of risk); *EEOC v. Chrysler Corp.*, 917 F. Supp. 1164, 1170 (E.D. Mich. 1996); *rev’d on other grounds*, 1998 U.S. App. Lexis 30607 (6th Cir. Nov. 25, 1998) (slightly increased risk not sufficient). In fact, there must be a high probability of substantial harm. See Appendix to Part 1630, Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(r); *Echazabal v. Chevron, U.S.A.*, 336 F. 3d 1023, 1031 (9th Cir. 2003); *EEOC v. Hussey Copper*, 2010 U.S. Dist. Lexis 22920, *43 (W.D. Pa. Mar. 12, 2010).

Whether or not a significant risk exists must be proved with particularized evidence about the condition of the individual at issue. *See* Fifth Circuit Pattern Jury Instruction 11.7.5 (ADA – Direct Threat Defense) (2009) (available at <http://www.lb5.uscourts.gov/juryinstructions/fifth/2009Changes.pdf>) (proof of direct threat requires that defendant performed a specific personal assessment of the plaintiff’s ability to safely perform the essential functions of the job). Generalized statements about potential harm which are not based on information about the individual are insufficient. *Echazabal, supra*, 323 F. 3d at 1031; *Hussey Copper, supra*, 2010 U.S. Dist. Lexis 22920 at *43. For example, a court denied summary judgment to a city where it presented only generalized statements about the city’s duty to protect public safety, without any specific evidence on whether the individual posed a direct threat.³² *Powell v. City of Pittsfield*, 143 F. Supp. 2d 94, 133 (D. Mass. 2001).³³ It is no defense that the employer acted in good faith in deciding that the employee posed a direct threat. *See Gillen v. Fallon Ambulance Serv.*, 283 F. 3d 11, 44 (1st Cir. 2002) (quoting *Bragdon, supra*, 524 U.S. at 649); *Jarvis v. Potter*, 500 F. 3d 1113, 1122 (10th Cir. 2007); *Verzeni v. Potter*, 109 Fed. Appx. 485, 492 (3rd Cir. 2004) (“Even an employer's good faith actions will not save him if the employer is misinformed about the realities of the disability.”)³⁴ Therefore, an employer must prove both that its belief that an employee posed a direct threat was objectively reasonable, and that this belief was based on an adequate individualized assessment of the employee's condition. *Fahey v. Twin City Fan Cos.*, 994 F. Supp. 2d 1064, 1072 n. 9 (D. S.D. 2014) (“Whether Twin City Fan's decision was objectively reasonable is different from the issue of whether Twin City Fan met its obligations under the ADA by performing an individualized inquiry to determine, before making its ultimate employment decision, whether Fahey posed a direct threat.”) The standards for when an assessment is adequately individualized are discussed in section VI, *infra*.

The possibility of reasonable accommodations that may eliminate the risk must also be considered. While this paper does not focus on reasonable accommodations, several common accommodations for employees with diabetes, such as permitting more frequent blood glucose checking and allowing immediate access to food or other means to treat oncoming hypoglycemia, can reduce safety risk and should be considered.³⁵

³² Of course, plaintiff’s medical evidence should also be individualized. *See Wurzel v. Whirlpool Corp.*, 482 Fed. Appx. 1, 15 (6th Cir. 2012) (opinion of plaintiff’s treating physician afforded little weight when he only opined that individuals with plaintiff’s condition generally were unlikely to experience certain medication side effects, without stating that plaintiff himself was unlikely to experience these effects; other evidence showed that plaintiff did in fact experience some of these side effects).

³³ Of course, evidence that the employer's decision was based on factors other than safety in the workplace will undermine a direct threat claim. *See Kroll v. White Lake Ambulance Auth.*, 2014 U.S. App. LEXIS 15896 (6th Cir. Aug. 19, 2014) (denying summary judgment, in part, based on statements and evidence suggesting that the employer was motivated by moral concerns about plaintiff’s behavior outside the workplace, rather than genuine medical concerns).

³⁴ On the other hand, as discussed further in section VI.B, *infra*, a court will sometimes defer to what it views as the employer's reliance on reasonable medical judgment after an individualized assessment. But if an employer does no assessment, or an inadequate one, its genuinely held belief that the plaintiff was a safety risk is not a defense.

³⁵ Extensive information about possible accommodations for a wide range of disabilities can be found through the Job Accommodation Network at askjan.org.

B. Burden of proof

Which party bears the burden of proof in a case involving direct threat claims has been frequently debated by the courts, with mixed results. Assigning the burden of proof is not straightforward because the ADA calls direct threat a “defense” but, at the same time, includes it as one aspect of being “qualified.” The direct threat provision, found at 42 U.S.C. § 12113(b), appears in a section of the Act entitled “Defenses,” suggesting that it is an affirmative defense on which the employer bears the burden of proof. However, that same provision describes a requirement that an individual not pose a direct threat as a qualification standard. *See id.* Employees (and the EEOC) argue that direct threat is properly classified as an affirmative defense, while employers argue that not posing a direct threat is a permissible qualification standard and, because it is plaintiff’s burden to show that he or she is “qualified” for the job, the plaintiff must therefore prove the absence of direct threat.

Most courts that have decided the issue, especially in recent years, have found that direct threat is an affirmative defense on which the employer bears the burden of proof. *See Hargrave v. Vermont*, 340 F.3d 27, 35 (2nd Cir. 2003); *Lovejoy-Wilson v. NOCO Motor Fuel*, 263 F. 3d 208, 220 (2nd Cir. 2001); *Clark v. SEPTA*, 2008 U.S. Dist. Lexis 5466, *26 (E.D. Pa. Jan. 25, 2008); *Verzeni v. Potter*, 109 Fed. Appx. 485, 491 (3rd Cir. 2004) (dicta); *Taylor v. Hampton Roads Reg’l Jail Auth.*, 550 F. Supp. 2d 614, 618 (E.D. Va. 2008); *Rizzo v. Children's World Learning Ctr., Inc.*, 84 F.3d 758, 764 (5th Cir. 1996); *Shelton v. City of Cincinnati*, 2012 U.S. Dist. Lexis 156595, *35-*36 (S.D. Ohio Nov. 1, 2012); *Hoback v. City of Chattanooga*, 2012 U.S. Dist. Lexis 124794, *17 (E.D. Tenn. Sept. 4, 2012); *EEOC v. Chrysler Corp.*, 917 F. Supp. 1164, 1171 (E.D. Mich. 1996), *rev'd on other grounds*, 1998 U.S. App. Lexis 30607 (6th Cir. Nov. 25, 1998); *Branham v. Snow*, 392 F. 3d 896, 907 (7th Cir. 2004); *EEOC v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 571 (8th Cir. 2007); *Hutton v. Elf Atochem N. America, Inc.*, 273 F.3d 884, 893 (9th Cir. 2001); *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999).

However, courts in several circuits have held that the plaintiff bears the burden of proof to show that he or she is not a direct threat in all, or at least some, circumstances. The Eleventh Circuit held, with little analysis, that plaintiff bears this burden in *Moses v. American Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996) (per curiam) (“The employee retains at all times the burden of persuading the jury . . . that he was not a direct threat.”) The First Circuit held that plaintiff bears this burden in cases where the essential functions of the job “necessarily implicate the safety of others.” *EEOC v. Amego, Inc.*, 110 F. 3d 135, 144 (1st Cir. 1997) (employee who worked in a group home where she was responsible for the care of residents, including dispensing prescription medications, was required to show that she did not pose a direct threat); *Reynolds v. VHS Transp. Co.*, 2011 U.S. Dist. LEXIS 7325, *3 (D. Mass. Jan. 20, 2011) (van driver had the burden of proving that she could drive safely because her job involved the safety of her passengers and the public). Where the safety concerns of the employer do not relate directly to the job’s essential functions, however, defendant bears the burden of proof. *See Rosado v. American Airlines*, 743 F. Supp. 2d 40, 50 (D. P.R. 2010) (defendant had the burden of proof to show that plaintiff was a direct threat, because the safety risks plaintiff might pose due to his drug addiction were not directly related to his ability to perform the essential functions of his job as a baggage handler). The Tenth Circuit also held that employees whose essential job functions include not endangering others must prove that they do not pose a direct threat. *McKenzie v.*

Benton, 388 F.3d 1342, 1354 (10th Cir. 2004) (plaintiff police officer bears burden of proof where "job qualifications ... properly included the essential function of performing [plaintiff's] duties without endangering her co-workers or members of the public with whom she came in contact"); *Justice v. Crown Cork & Seal*, 527 F. 3d 1080, 1091 (10th Cir. 2008) (electrician in manufacturing plant bears burden of proof where he admitted position could be "deadly"). The defendant bears the burden of proof when the plaintiff's job does not implicate public safety. *Jarvis v. Potter*, 500 F. 3d 1113, 1122 (10th Cir. 2007) (plaintiff's job as a postal service custodian does not affect public safety); *EEOC v. Beverage Distributors Co. LLC*, 2012 U.S. Dist. Lexis 173849, *4 n. 2 (D. Colo. Dec. 7, 2012) (treating direct threat as a defense where duties of a warehouse worker do not necessarily impact public safety).

Despite the continuing disagreement among the circuits on the issue of who bears the burden of proof in direct threat cases, the burden will generally not affect the outcome. Many direct threat cases do not address who has the burden of proof, and of far more importance in these cases, especially at the summary judgment stage, is producing the right kind of evidence to show that the employee will not pose a safety risk, as described in the following sections.

C. Overview of the Direct Threat Factors

A proper assessment of whether an individual poses a direct threat in a particular job must be individualized and also should consider four factors specified by the regulations to help determine when an individual poses a significant risk. The regulations state: "In determining whether an individual would pose a direct threat, the factors to be considered include: (1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm." 29 C.F.R. § 1630.2(r). While this list of factors is not exhaustive, many courts focus their analysis on these four factors, and most of the relevant considerations can be analyzed under one of them.

These factors derive originally from *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987), when the Supreme Court introduced the concept of direct threat under Section 504.³⁶ In enacting the ADA, Congress deliberately looked to the direct threat test as set out in *Arline*.³⁷ However, it should be noted that *Arline* arose in the context of communicable diseases; the plaintiff in that case was a school teacher diagnosed with tuberculosis, and the school district's concern in the case centered in the risk that she would transmit the disease to her students or others at the school. While the direct threat analysis has been expanded well beyond the communicable disease context, the factors are ideally suited to that context (since they often can be quantified based on public health data) and fit less well in other situations. For example, in

³⁶ It should be noted that while the factors given in the regulations are based on *Arline*, that case listed the factors slightly differently. The court stated that findings should be made "about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm." 480 U.S. at 287. Thus, the regulations combined two of the *Arline* factors (nature and severity of the risk) into one and added a fourth factor (imminence of the risk) not specifically included in *Arline*. Most courts analyze the four factors from the regulations, which are more general, rather than the *Arline* factors, which are more specific to communicable diseases; therefore, this paper will discuss the factors as enumerated in the regulations.

³⁷ H.R. Rep. No. 101-485, pt. 3, at 34 (1990), 1990 U.S.C.C.A.N. at 457 ("the Committee intends to codify the direct threat standard used by the Supreme Court in *Sch. Bd. of Nassau County v. Arline*.")

the context of diabetes risks related to severe hypoglycemia, the focus of the analysis is generally on the likelihood of harm; while the severity of harm is sometimes considered, the other two factors (duration and imminence of harm) rarely play a significant role in a court's determination. In short, while courts usually mention all four factors, the weight and amount of consideration they give to each factor varies widely based on the circumstances. The following sections discuss each of the four direct threat factors, and particularly how this factor affects the analysis of diabetes-related cases.

D. Duration of the Risk

The duration of the risk posed by an individual is rarely analyzed by courts in any detail. While its meaning is relatively clear (and distinct from the other factors) for communicable diseases, the duration of risk is harder to specify for most disabilities which, like diabetes, are permanent and incurable. As discussed earlier, the safety risk related to diabetes that most concerns employers and courts is that the individual will become cognitively impaired or unconscious due to severe hypoglycemia. For diabetes, then, and for other conditions whose symptoms are episodic, there are two possible ways to talk about the duration of risk. Some courts state that the duration of risk is infinite, because the individual will always have diabetes and will always be at some risk of severe hypoglycemia (assuming, of course, that the person is using insulin or an oral medication that can cause hypoglycemia).³⁸ On the other hand, it can be argued that the risk for severe hypoglycemia (or hyperglycemia) lasts only as long as the symptoms themselves last (since it is the symptoms, rather than the low blood glucose levels that cause them, that are the safety concern), or only as long as the person is actually experiencing low or high blood glucose levels. By this analysis, the duration of risk could be quite short for someone who is successfully managing his or her diabetes and who rarely, or never, experiences these complications.³⁹ Because, unlike many other conditions, most individuals with diabetes can recognize symptoms of oncoming hypoglycemia and can treat accordingly, this argument should carry some additional weight in cases involving diabetes. In *Bender v. Norfolk Southern Corp.*, the court came to differing conclusions about the duration of risk before and after trial. In denying summary judgment, the court found that plaintiff's evidence that he had never experienced severe hypoglycemia and was aware of and able to treat infrequent mild

³⁸ See *Hutton v. Elf Atochem N. America*, 273 F. 3d 884, 894 (9th Cir. 2001) (for individual with diabetes working in a chemical manufacturing plant, "[t]he duration of the risk would exist for as long as Hutton held the chlorine finishing operator's job."); *Wurzel v. Whirlpool Corp.*, 482 Fed. Appx. 1, 18 (6th Cir. 2012) (because plaintiff's heart condition was lifelong, the duration of the risk was unlimited); *Coleman v. Pennsylvania State Police*, 2013 U.S. Dist. Lexis 99609, *52 (W.D. Pa. July 17, 2013), *aff'd*, 561 Fed. Appx. 138 (3rd Cir. 2014) (duration of plaintiff's seizure risk continued throughout every shift he worked and lasted until he had been seizure free for five years); *Haas v. Wyoming Valley Health Care Sys.*, 553 F. Supp. 2d 390, 399 (M. D. Pa. 2008) (risk for mentally impaired surgeon would last throughout the procedure and treatment).

³⁹ See *Branham v. Snow*, 392 F. 3d 896, 907 (7th Cir. 2004) (plaintiff with diabetes argued that duration of risk was very short or nonexistent because he was successfully managing his diabetes and "tests his blood sugar levels several times a day, has exceptional control over his blood glucose levels and has "full awareness of all his reactions," allowing him to respond promptly to low blood sugar levels."); *EEOC v. Kinney Shoe Corp.*, 917 F. Supp. 419, 429 (W.D. Va. 1996) (duration of risk for individual with epilepsy was fleeting because seizures were of very short duration); *but see Olsen v. Capital Region Medical Ctr.*, 2012 U.S. Dist. Lexis 51605, *19 (W.D. Mo. Apr. 12, 2012), *aff'd on other grounds*, 713 F. 3d 1149 (8th Cir. 2013) (although the court considered the duration of risk to be the duration of the plaintiff's seizures, it still found that duration significant because those seizures caused plaintiff to lose consciousness for several minutes).

hypoglycemia that occurred at night created a genuine issue of fact. 2014 U.S. Dist. Lexis 4460, *39-*40 (M.D. Pa. Jan. 14, 2014). But following a defense verdict at trial, the court found that a jury could have reasonably believed that the duration of risk was permanent because plaintiff continued to experience mild hypoglycemia. 2014 U.S. Dist. Lexis 92364, *25 (M.D. Pa. July 8, 2014). And in a case involving a seizure disorder, the court noted the dispute between the parties as to how the duration of the risk should be measured, and then observed that courts analyzing seizure disorders have generally analyzed the duration of the seizures themselves. The court then found that issues of fact about the duration of the risk existed because there were questions about whether the plaintiff was actually experiencing seizures and whether they were being controlled. *EEOC v. Rexnord Indus.*, 966 F. Supp. 2d 829, 837-838 (E.D. Wis. 2013). While both sides of this debate have some support in the case law, this factor almost always is subsumed by consideration of the likelihood of the harm occurring. In each of the cases cited in the footnotes, the court reached the same conclusion on the duration factor as it did on the likelihood factor. Therefore, it should not be necessary to devote significant effort to the duration factor itself.

E. Severity of the Risk

Not all risks are of equal concern in the workplace; the potential for serious injury or death will naturally warrant more attention, and perhaps stricter standards, than possible minor injury or inconvenience caused by a disability. Therefore the direct threat analysis includes consideration of the severity of the risk posed by the individual.⁴⁰ The problem with this factor is that it is not measurable or quantifiable, and the regulations provide no guidance as to how it should be weighed against the other factors. This can lead employers (and courts) to overemphasize the level of danger and to exclude individuals who pose theoretically severe risks even when those risks are very unlikely to materialize. Courts unduly focused on the severity of a particular risk have also emphasized it to such a degree that they have eviscerated the requirement for individualized inquiry for certain limited classes of jobs they view as particularly dangerous, based on risks that may be merely theoretical or speculative.

For individuals with diabetes, the condition that causes the most concern for employers and courts is hypoglycemia.⁴¹ While hypoglycemia symptoms can obviously have an impact in the workplace and can raise safety concerns, several points need to be considered before making a safety determination about the risk of hypoglycemia in an individual. First, the symptoms of hypoglycemia, as well as the speed at which they develop, can vary from person to person. Second, not all people with diabetes are at risk for hypoglycemia; it is only those taking insulin or certain specified oral medications. Finally, and most importantly, in response to the early warning signs of hypoglycemia, most individuals can recognize and treat their condition. When they recognize the symptoms of mild hypoglycemia, they can check their blood glucose levels

⁴⁰ The regulations refer to this factor as the “nature and severity of the risk.” 29 C.F.R. § 1630.2(r). However, the “nature of the risk” is vague and not further defined, and few courts analyze it separately. Therefore this paper will refer simply to the severity of the risk.

⁴¹ See *supra* section II for a discussion of mild and severe hypoglycemia and their symptoms. Hyperglycemia can also raise safety concerns, because it can, over a period of time, cause cognitive difficulties and even unconsciousness. However, as discussed *supra*, most people with diabetes are at lower risk for developing severe hyperglycemia, and courts typically focus on the dangers of hypoglycemia.

and, if levels are in fact low, can treat using a fast-acting source of glucose. Therefore, many people with diabetes who are successfully managing their condition will pose little risk of severe hypoglycemia.⁴² However, the problems that can be caused by severe hypoglycemia cannot be discounted, and courts are well aware of them.⁴³

In practice, debates about the severity of the harm usually focus on the nature of the job, rather than the nature of the disability. The consequences of even severe hypoglycemia will be different, for example, in an office job than in a manufacturing plant. A receptionist or a janitor who works in an office building might become unconscious and fall if experiencing severe hypoglycemia, but is not likely to seriously injure themselves or anyone else. On the other hand, the duties of certain jobs make the risk posed by diabetes (and many other conditions) more severe. Four categories of positions in particular have generally been considered by courts to be “safety-sensitive” or particularly dangerous jobs in which the severity of harm is magnified:

- **Law enforcement:** Police officers and other law enforcement workers are considered to have particularly risky jobs because of their frequent contact with the public in volatile situations, the need to carry firearms, and the need to respond in emergency situations.⁴⁴

⁴² Of course, other complications of diabetes, such as neuropathy, heart disease, and vision problems, can also cause safety concerns. This paper, however, focuses on the risks posed by fluctuating blood glucose levels, as these are most unique to diabetes.

⁴³ See *Bombrys v. City of Toledo*, 849 F. Supp. 1210, 1218-19 (N.D. Ohio 1993) (“Were Mr. Bombrys in an emergency situation, he may not have the time to monitor his blood sugar. If he were to experience a drop in his blood sugar level, he may not have the opportunity to ingest food or glucose. This Court recognizes that, if Mr. Bombrys were to become incapacitated while involved in an emergency situation, the consequences to him and to those around him could be tragic.”); *LaCorte v. O’Neill*, 139 F. Supp. 2d 45, 48 (D.D.C. 2001) (“Defendant counters that plaintiff’s medical history indicates that he is at risk of ‘serious’ hypoglycemic symptoms that may recur at any time and require hospitalization ... and that even when he experiences milder symptoms, plaintiff still requires a snack and two to ten minutes of recovery time before being able to perform.”); *Hutton v. Elf Atochem N. America*, 273 F. 3d 884, 891 (9th Cir. 2001) (severe hypoglycemia could cause plaintiff to become unconscious, with possibly catastrophic results).

⁴⁴ See *Branham v. Snow*, 392 F. 3d 896, 905 (7th Cir. 2004) (although court denied summary judgment against plaintiff with diabetes who wanted to be an IRS special agent, it acknowledged the dangerous aspects of the position, including emergencies and stressful situations); *Bombrys v. City of Toledo*, 849 F. Supp. 1210, 1218-19 (N.D. Ohio 1993) (court acknowledged city’s legitimate concerns that if plaintiff with diabetes became unconscious while working as a police officer, the safety of the public would be at risk); *LaCorte v. O’Neill*, 139 F. Supp. 2d 45, 49 (D. D.C. 2001) (Secret Service agent was entrusted with the lives of top government officials); *McKenzie v. Benton*, 388 F. 3d 1342, 1355 (10th Cir. 2004) (parties stipulated that position of police officer was “inherently dangerous”); *Nelson v. City of N.Y.*, 2013 U.S. Dist. Lexis 117742, *35 (S.D. N.Y. Aug. 17, 2013) (job of a police officer is dangerous and difficult, and lapses in judgment could be deadly); *Coleman v. Pennsylvania State Police*, 2013 U.S. Dist. Lexis 99609, *52 (W.D. Pa. July 17, 2013), *aff’d*, 561 Fed. Appx. 138 (3rd Cir. 2014) (“The potential harm to persons and property of a seizure occurring while in performance of a critical duty, say a high speed chase or apprehension of a fleeing suspect, cannot be overstated - it would be calamitous.”); *McDonald v. Pennsylvania State Police*, 2012 U.S. Dist. Lexis 155725, *34 (W.D. Pa. Oct. 31, 2012), *aff’d*, 532 Fed. Appx. 176 (3rd Cir. 2013) (job of a police officer was uniquely demanding); *Taylor v. Hampton Roads Reg’l Jail Auth.*, 550 F. Supp. 2d 614, 618 (E.D. Va. 2008) (“the position of corrections officer is an inherently risky one”); *cf. Atkins v. Salazar*, 677 F. 3d 667, 682 (5th Cir. 2011) (job of National Park Service police officer was physically demanding and dangerous); *Allmond v. Akal Security*, 558 F. 3d 1312, 1318 (11th Cir. 2009) (justifying blanket ban against court security officers using hearing aids because of the tremendous harm that could result if an officer was not able to do his or her job); *cf. Kroll v. White Lake Ambulance Auth.*, 2014 U.S. App. LEXIS 15896, *19 (6th Cir. Aug. 19, 2014) (emergency medical technician clearly implicated public safety).

- **Transportation:** Individuals in transportation jobs, particularly those driving or controlling large vehicles, are considered to pose a heightened risk because of the possibility that large numbers of co-workers or members of the public could be seriously injured or killed in the event of an accident.⁴⁵ The medical standards imposed by federal and state governments on many transportation jobs reinforce the view that these jobs are safety-sensitive.⁴⁶
- **Manufacturing:** While manufacturing jobs vary widely in their functions and the dangers they entail, a number of courts have found some of these environments to be particularly dangerous. Complex and dangerous machinery, working at heights, work with dangerous chemicals and at extreme temperatures, can all convince a court that a manufacturing job is especially dangerous.⁴⁷
- **Health care:** Where employees are responsible for the care and safety of patients of a health care facility (for example, in cases involving surgeons or supervising nurses), courts may find the risk of harm from incapacitation to be severe.⁴⁸ The risk should be lessened where the individual is not in charge of patient care.⁴⁹

⁴⁵ See *Donahue v. Consolidated Rail Corp.*, 224 F. 3d 226, 231 (3rd Cir. 2000) (“If a train dispatcher passes out on the job, railroad employees and others could be injured or killed.”); *Bender v. Norfolk Southern Corp.*, 2014 U.S. Dist. Lexis 92364, *20 (M.D. Pa. July 8, 2014) (plaintiff locomotive engineer conceded that the consequences of a train accident caused by hypoglycemia could be severe); *Bosket v. Long Island R.R.*, 2004 U.S. Dist. Lexis 10851, *32 (E.D. N.Y. June 4, 2004) (stating that defendant’s concerns about the safety risk posed by a train signalman with a hearing impairment were understandable, though the evidence was insufficient to support summary judgment); *Clark v. SEPTA*, 2008 U.S. Dist. Lexis 5466 (E.D. Pa. Jan. 25, 2008) (bus mechanic posed severe risk because if he had a seizure he could fall from a bus while working on it or cause an accident while driving a bus).

⁴⁶ See discussion of blanket bans that have been upheld based on government standards, *supra* section IV.E.

⁴⁷ See *Darnell v. Thermafiber, Inc.*, 417 F. 3d 657, 661 (7th Cir. 2005) (“Were Darnell to experience [unconsciousness or confusion] at Thermafiber, the injury to himself or others could be great. Thermafiber employees are required to climb tall ladders, operate dangerous machinery—including saws, balers, conveyors, exhaust fans, ovens, and recycling machinery—and help lift 80-pound pieces of fiber board. The dangers posed by this environment figured prominently in [defendant’s doctor’s] assessment.”); *Wurzel v. Whirlpool Corp.*, 482 Fed. Appx. 1, 18 (6th Cir. 2012) (“Were plaintiff to suffer a spasm while driving a tow motor or working alone in proximity to moving machinery or at a height from which a fall could cause injury, the consequences for his own well-being and others can hardly be disputed”); *Justice v. Crown Cork & Seal*, 527 F. 3d 1080, 1091 (10th Cir. 2008) (plaintiff admitted that his work as an electrician in a manufacturing plant could be deadly); *Borgianni v. Thunder Basin Coal Co.*, 235 F. 3d 1284 (10th Cir. 2000) (plaintiff’s work with explosives as a blaster for mining company was inherently dangerous); *Moses v. American Nonwovens*, 97 F. 3d 446, 447 (11th Cir. 1996) (plaintiff with epilepsy worked both high above and below dangerous machinery; consequences of a seizure near such machinery could be catastrophic); *EEOC v. Rexnord Indus.*, 966 F. Supp. 2d 829, 838 (E.D. Wis. 2013) (“[i]t is undisputed [plaintiff] works in a potentially dangerous environment that includes working at tables with sharp edges and corners and working around forklifts.”); *Hickman v. ExxonMobil*, 2012 U.S. Dist. Lexis 189196, *21 (S.D. Tex. Sept. 27, 2012), *aff’d*, 540 Fed. Appx. 277 (5th Cir. 2013) (technician at an oil refinery had a safety sensitive position because it required working at heights and being a first responder in emergency situations); *Wilson v. Phillips Petroleum Co.*, 1998 U.S. Dist. LEXIS 19784, *7 (N.D. Tex. Dec. 8, 1998) (employee with bipolar disorder admitted she could not work at an oil refinery during manic episodes, where job required exposure to dangerous chemicals and heavy machinery that could cause an explosion).

⁴⁸ See *Amick v. Visiting Nurse and Hospice Home*, 2006 U.S. Dist. Lexis 76326, *26 (N.D. Ind. Oct. 18, 2006) (nurse responsible for providing care in patient homes became incapacitated due to diabetes); *Grosso v. UPMC*, 2012 U.S. Dist. Lexis 31737, *55 (W.D. Pa. Mar. 9, 2012) (plaintiff nurse was in charge of operating machine that circulated patient’s blood during open heart surgery, and thus any failure to properly operate the machine could result in patient death); *Haas v. Wyoming Valley Health Care Sys.*, 553 F. Supp. 2d 390, 399 (M.D. Pa. 2008) (if doctor with mental impairment had an episode during surgery, patient could be injured or die); *Altman v. N. Y. C.*

Working alone can be a particular concern for individuals with diabetes (and other conditions which can cause sudden incapacitation) working in safety-sensitive jobs, because there would be no co-workers or others to assist in the event of an emergency. See *Hutton v. Elf Atochem N. America*, 273 F. 3d 884, 891 (9th Cir. 2001) (finisher at chlorine plant would have to work essentially alone on the graveyard shift); *Donahue v. Consolidated Rail Corp.*, 224 F. 3d 226, 231-32 (3rd Cir. 2000) (if railroad employee experienced a heart spasm while working alone, consequences could be severe); *Hickman v. ExxonMobil*, 2012 U.S. Dist. Lexis 189196, *3 (S.D. Tex. Sept. 27, 2012), *aff'd*, 540 Fed. Appx. 277 (5th Cir. 2013) (oil refinery technicians performed most of their duties alone, making these positions safety-sensitive). Conversely, the presence of other employees to assist with treatment may lessen the risk. See *Kaw v. School Dist. of Hillsborough County*, 2009 U.S. Dist. Lexis 11086 (M.D. Fla. Jan. 30, 2009), *aff'd*, 434 Fed. Appx. 858 (11th Cir. 2011) (given that other teachers were present to provide assistance to a one-on-one school aide who experienced infrequent fainting spells, genuine issues of fact precluded summary judgment); *Lane v. Harborside Healthcare-Westwood Rehab. & Nursing Ctr.*, 2002 U.S. Dist. Lexis 13568, *27 (D. N.H. Jul. 16, 2002) (nurse's seizures did not pose direct threat where other nurses could cover her workload while she recovered from a seizure).

Attorneys should beware of courts which attempt to cut off the direct threat inquiry at the severity stage, by finding that certain jobs (or certain conditions) are so dangerous that no increased risk is tolerable. It is certainly proper to consider the severity of possible harm in determining the risk posed by an individual, and it may be true that “[t]he acceptable probability of an incident will vary with the potential hazard posed by the particular position: a probability that might be tolerable in an ordinary job might be intolerable for a position involving atomic reactors, for example.” *EEOC v. Exxon Corp.*, 203 F. 3d 871, 875 (5th Cir. 2000). However, some courts take this logic a step further and determine that in certain cases the severity of possible harm can be given controlling weight, despite the lack of any evidence that harm is likely. In *Darnell v. Thermafiber*, the Seventh Circuit held that “where the plaintiff’s medical condition is uncontrolled, of an unlimited duration, and capable of causing serious harm, injury may be considered likely to occur.” 417 F. 3d 657, 662 (7th Cir. 2005). While the court in that case based much of its reasoning on the fact that it viewed plaintiff’s diabetes as dangerously “uncontrolled,” it made the presumption that he posed a direct threat without looking to any actual evidence of increased risk.

Other courts have similarly focused exclusively on the possibility of severe harm.⁵⁰ Given the previously discussed focus on individualized assessment under the ADA and the need to avoid

Health & Hosps. Corp., 903 F. Supp. 503, 509 (S.D. N.Y. 1995) (severe harm could be caused if supervising doctor at hospital had a relapse of his alcoholism).

⁴⁹ See *Olsen v. Capital Region Medical Ctr.*, 2012 U.S. Dist. Lexis 51605, *19 (W.D. Mo. Apr. 12, 2012), *aff'd on other grounds*, 713 F. 3d 1149 (8th Cir. 2013) (mammography technician could seriously injure herself or others if she experienced a seizure); *Lane v. Harborside Healthcare-Westwood Rehab. & Nursing Ctr.*, 2002 U.S. Dist. Lexis 13568, *27-*28 (D. N.H. Jul. 16, 2002) (risk posed by nurse’s seizures was not severe for purposes of summary judgment where other nurses were available to cover her patients during her seizures and recovery).

⁵⁰ See *Hutton v. Elf Atochem N. America*, 273 F. 3d 884, 894 (9th Cir. 2001) (rejecting evidence that presence of safety systems rendered the risk that employee with diabetes could cause a disastrous accident very small, because “[e]ven were we to agree with Hutton ... that the likelihood of an accident is small, we conclude that the severity and scale of the potential harm to others presented by Hutton’s employment nevertheless pose a significant risk

validating employer decisions based on stereotypes and unfounded fears, all of these decisions are suspect. However, even where this principle has been accepted, it has been limited to a narrow category of jobs considered to be extremely dangerous.⁵¹ A district court rejected just such an argument in a case involving a law enforcement officer with diabetes. The court noted that defendants' attempt to focus solely on the severity of harm and the consequences that might occur if plaintiff experienced hypoglycemia was misguided, because it would permit the exclusion of people with diabetes from jobs based on mere speculation that the threatened harm would actually occur. "The issue of severity of harm, while relevant, is not an independent avenue to summary judgment and does not, without more, warrant a finding that plaintiff was not 'otherwise qualified' for the state trooper position." *Lewis v. Pennsylvania*, 2010 U.S. Dist. LEXIS 127154, *3-*4 (W.D. Pa. Dec. 1, 2010). Courts in most cases, even where they consider the risk to be severe, continue to analyze the other direct threat factors, including the likelihood that harm will occur.

Despite all the attention courts pay to the severity of risks in certain contexts where jobs are viewed as dangerous, the defendant must still present evidence that the risks posed by the individual are severe. Generalized allegations about the risks posed by the position (as opposed to the disability) are not sufficient; an employer may not simply exclude an individual with a disability from a position it perceives to be dangerous without some evidence that the threat is real. For example, in *EEOC v. Murray, Inc.*, a district court held that employees using insulin could not be restricted from driving forklifts merely because forklifts are potentially dangerous vehicles and can cause injuries if they are involved in an accident; the court held that this evidence was insufficient without proof that individuals with diabetes are actually prone to attention lapses or other problems which would make them unsafe. 175 F. Supp. 2d 1053, 1065 (M.D. Tenn. 2001); *see also Bosket v. Long Island R.R.*, 2004 U.S. Dist. Lexis 10851 (E.D. N.Y. June 4, 2004) (simply citing generalized safety concerns about the job is not enough to show a severe risk). And where job conditions are not shown to be particularly dangerous, courts may discount the severity of harm. *See Hammel v. Eau Galle Cheese Factory*, 2003 U.S. Dist. Lexis 7515, *39-*40 (W.D. Wisc. Apr. 15, 2003) (in analyzing risks posed by an individual with vision impairment in a factory, court held that knife wounds and getting a hand stuck in a machine were

under the direct-threat analysis."); *Turco v. Hoechst Celanese Chem. Group*, 101 F. 3d 1090, 1094 (5th Cir. 1996) ("Any diabetic episode or loss of concentration occurring while operating any of this machinery or chemicals had the potential to harm not only himself, but also others. This would be a walking time bomb and woe unto the employer who places an employee in that position."); *Borgialli v. Thunder Basin Coal Co.*, 235 F. 3d 1284, 1294 (10th Cir. 2000) (in case involving mine worker with psychiatric condition who handled explosives, court found no need for specific findings as to the likelihood of harm because district court had "correctly concluded that plaintiff's dangerous occupation was of determining weight in this case.").

⁵¹ Some older cases dealing with HIV/AIDS also find no need to evaluate the actual likelihood of harm when there is a theoretical possibility of transmission of the disease, based on the nature of AIDS as a fatal disease. *See Onishea v. Hopper*, 171 F.3d 1289, 1297 (11th Cir. 1999) ("Thus, when the adverse event is the contraction of a fatal disease, the risk of transmission can be significant even if the probability of transmission is low: death itself makes the risk 'significant.'"); *Estate of Mauro v. Borgess Med. Ctr.*, 137 F. 3d 398 (6th Cir. 1998); *Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F. 3d 1261 (4th Cir. 1995). *But see Henderson v. Thomas*, 913 F. Supp. 2d 1267, 1294 (M.D. Ala. 2012) (advances in treatment of HIV/AIDS meant prison could not justify a policy of segregated housing for all HIV positive inmates, and instead had to perform individualized assessments). These cases should be distinguishable since neither diabetes nor severe hypoglycemia is uniformly fatal. Even with diabetes, the link between the occurrence and the posited severe harm is much more tenuous and often speculative, since the episode must not only occur but must happen under circumstances that actually lead to severe injury to others.

severe risks, but the potential harm from tripping or stumbling over objects or people in the plant were not severe); *EEOC v. Kinney Shoe Corp.*, 917 F. Supp. 419, 429 (W.D. Va. 1996) (where plaintiff was a sales clerk in a shoe store with epilepsy, “[l]ittle harm can come to others from [his] seizures. The only threat to others is that [he] will fall into them on his way to the floor. The severity of such harm strikes the court as de minimis.”); *Kaw, supra*, 2009 U.S. Dist. Lexis 11086 at *25 (fainting spells did not pose a direct threat in the school setting). And even in a safety-sensitive job, plaintiffs have a chance to prove that potential harm is not severe. In *Branham, supra*, 396 F. 3d at 907-08, which involved a law enforcement position, the court stated:

With respect to ... the nature and severity of the risk ... Mr. Branham argues that, although the risks of severe hypoglycemia can include incapacitation, confusion, coma and death, he never has lost consciousness and he never has experienced physical or mental incapacitation as a result of mild hypoglycemia. ... A reasonable trier of fact could conclude that any hypoglycemia experienced by Mr. Branham will not impair him in the performance of his duties.

Nonetheless, plaintiffs in diabetes cases may have the best chance of defeating summary judgment on direct threat by emphasizing that they are unlikely to cause such harm; this paper focuses on that factor next.

F. Likelihood of harm

As with most disabilities, the likelihood of harm from severe hypoglycemia, or from diabetes generally, does not lend itself to precise quantification. There is no medically accepted way to measure the probability of hypoglycemia for any individual,⁵² and no court has attempted to define precisely what an acceptable risk of harm would be. But, as discussed earlier, the risk of harm must be significant, and therefore its likelihood must be more than small.

The likelihood of risk for a given condition should not be measured in a vacuum. As the cases discussed below demonstrate, the relevant question is whether an individual poses an increased risk above and beyond those that the employer tolerates in its working population. Those who are overweight, have high blood pressure, smoke or have heart disease are all at an increased risk of becoming incapacitated; at minimum, an employer which allows these groups to work should not be able to screen out an individual with diabetes unless that person poses a risk that is significantly greater than those groups pose. To do so suggests either that the employer is ignorant about the individual’s disease and its effects, or that the decision results from prejudice against that condition based on fears or stereotypes. In *LaCorte v. O’Neill*, the court denied summary judgment against a plaintiff with type 1 diabetes who wished to be a Secret Service agent, based in part on “evidence that non-diabetic officers have experienced different disabling physical conditions while working, including heart attacks, falling asleep, common maladies, and generally poor physical fitness; and that the Secret Service already employs two diabetic officers who self administer insulin to control their diabetes.” 139 F. Supp. 2d 45, 49 (D. D.C. 2001).

⁵² *But see Branham v. Snow*, 392 F. 3d 896, 908 (7th Cir. 2004) (plaintiff’s physician testified that his risk of experiencing severe hypoglycemia was 0.2 percent per year, and defendant offered no evidence to dispute that assessment).

Similarly, in *Bombrys v. City of Toledo*, summary judgment was denied to the city, which failed to hire an individual with type 1 diabetes as a police officer, based in part on similar evidence:

At the same time that it excludes insulin-dependent diabetics, the City seems willing to permit persons with other potentially disabling conditions to serve as police officers, i.e., the City of Toledo does not have a blanket policy preventing epileptics from serving as police officers. Asthmatics are also permitted to serve on the police force. The City does not relieve from duty those officers who develop insulin-dependent diabetes while serving on the force. At the very best, the City's policies in these respects seem inconsistent with a blanket policy that excludes all applicants with insulin-dependent diabetes. At worst, the City's blanket exclusion is impermissibly based upon generalizations and stereotypes.

849 F. Supp. 1210, 1219 (N.D. Ohio 1993). *But see* *Burton v. Metro. Transp. Auth.*, 244 F. Supp. 2d 252 (S.D. N.Y. 2003) (rejecting argument that plaintiff posed no greater risk than individuals from other groups). Attorneys should use discovery to examine the employer's policies or practices toward individuals with other conditions, to attempt to show that the employer is overly concerned about the risks posed by diabetes specifically. For example, interrogatories might be used to ask whether the employer employs those who smoke or have high blood pressure or heart disease, and whether any restrictions are placed on such employees by the employer's policies. In depositions, the basis for the decision to exclude an individual with diabetes, while not excluding individuals with these other conditions, could then be explored.

Determining whether harm is likely in an individual case is very fact-intensive, and because of the variety of possible factual situations, generalizations about these cases are difficult. However, this section will discuss several factors which bear on whether harm will be deemed likely, both for disabilities in general and for diabetes in particular.

1. History of avoiding diabetes-related problems

Those who have, over a significant period of time, avoided ill effects from their diabetes can present strong evidence that they pose a low risk of harm (though in certain cases courts have found a direct threat anyway because of the risks inherent in the job). According to the American Diabetes Association:

Often, a key factor in assessing employment safety and risk is documentation of incidents of severe hypoglycemia. An individual who has managed his or her diabetes over an extended period of time without experiencing severe hypoglycemia is unlikely to experience this condition in the future. Conversely, multiple incidents of severe hypoglycemia may in some situations be disqualifying for high-risk occupations. However, the circumstances of each incident should be examined, as some incidents can be explained due to changes in insulin dosage, illness, or other factors and thus will be unlikely to recur or have already been addressed by the individual through changes to his diabetes treatment regimen or education.

Employment Position Statement, *supra* note 7, at S114. In a number of cases, evidence that the individual has never experienced problems with severe hypoglycemia, or at least not in the workplace, has helped defeat summary judgment. For example, in *Branham v. Snow*, 392 F. 3d 896, 908 (7th Cir. 2004), plaintiff introduced evidence that he “has never suffered any period of incapacitation or other hypoglycemic episode and there is no medical evidence indicating that he will do so in the future.” While the court did not decide whether previous incidents of hypoglycemia were necessary to show a direct threat, it did find that Branham had presented sufficient evidence to survive summary judgment. In *DiPol v. N. Y. C. Transit Auth.*, 999 F. Supp. 309 (E.D. N.Y. 1998), the court considered the safety risk posed by a transit worker with diabetes and concluded:

Despite Defendant's assertions, it has not shown that Plaintiff was not qualified for his job in light of his diabetes. The Court finds it significant that Plaintiff has been a diabetic for forty years and has been in control of his condition. Moreover, Plaintiff has never experienced any problems on the job related to his diabetes. Although Defendant speculates as to possible safety concerns posed by Plaintiff's condition, no evidence has been produced demonstrating that Plaintiff's diabetes rendered him incapable of performing his job responsibilities.

Id. at 315. The court in *EEOC v. Chrysler Corp.*, 917 F. Supp. 1164, 1169 (E.D. Mich. 1996); *rev'd on other grounds*, 1998 U.S. App. Lexis 30607 (6th Cir. Nov. 25, 1998), similarly relied on evidence that plaintiff had worked in his current position and similar jobs for a number of years and had never experienced any problems related to his type 2 diabetes. In *Bender v. Norfolk Southern Corp.*, 2014 U.S. Dist. Lexis 4460, *41 (M.D. Pa. Jan. 14, 2014), plaintiff was able to survive summary judgment because he had no history of severe hypoglycemia and only experienced infrequent mild symptoms of hypoglycemia, and because a jury could believe that he would have access to a source of glucose to treat an oncoming episode within moments.⁵³ See also *Simms v. City of N. Y.*, 160 F. Supp. 2d 398, 405 (E.D. N.Y. 2001) (“seven years after he was diagnosed, but prior to the Department learning of his condition, he never experienced any problems on the job related to his diabetes”); *Bynum v. MVM*, 462 F. Supp. 2d 9, 14 (D. D.C. 2008) (plaintiff, who had diabetes and other medical conditions, survived summary judgment based on evidence that his work performance was good and that he had never experienced problems related to his disability on the job).

Cases addressing other disabilities have reached similar conclusions. See *Rizzo v. Children's World Learning Ctrs., Inc.*, 213 F. 3d 209, 213 (5th Cir. 2000) (en banc) (in case of child care van driver with hearing impairment, evidence of her safe driving record and lack of problems supervising children due to her disability was sufficient to support a jury verdict in her favor); *Holiday v. City of Chattanooga*, 206 F. 3d 637, 644 (6th Cir. 2000) (court ordered reversal of summary judgment against police officer with HIV where there was no evidence that his HIV

⁵³ But later in the same case, after a jury verdict for defendant, the court found there was sufficient evidence to support the verdict because of the possibility that plaintiff might not be able to treat mild hypoglycemia promptly. *Bender v. Norfolk Southern Corp.*, 2014 U.S. Dist. Lexis 92364, *26-*27 (M.D. Pa. July 8, 2014). These opposing outcomes resulted from the different standards in opposing a defense summary judgment motion and in challenging a defense verdict.

status had caused any symptoms or health problems and there had been no impact on his job performance); *Echazabal v. Chevron, U.S.A.*, 336 F. 3d 1023, 1032 (9th Cir. 2003) (plaintiff had worked for many years in plant exposed to chemicals defendant claimed were dangerous to him, without any evidence of harm); *Backhaus v. General Motors LLC*, 2014 U.S. Dist. Lexis 132266, *23 (E.D. Mich. Sept. 22, 2014) (in rejecting summary judgment on the direct threat issue, court focused on the fact that plaintiff with monocular vision had successfully driven forklifts on the job); *Lafata v. Dearborn Heights Sch. Dist. No. 7*, 2013 U.S. Dist. Lexis 173731, *28-*29 (E.D. Mich. Dec. 11, 2013) (evidence showed that plaintiff had successfully performed the job functions that defendant believed he could not safely do); *Rosado v. American Airlines*, 743 F. Supp. 2d 40, 51 (D. P.R. 2010) (denying summary judgment to employer where there was no evidence that plaintiff's mental illness and drug abuse had caused any safety problems in the workplace during his 23 years of employment); *EEOC v. Rite-Aid Corp.*, 750 F. Supp. 2d 564, 571 (D. Md. 2010) (evidence that plaintiff with epilepsy never injured himself beyond minor cuts and bruises while working in a warehouse, and never injured any of his co-workers, despite having multiple seizures over nearly a decade of employment); *Hatzakos v. Acme American Refrigeration*, 2007 U.S. Dist. Lexis 49034, *26-*27 (E.D. N.Y. July 6, 2007) (no evidence that plaintiff's psychological condition was perceived as a threat by his co-workers or had caused problems on the job).

However, having no record of disability-related safety problems on the job is not a guarantee of favorable treatment by the courts. As discussed in the last section, courts have held that in certain particularly dangerous jobs, the severity of the possible harm outweighs the possibly low odds that an incident will occur. In these cases, courts generally give little weight to evidence that the plaintiff has not experienced safety-related incidents in the past. See *Darnell v. Thermafiber*, 417 F. 3d 657, 662 (7th Cir. 2005) (court was unmoved by the fact plaintiff had worked in defendant's manufacturing plant for ten months without any diabetes-related problems, given its (unsupported) belief that his diabetes was "uncontrolled" and he was therefore at substantially increased risk); *Wilkerson v. Shinseki*, 606 F. 3d 1256, 1264 (10th Cir. 2010) (summary judgment granted where plaintiff had worked as boiler room operator for only two years without incident and defendant's doctor concluded that plaintiff's diabetes was "poorly controlled"); *Serrapica v. City of N. Y.*, 708 F. Supp. 64, 72 (S.D. N.Y. 1989) (discounting evidence plaintiff had performed physically demanding jobs without incident given that his diabetes was poorly controlled); *Wurzel v. Whirlpool Corp.*, 482 Fed. Appx. 1, 19 (6th Cir. 2012) (fact that employee had never had an accident or injured anyone on the job did not mean harm was not likely in the future where he had experienced multiple incidents of heart spasms leading to dizziness and fatigue on the job that were not controlled through medication); *Hickman v. ExxonMobil*, 2012 U.S. Dist. Lexis 189196, *21 (S.D. Tex. Sept. 27, 2012), *aff'd*, 540 Fed. Appx. 277 (5th Cir. 2013) (court found it irrelevant that plaintiff had not suffered any seizures at work when her seizures remained uncontrolled); *cf. Koessel v. Sublette County Sheriff's Dep't.*, 717 F.3d 736, 743 (10th Cir. 2013) (evidence that plaintiff performed his job duties successfully showed only that he could perform his duties physically, not that he could cope with the stress of his position despite his psychological condition); *Allmond v. Akal Security*, 558 F. 3d 1312, 1318 n. 7 (11th Cir. 2009) (ADA does not require employer to forgo setting a qualification standard until harm actually occurs). Usually, when courts take this view it is based on other evidence that the court believes shows that the likelihood of harm is great, or on the fact that the plaintiff has worked in the job for too short a time to give confidence that harm is unlikely to occur.

2. Previous Incidents of Harm or Safety Problems

The fact that an individual has experienced problems related to diabetes (or another disability) can be strong evidence that the harm is likely to recur and therefore the individual poses a direct threat, although this can sometimes be overcome through evidence (particularly medical testimony) that despite the event the individual is unlikely to pose a threat. Incidents on the job are particularly problematic, but even problems such as severe hypoglycemia away from work can convince a court that an individual is a safety threat. As most people with diabetes will experience some hypoglycemia symptoms from time to time, the frequency and severity of these episodes is very important. As discussed below, any such incidents will need to be adequately addressed in case preparation.⁵⁴

A few courts seem to hold that an individual who has a dangerous incident of hypoglycemia on the job is not qualified because of a “failure to control” his or her diabetes. See *Siefken v. Village of Arlington Heights*, 65 F.3d 664, 667 (7th Cir. 1995) (police officer who experienced severe hypoglycemia, causing him to drive his patrol car erratically, was not qualified for his position because he had failed to control his condition despite being given opportunity to do so); *Burroughs v. City of Springfield*, 163 F.3d 505, 508 (8th Cir. 1998) (police officer who, according to the court, knew that he could control his diabetes but failed to do so on two occasions, and became disoriented and unable to function on the job, was not qualified because of his failure to manage his diabetes). In *Burden v. Southwestern Bell Tel. Co.*, 183 Fed. Appx. 414 (5th Cir. 2006), a telephone company customer service technician (CST) (a job involving driving a company vehicle and working at heights and underground to install and maintain telephone wires and other equipment) had at least five incidents of serious hypoglycemia on the job. These included appearing confused and disoriented on the job, collapsing while working on a telephone pole, and being found unconscious with his car stopped in traffic. He was given opportunities to monitor and treat his blood glucose levels at work, but continued to have difficulty with hypoglycemia. The court found him unqualified for his job based on the safety risk he posed, particularly when driving. “Even after SBC and Burden reached an agreement allowing him to take breaks to measure his blood sugar and more easily access food while working, Burden again had an on-the-job hypoglycemic incident. Beyond asserting that he has served as a CST for twenty five years without a diabetes-related vehicular accident, Burden identifies little evidence that would raise an issue of fact regarding his capacity to continue to perform the functions of a CST.” *Id.* at 417.⁵⁵

⁵⁴ The threshold question of whether the alleged hypoglycemia actually occurred may need to be addressed in appropriate cases. For example, in *Lewis v. Pennsylvania*, 2010 U.S. Dist. Lexis 127135, *13 (W.D. Pa. Oct. 5, 2010), defendant claimed that plaintiff had experienced episodes of hypoglycemia in the past, but plaintiff denied that these episodes had occurred, and his expert testified that the medical records on which defendants’ claim was based were ambiguous. The magistrate judge found that there was a genuine issue of fact as to whether plaintiff had actually experienced hypoglycemia. A *Cf. EEOC v. Rexnord Indus.*, 966 F. Supp. 2d 829, 839 (E.D. Wis. 2013) (dispute of fact as to whether seizures actually resulted in loss of consciousness or were merely brief “blackouts”); *Hoback v. City of Chattanooga*, 2012 U.S. Dist. Lexis 124794, *28 (E.D. Tenn. Sept. 4, 2012) (summary judgment denied where the employer had evidence that suggested the violent actions or threats plaintiff allegedly made did not actually happen).

⁵⁵ *Cf. Atkins v. Salazar*, 677 F. 3d 667, 684 (5th Cir. 2011) (in upholding employer’s medical disqualification of plaintiff under business necessity defense, court relied heavily on the fact that plaintiff’s blood glucose levels

These cases should not foreclose recovery for the plaintiff simply because an incident of hypoglycemia occurred on the job, but instead should require a showing that the plaintiff was at fault or was not vigilant in managing diabetes. In *Rednour v. Wayne Township*, 2014 U.S. Dist. Lexis 134319 (S.D. Ind. Sept. 24, 2014), plaintiff had experienced multiple incidents of severe hypoglycemia on the job as a paramedic, but the court distinguished *Siefken* because there was evidence Rednour had not simply refused to manage her diabetes but had taken steps to prevent incidents of hypoglycemia, and because she had proposed an accommodation (use of a continuous glucose monitoring system) that could have prevented future incidents. *Id.* at *60-61. And in *Girten v. Town of Schererville*, 819 F. Supp. 2d 786, 801 (N.D. Ind. 2011), the court similarly distinguished *Siefken*, citing evidence that plaintiff had in fact been vigilant in monitoring and taking care of his diabetes, but had still experienced complications (in this case, hyperglycemia). (Girten had not experienced a safety-related problem at work; his hyperglycemia had allegedly caused him to argue with his supervisor and refuse to do assigned work.

While these cases do not explicitly consider the direct threat factors (particularly the likelihood of harm) in determining that the employee is not qualified, it remains true that where there have been multiple incidents of hypoglycemia on the job which have posed a danger to public safety, it will be difficult to avoid a finding that the individual poses a safety risk.⁵⁶

The majority of courts do not follow the approach of these cases and instead more explicitly consider the likelihood of future harm. Nonetheless, where there is evidence of dangerous hypoglycemia on the job, courts often will conclude that a direct threat exists. For example, in *Onken v. McNeilus Truck & Mfg.*, 639 F. Supp. 2d 966 (N.D. Iowa 2009), the court granted summary judgment against plaintiff with type 1 diabetes, who worked as a welder in a factory and had frequent hypoglycemia at his workplace. During hypoglycemic episodes, which occurred several times a year, he yelled at coworkers, slapped a tube of glucose gel out of an occupational nurse's hand, swung from a hook, and used profanity. His doctor recommended that he check his blood glucose more frequently and eat snacks as needed, and his employer permitted him to do this. *Id.* at 972-974. However, after his incidents of hypoglycemia continued the employer required him to have an independent medical evaluation, which concluded that if he could not control his hypoglycemia he posed a safety risk and should not be permitted to continue working. *Id.* at 975. The court held that as a result of his inability to prevent hypoglycemia and his history of dangerous behavior during hypoglycemia, there was sufficient objective medical evidence to show that plaintiff posed a direct threat to the safety of others and granted summary judgment. *Id.* at 979. In *Grosso v. UPMC*, 2012 U.S. Dist. Lexis 31737, *58-59 (W.D. Pa. Mar. 9, 2012), plaintiff nurse had an incident where she was disoriented and seemed to be sleeping during preparations for a patient surgery, which she claimed was due to hypoglycemia. The court found that this, coupled with her history of other incidents of sudden

“fluctuated wildly” on and off the job, even though there was no evidence presented that these incidents were severe or threatened safety, and on plaintiff's alleged failure to take adequate steps to control his diabetes).

⁵⁶ There was no indication in these cases that the employer prevented checking blood glucose levels or treating symptoms, or otherwise stood in the way of diabetes care on the job. Were such facts present, the employer would be under a duty to provide reasonable accommodations, including the ability to manage diabetes on the job, since the direct threat inquiry takes into account the availability of accommodations.

hypoglycemia, indicated that harm was likely to occur. And in *Coberley v. N. Central Texas College*, 2009 U.S. Dist. Lexis 15361, *12 (N.D. Tex. Feb. 27, 2009), plaintiff, who was a nursing instructor and clinical supervisor with diabetes, was found to be a direct threat based on multiple incidents of falling asleep and being disoriented during instructional and clinical time. And in *Rednour*, *supra*, 2014 U.S. Dist. Lexis 134319 at *33-*34, plaintiff conceded that her two serious incidents of hypoglycemia in a six-month period impacted her ability to perform her job's essential functions (though she argued that she could have been accommodated). These cases demonstrate that where there is evidence of dangerous behavior on the job related to diabetes, the court will often find a direct threat to exist even absent evidence that anyone was actually hurt or harmed. Numerous examples involving other disabilities also show that prior safety problems can be strong evidence of future harm and direct threat. These cases include situations involving seizures on the job,⁵⁷ cardiac events,⁵⁸ psychological problems,⁵⁹ alcoholism,⁶⁰ incidents of confusion or disorientation on the job,⁶¹ and workplace accidents.⁶²

However, past incidents are not always fatal to plaintiff's case. Courts are willing to deny summary judgment in some cases, particularly where the prior incident is not viewed as especially serious or where the incident can be sufficiently medically explained that the court

⁵⁷ See *Moses v. American Nonwovens*, 97 F. 3d 446, 448 (11th Cir. 1996) (plaintiff with epilepsy was not able to control his seizures with medication); *LaChance v. Duffy's Draft House*, 146 F. 3d 832, 834 (11th Cir. 1998) (plaintiff had multiple seizures over a period of several months while working as a line cook in a restaurant); *Hickman v. ExxonMobil*, 2012 U.S. Dist. Lexis 189196, *20-*21 (S.D. Tex. Sept. 27, 2012), *aff'd*, 540 Fed. Appx. 277 (5th Cir. 2013) (plaintiff's seizures were deemed likely to recur where she had been diagnosed with epilepsy less than a year and continued to experience seizures intermittently even following her termination); *Olsen v. Capital Region Medical Ctr.*, 2012 U.S. Dist. Lexis 51605, *18-*19 (W.D. Mo. Apr. 12, 2012), *aff'd on other grounds*, 713 F. 3d 1149 (8th Cir. 2013) (plaintiff had experienced fourteen seizures over a period of several years, had injured herself on several occasions at work, and had experienced seizures while caring for patients); *Mayer v. Whitlock Packaging Corp.*, 2010 U.S. Dist. Lexis 42286, *13 (E.D. Okla. Apr. 29, 2010) (plaintiff with seizures described as "frequent, unpredictable and violent," and who had injured herself and others during seizures at work, posed a direct threat).

⁵⁸ See *Wurzel v. Whirlpool Corp.*, 482 Fed. Appx. 1, 15 (6th Cir. 2012) (plaintiff had had eleven heart spasms at work, most of which had required him to leave work, some of which had required emergency treatment, and one where he had been found sitting on a bench nearly passed out); *Donahue v. Consolidated Rail Corp.*, 224 F. 3d 226, 232 (3rd Cir. 2000) (plaintiff had previously had a heart attack and later had passed out along a section of railroad track while working as a result of medications he took to control his heart condition).

⁵⁹ See *McKenzie v. Benton*, 388 F.3d 1342, 1354 (10th Cir. 2004) (evidence that police officer had experienced a psychotic episode off the job where she discharged her firearm in public supported jury's verdict for defendant); *Johnson v. City of Blaine*, 970 F. Supp. 2d 893, 909 (D. Minn. 2013) (plaintiff police officer had an extensive history of suicide ideation and other psychological problems).

⁶⁰ See *Bekker v. Humana Health Plan, Inc.*, 229 F.3d 662, 668 (7th Cir. 2000) (physician who had been observed multiple times smelling of alcohol while treating patients posed a direct threat).

⁶¹ See *Robertson v. Neuromedical Ctr.*, 161 F. 3d 292, 296 (5th Cir. 1998) (summary judgment granted where neurologist's memory problems had previously caused him to make errors in patient charts, allegedly compromising patient safety); *Antoon v. Women's Hosp. Foundation*, 2012 U.S. Dist. Lexis 46268, *14-*16 (M.D. La. March 30, 2012) (plaintiff mammography technician had on numerous occasions been observed as forgetful and unfocused on the job, and had made numerous errors in patient care); *Haas v. Wyoming Valley Health Care Sys.*, 553 F. Supp. 2d 390, 399 (M.D. Pa. 2008) (surgeon had become mentally impaired during surgery and had needed extensive assistance from others to complete the procedure).

⁶² See *Clayborne v. Potter*, 448 F. Supp. 2d 185, 191 (D. D.C. 2006) (plaintiff posed a direct threat because she had had repeated workplace accidents); *Peralta v. Avondale Indus.*, 2004 U.S. Dist. Lexis 22640, *11 (E.D. La. Nov. 8, 2004) (suggesting that employee would pose a direct threat when taking certain prescription medications where he had an automobile accident which he attributed to the medications' side effects).

believes it is unlikely to recur. For example, in *Jackson v. City of N.Y.*, 2011 U.S. Dist. Lexis 43861, *41 (E.D. N.Y. Mar. 3, 2011), plaintiff with type 2 diabetes experienced several seizures while on the job, which defendant believed were caused by her diabetes. The court denied summary judgment, however, because of evidence from plaintiff's treating physicians that these seizures were likely caused by changes in her medication regimen and did not recur after she was stabilized on insulin. The court also noted that there was no evidence that plaintiff had injured herself or caused harm to others as a result of the seizures.

In *LaCorte v. O'Neill*, 139 F. Supp. 2d 45, 48 (D.D.C. 2001), plaintiff who was denied a position as a Secret Service agent due to diabetes had experienced three hospitalizations due to hypoglycemia. Nonetheless, summary judgment was denied because plaintiff produced medical evidence that these hospitalizations could be explained (either as resulting from the flu or producing only mild symptoms). In *Gragg v. N. Y. State Dep't of Env'tl. Conservation*, 2000 U.S. Dist. Lexis 19607, *17-*18 (N.D. N.Y. Mar. 3, 2000), plaintiff had his driving privileges revoked and was reassigned to office duty following at least four incidents of lost consciousness at work, including an accident with a state vehicle caused by his diabetes. The court held that there was insufficient evidence, even at the motion to dismiss stage, to challenge this decision because plaintiff clearly posed a direct threat. However, plaintiff later began insulin pump therapy and requested that his driving privileges be reinstated; at the time of the motion to dismiss he had been free of hypoglycemia and seizures for over three years. The court held that he had presented sufficient evidence to survive a motion to dismiss, finding that, after his change in therapy, he was otherwise qualified and was no longer a direct threat. And in *Millage v. City of Sioux City*, 258 F. Supp. 2d 976, 993 (N.D. Iowa 2003), the court denied summary judgment to defendant despite the fact that plaintiff had experienced a hypoglycemic reaction while operating a city bus (although passengers were not at risk) based on evidence that he was sufficiently able to control his diabetes to permit him to safely drive and his clean driving record.⁶³

⁶³ See also *McCusker v. Lakeview Rehab. Ctr.*, 2003 U.S. Dist. Lexis 16340, *12 (D. N.H. Sept. 17, 2003) (defendant could not establish, at the motion to dismiss stage, that plaintiff with type 1 diabetes was a direct threat, despite multiple hypoglycemic incidents on the job, including one leading to an automobile accident); *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1248 (9th Cir. 1999) (summary judgment denied against store clerk where on the job seizures had resulted in only minor injuries); *Lovejoy-Wilson v. NOCO Motor Fuel*, 263 F. 3d 208, 220 (2nd Cir. 2001) ("NOCO has failed to provide any evidence that [plaintiff sales clerk] poses a significant risk of substantial harm. The plaintiff's seizures usually last a few minutes or less. The only injury she sustained during her employment with the company was the minor one to her elbow in April 1994. NOCO has not identified any time at which she failed to perform her duties or caused harm to others because of her affliction or otherwise."); *Backhaus v. General Motors LLC*, 2014 U.S. Dist. Lexis 132266, *23 (E.D. Mich. Sept. 22, 2014) (while forklift driver with monocular vision had been previously disciplined for unsafe driving on the job, there was no evidence that this incident was related to his vision); *EEOC v. Rexnord Indus.*, 966 F. Supp. 2d 829, 839 (E.D. Wis. 2013) (even though plaintiff had had two seizures at work, one of which resulted in her hitting her head and receiving medical treatment, any injury that resulted was minor, and there were factual disputes as to whether plaintiff actually lost consciousness); *Nelson v. City of N.Y.*, 2013 U.S. Dist. Lexis 117742, *37-*38 (S.D. N.Y. Aug. 17, 2013) (plaintiff's physician stated that plaintiff's prior problems on the job could have been related to an undiagnosed physical condition rather than alleged mental illness, and were not likely to recur); *EEOC v. Union Pacific R.R.*, 6 F. Supp. 2d 1135, 1138 (D. Idaho 1998) (summary judgment denied where employer could only speculate that employee's monocular vision had caused a workplace vehicle accident); *Hammel v. Eau Galle Cheese Factory*, 2003 U.S. Dist. Lexis 7515, *39 (W.D. Wisc. Apr. 15, 2003) (incidents where employee with vision impairment stumbled or tripped over objects on factory floor or may have put hands too far into production machine were not viewed as serious enough to justify summary judgment); *EEOC v. Kinney Shoe Corp.*, 917 F. Supp. 419, 429 (W.D. Va. 1996)

Another category of prior incident deserves brief mention here. Courts are particularly willing to grant summary judgment on a finding of direct threat where the employee has engaged in threatening behavior toward co-workers or others while on the job. Given well-publicized incidents of workplace violence in recent years, it is hardly surprising that courts hold that employers are not required to wait until threats are realized before taking action to protect the safety of others, even if at times these decisions ignore evidence that there may be little likelihood of the threats being carried out.⁶⁴ People with diabetes, even those experiencing severe hypoglycemia, do not normally exhibit threatening behavior as a result of the disease. However, those experiencing hypoglycemia do sometimes act aggressively toward those attempting to assist or protect them, without intending to do so, and this behavior might be interpreted as threatening. *See Onken, supra*, 639 F. Supp. 2d at 980 (during severe hypoglycemia, plaintiff hit or swung at several co-workers, some of whom felt threatened).

Attorneys representing a client who has experienced hypoglycemia, whether on or off the job, or other diabetes complications raising safety concerns need to focus on gathering evidence to counter the assumption that past incidents indicate a likelihood of future harm. This will require medical testimony about the severity of the incident and what it indicates about the future. It is not enough simply to rely on the fact that the incident happened off the job or that no one was harmed, although these facts will support the plaintiff's claim. Where possible, the incident should be medically explained in a way that shows it is unlikely to recur or pose a threat. Some hypoglycemia can be caused by a change in insulin dosage, for example, while some individuals experience a pattern of hypoglycemia while sleeping which is unlikely to affect them while at work. Also, incidents that occurred far in the past, or those that occur very infrequently, should not support a conclusion that an individual is a direct threat, at least at the summary judgment stage. Presenting the right medical evidence on this point can be critical to the plaintiff's case.

3. Medical Opinions of Defendant's Physicians

Another key aspect of a direct threat case is the medical evidence presented to demonstrate the risk of harm and the likelihood that it will occur. Of course, in almost all cases, defendants will present testimony from a physician or other health care professional justifying the decision that the individual posed a threat, usually based on an opinion rendered at the time the employment decision was made.⁶⁵ Such opinions must of course be challenged with countervailing medical

(summary judgment denied on direct threat issue where employee with epilepsy had never injured himself or anyone else during one of his seizures); *Lane v. Harborside Healthcare-Westwood Rehab. & Nursing Ctr.*, 2002 U.S. Dist. Lexis 13568, *27 (D. N.H. Jul. 16, 2002) (summary judgment denied despite nurse's multiple seizures on the job where no one had been injured by seizures and patient care had not been compromised).

⁶⁴ *See Jarvis v. Potter*, 500 F. 3d 1113, 1124 (10th Cir. 2007); *Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1090 (10th Cir. 1997); *Palmer v. Cir. Ct. Of Cook County*, 117 F.3d 351, 353 (7th Cir. 1997); *Williamson v. Bon Secours Richmond Health Sys.*, 2014 U.S. Dist. Lexis 102602, *12-*13 (E.D. Va. July 28, 2014); *Mayo v. PCC Structural, Inc.*, 2013 U.S. Dist. LEXIS 91767, *9-*10 (D. Ore. July 1, 2013); *Pough v. SBC Communications*, 570 F. Supp. 2d 1006, 1017 (N.D. Ill. 2008); *Johnson v. Maynard*, 2003 U.S. Dist. Lexis 2676, *13 (S.D. N.Y. Feb. 25, 2003).

⁶⁵ This section discusses the content of the medical opinion relied on by the employer, and whether that content supports the employer's decision. Whether that opinion was arrived at through a legally adequate individualized assessment, and what evidence was considered in reaching that opinion, is a separate but equally important question and is explored later in this paper.

evidence. However, it is also important to determine whether the medical opinion fully supports the employer's decision. Where the opinion is equivocal or does not go as far as the employer did, this can greatly undermine the employer's case. See *Rednour v. Wayne Township*, 2014 U.S. Dist. Lexis 134319, *13 (S.D. Ind. Sept. 24, 2014) (defendant's physician had not recommended termination but had opined that plaintiff could be accommodated with a short leave of absence to adjust her medications and could return to work once she had been free of hypoglycemia for 2-4 weeks); *Jackson v. City of N.Y.*, 2011 U.S. Dist. LEXIS 43861, *42 (E.D. N.Y. Mar. 3, 2011) (decision of city medical board was undermined because it used different rationales for its decision at different times and it had permitted other police officers with diabetes to continue on full duty, despite its claim that it had a policy against allowing officers with diabetes to return to their jobs).⁶⁶ Therefore, discovery should be used to determine exactly what the employer's medical provider concluded and how this information was used in the employer's decision making process.

4. Conclusions of Plaintiff's Own Doctors

It should come as little surprise that medical evidence from a treating physician (or, better yet, an expert) is crucial in challenging an employer's decision that an individual poses a direct threat. Numerous courts have relied on plaintiff's medical opinion that he or she could safely perform the job in denying summary judgment to defendant. See *Branham v. Snow*, 392 F. 3d 896, 908 (7th Cir. 2004) (plaintiff's doctor opined that he could perform the essential functions of the job and that his ability to monitor his blood glucose levels and respond appropriately put him at little risk of harm); *Shelton v. City of Cincinnati*, 2012 U.S. Dist. Lexis 156595, *37 (S.D. Ohio Nov. 1, 2012) (plaintiff produced medical opinions contradicting the city's determination that he could not perform firefighting duties due to instances of hypoglycemia); *Jackson v. City of N.Y.*, 2011 U.S. Dist. LEXIS 43861, *41 (E.D. N.Y. Mar. 3, 2011) (denying summary judgment against police officer with diabetes based on opinion of her treating physicians that she had not experienced any recent seizures related to diabetes and could safely perform the duties of her position); *Lewis v. Pennsylvania*, 2010 U.S. Dist. Lexis 127135, *13-*14 (W.D. Pa. Oct. 5, 2010) (plaintiff's treating physician and expert opined that plaintiff's diabetes would not impair his ability to perform his job as a police officer, and the differing conclusions of plaintiff's and defendant's physicians represented a "difference of medical opinion" that required denial of

⁶⁶ See also *Williams v. Phila. Housing Auth. Police Dept.*, 380 F. 3d 751, 769 (3rd Cir. 2004) (police officer who could not carry a firearm due to a mental condition had raised a triable issue as to whether he was qualified for positions which required him to be around others with firearms because the agency's own doctor had opined that he could perform these positions); *Lovejoy-Wilson v. NOCO Motor Fuel*, 263 F. 3d 208, 220-221 (2d Cir. 2001) (although the employer's physician opined that the plaintiff, who had epilepsy, should be further examined by a neurologist and should not perform certain duties such as working at heights or working alone, he did not say that she could not perform her current job duties); *Justice v. Crown Cork & Seal*, 527 F. 3d 1080, 1084 (10th Cir. 2008) (questions of fact existed as to whether the restrictions placed on plaintiff regarding working at unprotected heights actually prevented him from performing his job duties); *Fahey v. Twin City Fan Cos.*, 994 F. Supp. 2d 1064, 1074 (D. S.D. 2014) (employer's doctor stated that plaintiff had monocular vision and would need accommodations at his work station, but did not state he was unable to perform the job safely); *Nevitt v. U.S. Steel Corp.*, 2014 U.S. Dist. Lexis 61758, *28 (N.D. Ala. May 5, 2014) (employer imposed safety-related job restrictions even though its own medical examination showed normal results); *EEOC v. Union Pacific R.R.*, 6 F. Supp. 2d 1135, 1138 (D. Idaho 1998) (one doctor consulted by defendant concluded that plaintiff could safely drive for defendant); *Haynes v. City of Montgomery*, 2008 U.S. Dist. Lexis 79992, *14 (M.D. Ala. Oct. 6, 2008) (employer's doctor concluded that plaintiff could physically perform the job).

summary judgment); *EEOC v. Chrysler Corp.*, 917 F. Supp. 1164 (E.D. Mich. 1996), *rev'd on other grounds*, 1998 U.S. App. Lexis 30607 (6th Cir. Nov. 25, 1998) (plaintiff's doctor opined that he was in good health and not a safety risk even though he was likely to need medication to treat his type 2 diabetes in the future); *Simms v. City of N. Y.*, 160 F. Supp. 2d 398, 405 (E.D. N.Y. 2001) (summary judgment denied where plaintiff's treating physician supported his ability to safely perform his job as a firefighter); *Gaus v. Norfolk Southern Railway Co.*, 2011 U.S. Dist. Lexis 111089, *76 (W.D. Pa. Sept. 28, 2011) (multiple doctors treating plaintiff for his chronic pain condition offered opinions that he could safely perform his job duties despite his use of prescription medications, creating a genuine issue of material fact); *Compton v. HPI Acquisitions Co.*, 2004 U.S. Dist. Lexis 27701, *20-*21 (E.D. Tenn. Nov. 22, 2004) (opinion of plaintiff's doctor that he was able to perform the essential functions of his job with the accommodation of a short medical leave was sufficient to defeat summary judgment, particularly where there was no opposing medical opinion from the employer); *Lovejoy-Wilson, supra* (plaintiff's doctor stated she did not pose a threat and job was appropriate for her); *Echazabal v. Chevron, U.S.A.*, 336 F. 3d 1023, 1031-32 (9th Cir. 2003) (plaintiff presented testimony from his treating physician and medical experts that he was not a direct threat to himself in the position); *Nevitt v. U.S. Steel Corp.*, 2014 U.S. Dist. Lexis 61758, *28 (N.D. Ala. May 5, 2014) (evidence from other evaluating physicians indicated that plaintiff could perform the job safely); *Lafata v. Dearborn Heights Sch. Dist. No. 7*, 2013 U.S. Dist. Lexis 173731, *29 (E.D. Mich. Dec. 11, 2013) (court denied summary judgment where plaintiff's physician stated that he had more than adequate strength to perform job functions without posing a direct threat); *Nelson v. City of N.Y.*, 2013 U.S. Dist. Lexis 117742, *36 (S.D. N.Y. Aug. 17, 2013) (a reasonable jury could find plaintiff was not a direct threat and could perform the essential functions of her police officer job safely where her treating psychologist had presented evidence that her condition was no longer as severe); *Hoback v. City of Chattanooga*, 2012 U.S. Dist. Lexis 124794 (E.D. Tenn. Sept. 4, 2012) (two outside physicians opined that plaintiff was able to return to work safely despite post-traumatic stress disorder); *Wright v. Stark Truss Co.*, 2012 U.S. Dist. Lexis 103663, *29 (D. S.C. May 10, 2012) (plaintiff had been released to return to work without restriction following suicide attempt and diagnosis of depression, and no medical professional had determined him to be a threat); *EEOC v. Browning-Ferris Indus.*, 262 F. Supp. 2d 577, 590 (D. Md. 2002) ((similar).⁶⁷ Failing to present any medical evidence can be fatal to plaintiff's claim. See *Pough v. SBC Comms.*, 570 F. Supp. 2d 1006, 1017 (N.D. Ill. 2008) (plaintiff offered no opinion from a physician that she was able to work safely); *McGee v. City of Greenville*, 2007 U.S. Dist. Lexis 9686, *9 (D. S.C. Feb. 7, 2007) (summary judgment granted where plaintiff failed to present any evidence from his doctor that he could work safely).

Treating doctors, however, are not always supportive. Few things can be more damaging to a plaintiff's case when safety issues are involved than a statement by plaintiff's own treating physician or medical expert that plaintiff should not do the job at issue or will pose a safety risk. In *Darnell v. Thermafiber*, 417 F. 3d 657, 661-662 (7th Cir. 2005), plaintiff's treating physician agreed at his deposition that the plaintiff's diabetes was "uncontrolled," that uncontrolled or unregulated diabetes could lead to serious symptoms, and that the plaintiff's lack of control and noncompliance with treatment could increase his risk of harm on the job. While some of these

⁶⁷ But see *Garner v. Gwinnett County*, 1999 U.S. Dist. Lexis 6370, *11 (N.D. Ga. Mar. 24, 1999) (despite assurances from plaintiff's treating psychiatrists that his condition had improved, defendant was not required to reinstate after he had made threats to coworkers).

statements may have been taken out of context, and the physician did not conclude that plaintiff could not safely perform the job, he was still not able to offer the kind of unequivocal opinion supporting the plaintiff's ability to safely perform the job that might have allowed plaintiff to survive summary judgment.

Statements by treating physicians and experts in other cases have been equally damaging. *See EEOC v. Amego, Inc.*, 110 F. 3d 135, 146 (1st Cir. 1997) (plaintiff's treating physicians refused to give any assurances that her mental problems would not interfere with patient safety); *Donahue v. Consolidated Rail Corp.*, 224 F. 3d 226, 231 (3rd Cir. 2000) (plaintiff's cardiologist refused to clear him for work for defendant railroad because of his heart problems); *Jarvis v. Potter*, 500 F. 3d 1113, 1124 (10th Cir. 2007) (plaintiff's treating health care provider wrote a letter stating that he was a threat to others because of his post traumatic stress disorder); *LaChance v. Duffy's Draft House*, 146 F. 3d 832, 834 (11th Cir. 1998) (plaintiff and his treating physician both admitted that that his seizures posed a safety risk when working in a restaurant environment); *Pesterfield v. Tennessee Valley Auth.*, 941 F.2d 437, 443-44 (6th Cir. 1991) (plaintiff's doctor concluded that he could not safely return to work following hospitalization for psychiatric treatment); *Haas v. Wyoming Valley Health Care Sys.*, 553 F. Supp. 2d 390, 401 (M.D. Pa. 2008) (letters from plaintiff's treating psychologists were brief, not convincing, and gave no assurances that his condition had improved to the point that he would not pose a risk to patient safety as a surgeon); *Ketcher v. Wal-Mart Stores*, 122 F. Supp. 2d 747, 752 (S.D. Tex. 2000) (granting summary judgment against plaintiff who experienced dizziness due to tinnitus where plaintiff's own doctor concluded that he posed a safety risk and plaintiff, although he disagreed with his doctor's opinion, offered no evidence to refute it); *Davis v. Michigan Agric. Commodities*, 2009 U.S. Dist. Lexis 5582, *27 (E.D. Mich. Jan. 12, 2009) (summary judgment granted where treating physician opined that plaintiff, a laborer who experienced numerous seizures at work, should not drive or operate heavy equipment); *cf. Kemp v. Volvo Group N. America*, 2013 U.S. Dist. Lexis 9454, *13 (W.D. Va. Jan. 24, 2013) ((while not directly ruling on the direct threat issue, court found that defendant was not unreasonable in excluding plaintiff from a job in its industrial plant based on a letter he himself had provided from his optometrist stating that his retinitis pigmentosa had worsened and would cause him to pose a safety risk in a manufacturing environment).⁶⁸ On the other hand, a mere statement from a treating physician that harm is possible will not necessarily doom a plaintiff's case. *See Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1248 (9th Cir. 1999) (doctor's testimony, two years after termination, that plaintiff could possibly injure someone was not enough to support summary judgment).

Courts may also disregard the opinions of treating physicians if they do not have complete or accurate information, or do not appear to base their conclusions on medical evidence. In *Wurzel v. Whirlpool Corp.*, 482 Fed. Appx. 1, 16 (6th Cir. 2012), plaintiff had experienced heart spasms at work due to angina, and was required to see his treating physician as a condition of returning to work. Plaintiff, however, did not inform his physician of the severity or increasing frequency of these spasms, describing spasms as rare and easily treated with medication. The court held

⁶⁸ While admissions by plaintiff's physician can constitute evidence of the likelihood of harm, admissions by plaintiffs who are not medical professionals, without more, should not. *See EEOC v. Midwest Div. – RMC, LLC*, 2006 U.S. Dist. Lexis 53052, *195 (W.D. Mo. Jul. 31, 2006) (plaintiff's expressed concerns about safety were not the kind of medical knowledge that could support summary judgment on direct threat where those concerns may have been alleviated by reasonable accommodations).

that the physician's opinion, which stated that plaintiff was at no greater risk of sudden incapacitation than any other patient with angina, was not entitled to great weight because plaintiff had misled his physician about his symptoms (which were, in fact, uncommon for an individual with angina) and the progression of the disease. Critically, the physician stated that had he had all available information, he would likely have reached a different conclusion. *See also Jennings v. Dow Corning Corp.*, 2013 U.S. Dist. Lexis 66803, *38 (E.D. Mich. May 10, 2013) (plaintiff's treating physician, when he opined that plaintiff was capable of performing job duties, was unaware of plaintiff's ongoing chronic back pain, and when presented with this evidence at his deposition he changed his opinion). And in *Coleman v. Pennsylvania State Police*, 2013 U.S. Dist. Lexis 99609, *52-*53 (W.D. Pa. July 17, 2013), *aff'd*, 561 Fed. Appx. 138 (3rd Cir. 2014), both sides offered physician testimony about the likelihood that the plaintiff would experience seizures in the future, but the court determined that while defendant's medical director based his opinion on medical research, plaintiff's doctor stated no medical basis for his conclusion.

All of these cases signal the importance of having testimony from a medical provider such as plaintiff's treating physician on the issue of whether plaintiff's diabetes is likely to result in severe hypoglycemia or other complications that could render him or her a safety threat. Expert testimony from an endocrinologist is also highly beneficial, as such a specialist can provide needed background for the judge and jury on the science of diabetes and challenge the ignorance and stereotypes that often inform the decisions of employers and even their physicians. Expert testimony is also especially helpful where plaintiff's treating physician is not an endocrinologist (many people with type 2 diabetes in particular are treated by general practitioners). However, the cases also show that it is critical that the opinions of the treating physician be supportive. Where plaintiff's own physician believes that there is a significant risk or refuses to support the plaintiff, care should be taken before accepting the case. Also, treating physicians and experts need to be carefully prepared for discovery and depositions. It is important that they be prepared not to use vague terms like "uncontrolled diabetes," which can be interpreted as synonymous with a safety threat, and that they take great care in answering hypothetical questions about what could happen if an individual experiences severe hypoglycemia or other complications where there is no evidence that the individual is actually at significant risk of these complications.

5. Diabetes-Specific Concerns

Having discussed the general issues relating to past incidents of harm and the opinions of physicians and experts on both sides of the safety question, there are a few issues specific to diabetes and its treatment that should be considered when evaluating whether an individual with diabetes is likely to pose a risk of harm and is therefore a significant risk. These issues include the type of diabetes and how the disease is treated, "controlled" and "uncontrolled" diabetes, the risks of hypoglycemia and hyperglycemia, and hypoglycemia unawareness.

Diabetes type and treatment: Whether an individual with diabetes is taking insulin or an oral medication that can cause hypoglycemia (a sulfonylurea) is a key consideration. Those with type 1 diabetes must take insulin, but some people with type 2 diabetes do not take insulin or a sulfonylurea and will pose no risk of hypoglycemia of any kind. (Remember that hypoglycemia is not caused by diabetes itself but by the methods used to treat the disease by lowering blood

glucose levels.) Many employers and courts (and some doctors) are not aware of this distinction, so evidence from a diabetes expert should be presented where necessary to show that an individual poses no hypoglycemia risk.⁶⁹ *Cf. Jackson v. City of N.Y.*, 2011 U.S. Dist. LEXIS 43861, *42 (E.D. N.Y. Mar. 3, 2011) (denying summary judgment for defendant based, in part, on testimony of plaintiff with type 2 diabetes that she did not experience any short-term adverse consequences when she missed a dose of insulin).

Hypoglycemia and hyperglycemia: Most employers are primarily concerned with the risks of hypoglycemia. *See Bombrys v. City of Toledo*, 849 F. Supp. 1210, 1214 (N.D. Ohio 1993) (“While elevated blood sugar levels are of some concern due to their long-term side effects, the real danger to diabetic individuals is low blood sugar levels. The hazardous side effects associated with low blood sugar levels occur more quickly, more often, and with more suddenness than do the effects of high blood sugar levels.”) However, some courts seem unaware of the distinction between the two conditions, and seem to believe that the presence of high blood glucose levels, or the mere fact that levels fluctuate, signals risk. *See Darnell v. Thermafiber*, 417 F. 3d 657, 661 (7th Cir. 2005) (discussing the dangers posed by plaintiff’s fluctuating blood glucose levels, even though the only medical evidence about his blood glucose levels showed that they were too high). The testimony of a diabetes expert may be needed to focus the court’s attention on the real short-term risks of the disease. Defendants also occasionally argue that those who are intensively managing their diabetes (using more frequent blood glucose monitoring and insulin doses to keep blood glucose levels closer to target ranges so that risk for long term complications can be lowered) are at increased risk of hypoglycemia. *See Branham, supra*, 392 F. 3d at 908 (“One of the IRS’ experts, Dr. Cohen, an endocrinologist, found that the program of intensive treatment which Mr. Branham was following at the start of this case was ‘associated with increased risk’ of severe hypoglycemia.”) While it may be true that certain treatment regimens in the aggregate pose increased risks, this is not a basis for making employment decisions about individuals. Treatment regimens are individualized to the needs of the person, and a regimen that actually increased the risk of hypoglycemia for that individual would be modified to lessen that risk.

Hypoglycemia unawareness: As discussed *supra*, people with diabetes occasionally develop hypoglycemia unawareness, and are no longer able to perceive signs of mild hypoglycemia. This means that, unless they check their blood glucose levels, they may not be aware of hypoglycemia until it causes cognitive impairment or more severe symptoms. *See Onken v. McNeilus Truck & Mfg.*, 639 F. Supp. 2d 966, 971 (N.D. Iowa 2009) (“Plaintiff is among a small percentage of diabetics who are often unable to detect a low blood sugar level from their physical symptoms. As a result, diabetics like Plaintiff often do not have advance notice or warning of an imminent hypoglycemic episode. As a result, diabetics like Plaintiff are often unable to take preventive measures to avoid becoming hypoglycemic.”); *Amick v. Visiting Nurse and Hospice Home*, 2006 U.S. Dist. Lexis 76326, *8 (N.D. Ind. Oct. 18, 2006) (before experiencing an incident of severe hypoglycemia, plaintiff testified that she “had no symptoms of low blood sugar, had no

⁶⁹ The amount of the insulin dose is not a predictor of hypoglycemia risk. In *Bombrys v. City of Toledo*, 849 F. Supp. 1210, 1220 (N.D. Ohio 1993), the court noted in its reasoning that plaintiff took a relatively low dose of insulin, as compared with another city employee. However, this has no medical relevance. Individuals with type 2 diabetes may take higher doses of insulin than those with type 1, because the body’s insulin resistance makes the insulin less effective. This does not mean that an individual taking a higher dose is at higher risk.

forewarning that the incident would occur, and that the incident was a total surprise to her.”); *Grosso v. UPMC*, 2012 U.S. Dist. Lexis 31737, *51 (W.D. Pa. Mar. 9, 2012) (plaintiff admitted that she had hypoglycemia unawareness and had no warning signs of severe hypoglycemia, and had experienced over 30 incidents of severe hypoglycemia, including six or seven incidents when she lost consciousness, over an 18-month period) Hypoglycemia unawareness raises risks, but it should not automatically lead to a finding of direct threat. In *Amick, supra*, for example, summary judgment was denied based on plaintiff’s doctor’s opinion that if she tested her blood glucose levels every 15 minutes while driving, she would not be at significantly increased risk.⁷⁰ Conversely, individuals who do recognize signs of oncoming hypoglycemia (as most do) can argue that they pose lower risk because they are able to appropriately respond to the condition before it becomes severe.⁷¹

“Controlled” and “uncontrolled” diabetes: Two particularly unhelpful words that sometimes make their way into court opinions are “controlled” and “uncontrolled” diabetes. These terms have no precise medical definition, and different practitioners may use them in different ways. Sometimes the term “uncontrolled” simply means that the individual is not optimally compliant with physician instructions. Alternatively, it may refer to the fact that his or her A1C test results—a measurement of average blood glucose values over a two to three month period—are higher than the recommended targets (such targets are correlated with reduced risk for long-term complications, rather than short-term risks like hypoglycemia). In one case, the plaintiff’s treating endocrinologist testified that his medical records noted that plaintiff’s diabetes was “uncontrolled,” but this only meant that her A1C level was higher than optimal; he stated that plaintiff was compliant with her treatment and her diabetes was not “uncontrolled in the everyday sense of the term.” *Rednour v. Wayne Township*, 2014 U.S. Dist. Lexis 134319, *12 (S.D. Ind. Sept. 24, 2014). Whatever its meaning, “uncontrolled” is not synonymous with being at high risk. According to the American Diabetes Association’s Position Statement on Diabetes and Employment:

Sometimes an individual’s diabetes is described as “uncontrolled,” “poorly controlled,” or “brittle.” These terms are not well defined and are not relevant to job evaluations. As such, giving an opinion on the level of “control” an individual has over diabetes is not the same as assessing whether that individual is qualified to perform a particular job and can do so safely. Such an individual assessment is the only relevant evaluation.

Employment Position Statement, *supra* note 7, at S114.

The problems with misuse of these terms is illustrated in *Darnell v. Thermafiber*, 417 F. 3d 657, 661-62 (7th Cir. 2005). There, defendant’s evaluating doctor concluded, based primarily on

⁷⁰ *But see Atkins v. Salazar*, 677 F. 3d 667, 684 (5th Cir. 2011) (basing summary judgment, at least in part, on defendant’s speculative concerns that plaintiff might develop hypoglycemia unawareness, even though there was no evidence that plaintiff had ever experienced it).

⁷¹ *But see Bender v. Norfolk Southern Corp.*, 2014 U.S. Dist. Lexis 92364, *26-*27 (M.D. Pa. July 8, 2014) (after a jury verdict for defendant, the court found that a reasonable jury could believe that defendant had shown harm was likely from potential episodes of severe hypoglycemia, because such episodes could last up to fifteen minutes—plenty of time for serious consequences if the episode went untreated; the jury was free to reject plaintiff’s argument that he was aware of and could readily treat oncoming hypoglycemia).

results of a urine glucose test (which is medically obsolete) and his impression that the plaintiff was “noncompliant” with diabetes treatment, that his diabetes was uncontrolled. The court relied heavily on this determination, and its assumption that plaintiff would therefore be subject to wild fluctuations in blood glucose levels, to find that he posed a direct threat, despite a lack of evidence that plaintiff had ever experienced severe hypoglycemia or had any problems on the job due to diabetes. The court held, “[W]here the plaintiff’s medical condition is uncontrolled, of an unlimited duration, and capable of causing serious harm, injury may be considered likely to occur.”

Other courts have also found it significant that diabetes was not well “controlled,” without further defining that term. *See Serrapica v. City of N. Y.*, 708 F. Supp. 64, 72 (S.D. N.Y. 1989) (upholding dismissal of plaintiff whose diabetes was determined to be “poorly controlled” and thus violated city standards); *Amariglio v. Amtrak*, 941 F. Supp. 173, 179 (D. D.C. 1996) (plaintiff was excluded from position as train conductor because his doctor stated that he was “under treatment to control his diabetes” and defendant therefore determined that his diabetes was uncontrolled).⁷²

Attorneys need to present evidence, preferably from a diabetes expert, that the concept of “control” is not relevant to employment determinations. They also need to prepare experts and treating physicians to avoid stating that an individual’s diabetes is “controlled” or “uncontrolled” (or to render an opinion on level of control), and to be very specific about the conclusion being drawn and why the general terms are inappropriate.

G. Imminence of harm

The final direct threat factor concerns evidence of the “imminence” of harm. It is not clear what this term means, and courts have made few attempts to define it. Logically, it would seem to mean how quickly the risk might develop or how likely it is to occur at any given time. When they analyze this factor at all, courts generally reach the same conclusion as under the likelihood of harm factor. *See Echazabal v. Chevron, U.S.A.*, 336 F. 3d 1023, 1030-1031 (9th Cir. 2003) (conflating likelihood and imminence analysis); *Branham v. Snow*, 392 F. 3d 896, 908 (7th Cir. 2004) (risk not imminent because plaintiff has never suffered harm at work and can recognize and treat symptoms of hypoglycemia); *EEOC v. Kinney Shoe Corp.*, 917 F. Supp. 419, 429 (W.D. Va. 1996) (harm was not imminent because there was no evidence that plaintiff with epilepsy had ever injured anyone during his seizures); *Hutton v. Elf Atochem N. America*, 273 F. 3d 884, 894-95 (9th Cir. 2001) (the imminence of harm cannot be known because of the unpredictability of episodes of severe hypoglycemia); *EEOC v. Rexnord Indus.*, 966 F. Supp. 2d 829, 840 (E.D. Wis. 2013) (dispute of fact as to imminence of harm from possible seizures because disputes of fact existed about whether plaintiff’s seizures were controlled and whether she could predict their occurrence); *Gaus v. Norfolk Southern Railway Co.*, 2011 U.S. Dist. Lexis

⁷² The use of vague terms can also work to plaintiff’s benefit. Several courts have denied summary judgment based on little more than the statement of plaintiff or his doctor that diabetes was “controlled.” *EEOC v. Chrysler Corp.*, 917 F. Supp. 1164, 1170 (E.D. Mich. 1996); *rev’d on other grounds*, 1998 U.S. App. Lexis 30607 (6th Cir. Nov. 25, 1998) (plaintiff was under the care of a physician and his diabetes was being controlled); *DiPol v. N. Y. C. Transit Auth.*, 999 F. Supp. 309, 315 (E.D. N.Y. 1998) (plaintiff was in control of his diabetes). However, it is preferable to avoid the concept of “control” and simply present evidence that plaintiff is suffering no ill effects from his diabetes.

111089, *70 (W.D. Pa. Sept. 28, 2011) (harm from drowsiness or inattention that might be caused by plaintiff's pain medications was not imminent because there was no evidence that symptoms would arise suddenly and without warning).

VI. The Individualized Assessment

A. Overview

Federal law requires employers to put aside fears and assumptions and to gather significant evidence about the safety risks posed by individuals with disabilities. But what is needed to comprise a valid individualized assessment? Since employers typically rely on some form of medical evaluation in these situations, answering this question focuses on the relationship between the employer and the physician or other health care provider and what that provider must do before giving an opinion.

The regulations implementing the ADA provide: "The determination that an individual poses a 'direct threat' shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence." 29 C.F.R. § 1630.2(r). Indeed, an employer will not be able to prevail on the direct threat defense absent evidence that it in fact performed an individualized assessment. *Rednour v. Wayne Township*, 2014 U.S. Dist. Lexis 134319, *63-*64 (S.D. Ind. Sept. 24, 2014) (defendant's direct threat argument rejected where it did not perform an adequate individualized assessment and where the only medical evidence it did gather failed to support its decision to terminate plaintiff after an episode of hypoglycemia); *Bender v. Norfolk Southern Corp.*, 2014 U.S. Dist. Lexis 4460, *43 (M.D. Pa. Jan. 14, 2014) ("Indeed, it is only through a proper individualized assessment that an employer can show that the applicant would pose a significant risk of substantial harm in the safety-sensitive position"); *EEOC v. American Tool & Mold, Inc.*, 2014 U.S. Dist. Lexis 71472, *46 (M.D. Fla. Apr. 16, 2014) (employer could not utilize the direct threat defense where it had not performed an individualized assessment); *Eldredge v. City of St. Paul*, 809 F. Supp. 2d 1011, 1033 (D. Minn. 2011) (no summary judgment on direct threat issue where issues of fact remained as to whether individualized assessment had been conducted). As one court noted, "[b]ecause of its failure to make the requisite individualized inquiry, [defendant's] ultimate decision to rescind the offer could have only been based on prejudices, stereotypes, or unfounded generalizations." *Fahey v. Twin City Fan Cos.*, 994 F. Supp. 2d 1064, 1075 (D. S.D. 2014).

The key inquiry, then, is whether the employer gathers the best available evidence and draws a reasonable conclusion from that evidence.

The opinion should, of course, be independent and based on the doctor's medical judgment, not merely a rubber stamp of the employer's desires or policies. *See Garr v. Union Pacific R. R. Co.*, 2013 U.S. Dist. Lexis 1274, *26 (N.D. Ill. Jan. 4, 2013) (question of fact as to whether individualized assessment occurred where doctor stated his opinion did not represent a final recommendation and there was no evidence as to how defendant had actually made its decision); *Haynes v. City of Montgomery*, 2008 U.S. Dist. Lexis 79992, *14 (M.D. Ala. Oct. 6, 2008)

(doctor acted merely as a proxy for the city when he did not make a final determination on whether the side effects of plaintiff's medication prevented him from performing his job, which he said required an "administrative determination" by the city); *Taylor v. Hampton Roads Reg'l Jail Auth.*, 550 F. Supp. 2d 614, 618 (E.D. Va. 2008) (doctor did not cite any medical basis for his findings, but merely served as a proxy for defendant); *EEOC v. Union Pacific R.R.*, 6 F. Supp. 2d 1135, 1138 (D. Idaho 1998) (doctor admitted that he relied in large part on his belief that defendant's rules prohibited individual with monocular vision from employment). And it must be based on individualized evidence, not on assumptions about the underlying condition's general effects. *See Lowe v. Alabama Power Co.*, 244 F. 3d 1305, 1309 (11th Cir. 2001) (assessment was not properly individualized where work restrictions imposed were "based, at least in part, on [the employer's physician's] assumption that all double amputees have the same limitations.") On the other hand, an assessment need not lose its objectivity merely because it was solicited by the employer to serve its interests. *See McDonald v. Webasto Roof Sys.*, 2014 U.S. App. LEXIS 12620 (6th Cir. June 25, 2014) (employer could rely on the results of a follow up medical examination it sought after an initial examination raised concerns, even though plaintiff accused it of "shopping" for a favorable opinion); *Wurzel v. Whirlpool Corp.*, 482 Fed. Appx. 1, 17 (6th Cir. 2012) (employer could rely on opinion of independent medical examiner even though examiner originally found plaintiff fit to work and only changed his opinion after defendant's doctor asked him to reconsider; defendant provided the examiner with new information that justified the change in opinion). The opinion must also have been available to the employer at the time of its decision; after acquired medical opinion can be relevant evidence of whether a threat existed but cannot be used to show that an individualized assessment was conducted. *Fahey, supra*, 994 F. Supp. 2d at 1073 (employer could not rely on doctor's deposition testimony taken during litigation to prove it had conducted an individualized assessment).

B. Deference to Medical Judgments

Given the focus on medical evidence as part of the direct threat inquiry, it is hardly surprising that employers would seek opinions from physicians and, when those opinions are supportive, rely on them in making an adverse employment decision. But a doctor's letter is not always a recipe for summary judgment. As noted earlier, a good faith belief by the employer is not enough to support a finding of direct threat; it must have objective evidence. And simply having an opinion rendered by a doctor is not enough either. Because employers may not engage in contractual relationships that have the effect of discriminating, they may not simply contract away the responsibility for making medical determinations and avoid liability when those determinations are wrong and unreasonable. 42 U.S.C. § 12112(b)(2); *EEOC v. American Tool & Mold, Inc.*, 2014 U.S. Dist. Lexis 71472, *37 n. 6 (M.D. Fla. Apr. 16, 2014) (employer could not escape liability under the ADA for decisions it attributed to the occupational medicine practice that conducted its medical examinations); *Lafata v. Dearborn Heights Sch. Dist. No. 7*, 2013 U.S. Dist. Lexis 173731, *26 (E.D. Mich. Dec. 11, 2013) (summary judgment denied where employer's decisionmakers relied on the recommendation of its contracted physician without even having seen his report). Good faith reliance on a medical provider's opinion will not save an employer from liability where the provider's assessment was not adequately individualized or objective. The First Circuit described what is necessary to support an employer's medical determination:

[Defendant claims] ...that its good-faith reliance on the results of [a medical] examination should put to rest any legitimate question about its intentions. The case law does not support so mechanistic a view. To be sure, obtaining a physician's detailed assessment and then acting in accordance with it can be persuasive evidence that an employer has based its decision on an individualized inquiry into the applicant's capabilities. But a physician's endorsement does not provide complete insulation. An employer cannot evade its obligations under the ADA by contracting out personnel functions to third parties—and this prohibition extends to an employer's attempt to use a pre-employment examination as conclusive proof of an applicant's physical capabilities. The short of it is that a medical opinion is often cogent evidence of nondiscriminatory intent—in some instances, it may even be enough to justify summary judgment—but the mere obtaining of such an opinion does not automatically absolve the employer from liability under the ADA. Thus, an employer cannot slavishly defer to a physician's opinion without first pausing to assess the objective reasonableness of the physician's conclusions.

Gillen v. Fallon Ambulance Serv., 283 F. 3d 11, 31-32 (1st Cir. 2002) (citations omitted). *See also Doe v. Deer Mtn. Day Camp*, 682 F. Supp. 2d 324, 346 (S.D. N.Y. 2010) (“Defendants have the responsibility to present the court with objective, medical evidence—such as reliable medical guidelines, literature, or expert testimony—to establish that their direct threat assessment was reasonable”); *EEOC v. Texas Bus Lines*, 923 F. Supp. 965, 979-980 (S.D. Tex. 1996) (employer can be liable if it relies on a medical opinion that is clearly erroneous and unsupported by evidence).

But is the conduct of an individualized assessment sufficient to defeat a plaintiff's claim, even where plaintiff presents evidence challenging or contradicting the assessment's conclusions? Logically, the trier of fact should still have a duty to independently weigh the evidence and determine whether the plaintiff did actually pose such a threat. But courts will sometimes defer to medical judgments that appear objective and reasonable, even if plaintiff disagrees with the assessment.⁷³ *See Deer Mtn.*, *supra*, 682 F. Supp. 2d at 346 (“In making a determination of objective reasonableness, the fact-finder's responsibility does not involve ‘independently assess[ing] whether it believes that [Plaintiff himself] posed a direct threat.’”), *quoting Jarvis v. Potter*, 500 F.3d 1113, 1122 (10th Cir. 2007); *Coleman v. Pennsylvania State Police*, 561 Fed. Appx. 138, 145 n. 13 (3rd Cir. 2014) (where a reasonable individualized assessment had been performed by defendant's physician, defendant was permitted to rely on its physician's recommendation over a contrary recommendation from plaintiff's physician); *Crocker v. Runyon*, 207 F. 3d 314, 320 (6th Cir. 2000) (“The Postal Service here relied in good faith on the two medical opinions it received, and Crocker did not offer any contemporaneous medical evidence

⁷³ Courts make a distinction between medical evidence, upon which an employer may be permitted to rely, and other objective evidence, which will be relevant to whether an individual posed a direct threat and to whether an individualized assessment was performed but which an employer may not simply rely on. *See EEOC v. Rextord Indus.*, 966 F. Supp. 2d 829, 836 (E.D. Wis. 2013) (considering whether an employer could rely on a medical opinion issued by its doctor, but holding that other evidence, such as emergency treatment plaintiff received for workplace seizures and representations plaintiff made about her medical condition, was not medical evidence and could not be relied upon).

to contradict those opinions.”); *Wurzel v. Whirlpool Corp.*, 482 Fed. Appx. 1, 14 (6th Cir. 2012) (finding defendant’s medical inquiry to be adequately individualized and reasonable, and suggesting that this was sufficient to uphold summary judgment); *Knapp v. Northwestern Univ.*, 101 F.3d 473, 483 (7th Cir. 1996) (court will not second guess the decisions of medical providers where judgment was based on substantial evidence); *Johnson v. City of Blaine*, 970 F. Supp. 2d 893, 909 (D. Minn. 2013) (city could rely on results of psychological evaluation conducted by an objective medical professional after a thorough assessment); *Lowber v. W. L. Halsey Grocery Co.*, 2013 U.S. Dist. LEXIS 109440, *13 (N.D. Ala. Aug. 5, 2013) (granting summary judgment where defendant had reasonably relied on its medical evaluation of plaintiff’s vision, despite plaintiff’s testimony disputing the accuracy of that evaluation); *Jennings v. Dow Corning Corp.*, 2013 U.S. Dist. LEXIS 66803, *35 (E.D. Mich. May 10, 2013) (employer was permitted to rely on medical evaluation court believed was objectively reasonable); *Hickman v. ExxonMobil*, 2012 U.S. Dist. Lexis 189196, *26 (S.D. Tex. Sept. 27, 2012), *aff’d*, 540 Fed. Appx. 277 (5th Cir. 2013) (“ExxonMobil need not show that no reasonable jury could find that [plaintiff] could safely return to work. ExxonMobil need only show that no reasonable jury could find ExxonMobil and [its physician] acted unreasonably when making its individualized determination of Hickman’s ability to safely work as [an oil refinery technician].”) ⁷⁴

While these courts speak of the deference to be afforded to properly obtained medical opinions, they often also evaluate the objective evidence of the threat itself and find it independently justifies summary judgment. Thus, the concept of deference typically arises in cases where the court believes there can be little or no factual dispute about the evidence. Moreover, deference to medical opinion is only proper where that opinion was actually the product of an individualized assessment that considered the most current scientific and medical evidence; as will be discussed in the rest of this paper, there are a number of ways to demonstrate that an assessment was not objective or individualized.

Not all courts, however, conflate the direct threat and individualized assessment inquiries. In *Nevitt v. U.S. Steel Corp.*, 2014 U.S. Dist. Lexis 61758, *28 (N.D. Ala. May 5, 2014), the court addressed and rejected a claim that defendant had rescinded plaintiff’s job offer based on an improper medical inquiry, which required an analysis of whether defendant had performed a reasonable individualized assessment. The court found that such an assessment had been performed by the doctor, who considered all the medical records and drew a defensible conclusion. However, at the same time the court denied summary judgment on defendant’s direct threat defense, finding that there was conflicting medical evidence in the record which created a jury question, despite the conduct of an individualized assessment.

⁷⁴ A district court also recently ruled that it could not second guess the decisions of a state licensing commission responsible for determining the fitness of law enforcement officers. *McDonald v. Pennsylvania State Police*, 2012 U.S. Dist. Lexis 155725, *38 (W.D. Pa. Oct. 31, 2012). While the plaintiff in that case had been given some individualized consideration, evidence suggested that the ultimate determination had been based on a generalized assumption that no one taking a particular prescription drug could work as a police officer. The court nonetheless said it was reluctant to second guess the decisions of the licensing commission, which had been the authority to make safety determinations. On appeal, however, while it affirmed summary judgment against the plaintiff, the Third Circuit took pains to express its doubt about the level of deference the district court had afforded the licensing commission. 532 Fed. Appx. 176, 177 (3rd Cir. 2013).

And the presence of conflicting credible medical opinion should remove the legal basis for deference. In *Valenzisi v. Stamford Bd. of Educ.*, 948 F. Supp. 2d 227, 243 (D. Conn. 2013), the court stated that, had an employer possessed only the report of its own physician in making its decision, it would have been justified in relying on that opinion, and plaintiff's claim would have failed. *Id.* at *42. However, plaintiff had presented to his employer a letter from his own doctor stating that he was capable of performing his job, and the court found this was sufficient reason to deny summary judgment. *Id.* at *44.⁷⁵ See also *Brown v. City of Long Branch*, 380 Fed. Appx. 235, 238 (3rd Cir. 2010) (district court improperly dismissed complaint where plaintiff police officer disagreed with assessment of defendant's physician that he could not safely perform his job duties; such a claim should have been permitted to survive a motion to dismiss); *Hoback v. City of Chattanooga*, 2012 U.S. Dist. Lexis 124794, *27 (E.D. Tenn. Sept. 4, 2012) (city relied exclusively on its own doctor's conclusions despite having conflicting medical report from plaintiff's doctor in its possession). Therefore, plaintiffs need to do more than merely disagree with the assessment of their condition by the employer or demonstrate a reasonable difference of medical opinion; they need to show how that assessment was unreasonable, in that it ignored key evidence, was based on a lack of knowledge about the condition, or relied on impermissible considerations.

C. The Need for Medical Evidence

An initial question is whether the employer need gather any medical evidence at all, or seek a medical opinion. The regulations require that an assessment be based on "the most current medical knowledge and/or on the best available objective evidence." 29 C.F.R. § 1630.2(r). This seems to leave open the possibility that decisions might be based on objective, but non-medical, evidence. Indeed, case law holds that medical evidence is not always necessary, particularly where there is clear evidence that the employee poses a safety risk.⁷⁶ However, in *Rednour v. Wayne Township*, 2014 U.S. Dist. Lexis 134319, *65-*66 (S.D. Ind. Sept. 24, 2014), the court found that testimony about the events surrounding an incident of severe hypoglycemia and the safety concerns expressed by one of plaintiff's co-workers were not the kind of medical evidence that could support summary judgment on the direct threat defense. Even if making decisions without medical input is ever justified, it should not be permitted for situations where diabetes causes safety concerns; diabetes, unlike certain other conditions, is not one whose impacts can be readily observed and evaluated by those without medical training. Even in cases

⁷⁵ The employer in *Valenzisi* argued that plaintiff was not qualified to perform his job because of cognitive deficits, not a specific safety risk, but the court's logic would apply to direct threat cases as well.

⁷⁶ See *Den Hartog v. Wasatch Academy*, 129 F. 3d 1076, 1090 (10th Cir. 1997) (summary judgment granted despite failure of employer to gather medical evidence about threat posed by son of teacher; son had made several credible threats to harm individuals at the school, so threat was obvious); *Olsen v. Capital Region Medical Ctr.*, 2012 U.S. Dist. Lexis 51605, *20 (W.D. Mo. Apr. 12, 2012), *aff'd on other grounds*, 713 F. 3d 1149 (8th Cir. 2013) (defendant was not required to consult any health care providers regarding the safety risks of plaintiff's seizures where multiple seizures had already occurred on the job and caused injury to the plaintiff); *Altman v. N. Y. C. Health & Hosps. Corp.*, 903 F. Supp. 503, 510 (S.D. N.Y. 1995) (no need to gather medical evidence about physician's alcoholism where his recent relapse demonstrated that he posed a threat to patient safety); *EEOC v. Stoughton Trailers, LLC*, 2010 U.S. Dist. Lexis 62279, *26 (W.D. Wisc. Jun. 23, 2010) (where employer had concerns about employee's hearing impairment, allowing employee to tour manufacturing plant and make suggestions for accommodation was sufficient individualized assessment, without the need for medical evidence); *Mayes v. Whitlock Packaging Corp.*, 2010 U.S. Dist. Lexis 42286, *13 (E.D. Okla. Apr. 29, 2010) (no need for medical evaluation where plaintiff had multiple violent seizures at work).

where prior incidents of hypoglycemia in the workplace seem to suggest a clear safety risk, medical evidence still should be gathered to see if there is a sufficient explanation for these events or accommodations that can be made.

A medical opinion is not a shield against liability if it was not conducted reasonably or based on objective medical evidence, as discussed further in section VI.E below. However, seeking the opinion of a medical professional (and relying on that opinion, if reasonable) can be strong evidence that an individualized assessment was properly conducted. See *Jarvis v. Potter*, 500 F. 3d 1113, 1123 (10th Cir. 2007) (“objective reasonableness may well depend on whether professional advice is obtained”); *Gillen v. Fallon Ambulance Serv.*, 283 F. 3d 11, 31-32 (1st Cir. 2002). But employers cannot claim ignorance about the effects of a disability when they have not sought adequate medical advice. *Taylor v. Pathmark Stores*, 177 F. 3d 180, 193 (3rd Cir. 1999) (“[U]nder the ADA, it is the employer’s burden to educate itself about the varying nature of impairments and to make individualized determinations about affected employees”). And in most cases the failure to obtain any medical evidence will render an assessment inadequate. See *Fahey v. Twin City Fan Cos.*, 994 F. Supp. 2d 1064, 1074 (D. S.D. 2014) (employer had not conducted an individualized assessment where it received a short report from its outside doctor stating that plaintiff had monocular vision but, instead of seeking any further medical information, the employer simply decided that monocular vision precluded plaintiff from performing the job); *Wright v. Stark Truss Co.*, 2012 U.S. Dist. Lexis 103663 (D. S.C. May 10, 2012) (defendant not entitled to summary judgment on claim that plaintiff was a direct threat following suicide attempt and diagnosis of depression where defendant did not seek any medical evaluation of plaintiff, who was released to return to work without restrictions); *EEOC v. Midwest Division – RMC, LLC*, 2006 U.S. Dist. Lexis 53052, *196 (W.D. Mo. Jul. 31, 2006) (summary judgment denied where defendant failed to contact any doctors or other experts before determining that plaintiff with visual impairment posed direct threat); *Hammel v. Eau Galle Cheese Factory*, 2003 U.S. Dist. Lexis 7515, *41 (W.D. Wisc. Apr. 15, 2003) (opinion of employees that plaintiff posed a threat based on their observations of him on factory floor is not sufficient where no medical evidence was collected).⁷⁷

In most cases, defendants faced with safety concerns will seek a medical opinion. For the assessment to be properly individualized, the doctor has the same obligation as the employer: to gather the best available evidence and make a decision based on that evidence, rather than stereotypes or assumptions. The Supreme Court in *Bragdon v. Abbott* discussed the importance of objective evidence to the health care provider’s assessment. “As a health care professional, petitioner had the duty to assess the risk of infection based on the objective, scientific information available to him and others in his profession. His belief that a significant risk existed, even if maintained in good faith, would not relieve him from liability. ... [P]etitioner receives no special deference simply because he is a health care professional.” 524 U.S. 624, 649 (1998).

⁷⁷ Of course, the employer need not use its own doctor to perform an individualized assessment, but instead can rely on the opinion of plaintiff’s treating physician. As discussed later, such opinions should at a minimum be considered.

D. Qualifications of the Examiner

To make a meaningful assessment, a doctor must obviously know something about the condition being assessed. The problem is that many physicians who perform pre-employment medical examinations and other assessments for employers practice occupational medicine or another general field, and are not specialists in any particular disease. Diabetes, for example, is a complex disease with symptoms that vary among individuals, and assessing the risk of severe hypoglycemia or other complications requires experience with the disease. Too often, those who do not specialize in treating diabetes make uninformed judgments based on limited data (such as a single blood glucose level or A1C test result). Where a doctor is not a specialist in the relevant disease and fails to gather sufficient medical background or consult with a specialist, the assessment may be found to be inadequate. For example, in *Echazabal v. Chevron, U.S.A.*, 336 F. 3d 1023 (9th Cir. 2003), the defendant restricted a longtime employee in one of its plants from his job after two doctors opined that the results of enzyme tests indicated that his liver was not functioning properly and that exposure to chemicals in the plant was dangerous for him. The court emphasized, however, that these doctors lacked any expertise in liver disease when they made the decision to disqualify plaintiff:

Moreover, neither of the Chevron doctors had expertise in this area. Dr. Baily stated that he was not a liver specialist, that his experience with patients with chronic liver diseases was ‘very limited,’ that he was ‘not familiar with the specific biochemistry of liver abnormalities,’ that he had not spoken with a liver specialist about Echazabal's case, and that he was not aware of specific evidence that hepatotoxins pose a risk to individuals with hepatitis. Dr. Baily had no knowledge of whether Chevron ever contacted a specialist about the position. Similarly, Dr. McGill had not treated any patients in the prior 15 years for chronic liver disease, did not consult any treatises on the issue, did not research the likelihood of liver failure due to exposure to liver toxins, and did not consult a specialist.

Id. at 1032. By contrast, plaintiff's experts, who pointed out the flaws in Chevron's doctors' analysis and concluded that plaintiff did not pose a risk, were experts in the field. Likewise, in *EEOC v. Browning-Ferris Indus.*, 262 F. Supp. 2d 577 (D. Md. 2002), defendant's examining doctor barred an individual from working in a position in which she would be exposed to trash because he believed her Crohn's disease and the medications she took to treat it meant she was at increased risk of infection. However, the court pointed out that he had little expertise in the disease:

At the time he examined [the individual], Dr. Talusan and the two other doctors in the clinic saw approximately 80 to 120 patients per day through contractual arrangements with clients such as BFI. In this capacity, Dr. Talusan conducted pre-employment physicals, fitness for duty evaluations, and drug testing and treated people for work-related injuries. According to Dr. Talusan's own testimony, he is neither a Crohn's specialist nor a gastroenterologist and has not treated Crohn's patients for over forty years.

Id. at 587. The court also pointed out that the doctor had little experience prescribing the medications which he believed increased the individual's risk for infection. He did conduct limited research on Crohn's disease by reading medical literature, but did not consult any articles that dealt with the problems he believed plaintiff faced. *Id.* at 587-89. By contrast, the individual's experts were specialists in Crohn's disease and stated that there was no medical evidence supporting a link between the disease or the medications the individual took and an increased risk of infection. *Cf. Keith v. Oakland County*, 703 F. 3d 918, 924 (6th Cir. 2013) (defendant's doctor "has no education, training, or experience in assessing the ability of deaf individuals to work as lifeguards" and thus failed to perform an individualized assessment); *Rojek v. Catholic Charities of Jackson*, 2010 U.S. Dist. Lexis 52056, *47 (E.D. Mich. May 27, 2010) (experts who evaluated plaintiff's ability to perform her job despite visual impairment had no experience in working with blind individuals). While a lack of specialization in a particular disease may be overcome with sufficient research or consultation with specialists,⁷⁸ the fact that a physician renders an opinion in an area in which he has no expertise should prompt further exploration.

It is worth remembering that in both *Echazabal* and *Browning-Ferris* the plaintiff presented extensive expert testimony about the disease and showed why the defendant's physicians were not only uninformed about the disease, but got their determination wrong by relying on irrelevant information or assumptions. Therefore, it may not be wise to rely solely on the fact that an evaluating physician is not a diabetes specialist, without introducing expert evidence showing how the physician failed to consider basic information about diabetes or to show an understanding of the disease. In written discovery and deposition of these physicians, attorneys should explore the scope of their practice, the experience they have in treating the disease, what knowledge they have concerning the disease, and whether they sought out any additional information before making a determination.

E. Extent of the Examination

The assessment must also examine all relevant medical evidence in order to be adequately individualized. This begins with an examination of the individual himself or herself; it is difficult to support an assessment which does not involve a personal examination of the individual by the physician. *See Rorrer v. City of Stow*, 743 F.3d 1025, 1045 (6th Cir. 2014) (employer's doctor reversed the decision of another doctor in his practice clearing plaintiff to work as a firefighter without personally examining the plaintiff); *EEOC v. American Tool & Mold, Inc.*, 2014 U.S. Dist. Lexis 71472, *42 (M.D. Fla. Apr. 16, 2014) (doctor did not conduct the examination of the plaintiff and was not even present when it was performed by a nurse practitioner); *EEOC v. Hussey Copper*, 2010 U.S. Dist. Lexis 22920, *37-*38 (W.D. Pa. Mar. 12, 2010) (physician failed to personally examine plaintiff, and instead relied on brief examination by nurse); *cf. Lafata v. Dearborn Heights Sch. Dist. No. 7*, 2013 U.S. Dist. Lexis Mich. Dec. 11, 2013) (physician admitted his examination of plaintiff was "neither lengthy nor

⁷⁸ *Cf. Wurzel v. Whirlpool Corp.*, 482 Fed. Appx. 1, 16 (6th Cir. 2012) (company physician without expertise in plaintiff's heart condition made decision after consultation with an independent cardiologist); *Fraterrigo v. Akal Security, Inc.*, 2008 U.S. Dist. Lexis 87451, *29 (S.D. N.Y. Oct. 29, 2008) (doctor who developed medical standards (including hearing requirement) for U.S. Marshals Service did not need to be an audiologist or have special expertise in audiology, when he consulted an audiologist in preparing the standards).

comprehensive”); *Jennings v. Dow Corning Corp.*, 2013 U.S. Dist. Lexis 66803, *27-*28 (E.D. Mich. May 10, 2013) (even though doctor who made recommendation had not personally examined plaintiff, he had extensively reviewed plaintiff’s medical history and discussed his situation with the nurse who had performed the examination); *but see Coleman v. Pennsylvania State Police*, 561 Fed. Appx. 138, 145 (3rd Cir. 2014) (no requirement that doctor personally examine plaintiff where he had extensive records of plaintiff’s seizure activity and medical history). And many pre-employment examinations are conducted quickly, with the physician seeing dozens of patients in a day and unlikely to take the opportunity to review the plaintiff’s medical condition or history in much detail. Follow-up consultation with specialists also frequently does not happen, even when it would be appropriate. That an examination is conducted quickly, and that the physician spends little time considering the case, is not by itself enough to undermine the assessment’s validity. But where the evaluation fails to consider key evidence or factors, courts may find that it is legally inadequate.

One critical source of information in an individualized assessment is the person’s medical history, including information about how their condition is being treated and what problems it may have previously caused. As the court noted in *Bombrys v. City of Toledo*, 849 F. Supp. 1210, 1219 (N.D. Ohio 1993), “An individual’s medical history and record of compliance with physician’s recommendations would seem to be an ideal place to begin such an [individualized assessment].” In *EEOC v. Chrysler Corp.*, 917 F. Supp. 1164, 1171 (E.D. Mich. 1996); *rev’d on other grounds*, 1998 U.S. App. Lexis 30607 (6th Cir. Nov. 25, 1998), the court held that Chrysler had not conducted a proper individualized assessment of an individual with type 2 diabetes when the company’s doctor made a determination that he was a safety threat, based only on three blood glucose tests, in view of the fact that the physician failed to even ask plaintiff about his past or current health or whether he was experiencing any complications from his diabetes. In a case involving HIV, the Sixth Circuit has held that it was improper for a doctor to make a determination that plaintiff posed a risk without examining whether his medical records and history showed any evidence that the disease caused any ill effects:

There is also no evidence on the record that Dr. Dowlen attempted to determine whether Holiday actually experienced fatigue, sluggishness, shortness of breath or any other symptom of physical weakness or lack of endurance—even after Holiday voluntarily disclosed his HIV status. The doctor’s complete failure to investigate the physical effects, if any, of Holiday’s HIV status raises a genuine issue of material fact as to whether his subsequent opinion was the product of the ADA-mandated individualized inquiry into Holiday’s actual condition.

Holiday v. City of Chattanooga, 206 F.3d 637, 644 (6th Cir. 2000). *See also Keith, supra*, 703 F. 3d at 923-924 (physician ended his cursory examination of plaintiff when he learned he was deaf, and admitted he was disqualifying him from a position as a lifeguard solely based on his deafness without analyzing his individual capabilities or the requirements of the job); *Hussey, supra*, 2010 U.S. Dist. Lexis 22920 at *38 (physician gathered no information about plaintiff’s experience with methadone or whether he was experiencing any of the drug’s side effects which the physician assumed that he would experience).⁷⁹ Examining an individual’s work history, or

⁷⁹ On the other hand, since the focus of an assessment should be on the individual’s ability to safely perform the job at the time of the examination, over-reliance on medical history can also be a problem if it ignores the plaintiff’s

affording the individual an opportunity to demonstrate abilities on the job, can also be critical,⁸⁰ although some courts hold that medical and work history need not be carefully considered where the evidence of threat is obvious or undisputed.⁸¹

Of course, employers and evaluating doctors should also consider the opinions and reasoning of plaintiff's own treating doctors. See *Gaus v. Norfolk Southern Railway Co.*, 2011 U.S. Dist. Lexis 111089, *76 (W.D. Pa. Sept. 28, 2011) (doctor who made decision to disqualify plaintiff based on his use of pain medications consulted only briefly with one of plaintiff's treating physicians and ignored the opinions of several physicians, including some retained by defendant, that plaintiff could safely perform his job); *EEOC v. Blue Cross Blue Shield of Conn.*, 30 F. Supp. 2d 296, 307 (D. Conn. 1998) (defendant would be required to reevaluate its conclusion if provided evidence from plaintiff's medical provider that contradicted its initial opinion); *McGee v. City of Greenville*, 2007 U.S. Dist. Lexis 9686, *9 (D. S.C. Feb. 7, 2007) (defendant gave plaintiff an opportunity to submit documentation from his treating physician supporting his ability to work safely, but he failed to do so); *but see Wurzel v. Whirlpool Corp.*, 482 Fed. Appx. 1, 16 (6th Cir. 2012) (defendant was permitted to disregard the opinions of plaintiff's treating physicians where plaintiff had not provided them with accurate information about the symptoms of his condition). In *Verkade v. U. S. Postal Serv.*, 378 Fed. Appx. 567 (6th Cir. 2010), the defendant's physician restricted plaintiff from performing his job duties after he experienced dizziness on the job due to Meniere's disease. However, when plaintiff submitted documentation from his treating physician that he could perform his job safely, the employer's physician reviewed this information and, after making further inquiries, removed the restriction. The court held that the doctor's opinion was reasonable, as both the initial decision to remove the plaintiff from duty and the subsequent reconsideration were based on individualized review of the plaintiff's file and research into the condition. *Id.* at 578.

An employer or physician may also be faulted for failing to seek follow up tests or the opinion of a specialist where warranted. See *McKenzie v. Dovala*, 242 F. 3d 967, 975 (10th Cir. 2001) (defendant did not submit plaintiff to a standard psychological test and so did not perform an individualized assessment); *Backhaus v. General Motors LLC*, 2014 U.S. Dist. Lexis 132266,

present condition. See *Nelson v. City of N.Y.*, 2013 U.S. Dist. Lexis 117742, *40-*41 (S.D. N.Y. Aug. 17, 2013) (defendant's doctors had not relied on the most current objective medical evidence when they appeared to focus on her psychological history rather than a current assessment of her condition).

⁸⁰ See *DiPol v. N. Y. C. Transit Auth.*, 999 F. Supp. 309, 315 (E.D. N.Y. 1998) (doctor never inquired of plaintiff's supervisors as to whether he had experienced problems on the job due to his diabetes); *Echazabal v. Chevron, U.S.A.*, 336 F.3d 1023, 1032 (9th Cir. 2003) ("individualized risk assessment also requires consideration of relevant information about an employee's past work history"); *Gillen v. Fallon Ambulance Serv.*, 283 F. 3d 11, 32 (1st Cir. 2002) (assessment failed to properly consider plaintiff's work history, which showed an ability to perform the job duties); *Backhaus v. General Motors LLC*, 2014 U.S. Dist. Lexis 132266, *19 (E.D. Mich. Sept. 22, 2014) (employer's physician failed to conduct a proper assessment where he "based his decision solely on the results of a single test without permitting [plaintiff] to demonstrate his ability to drive a forklift or shuttle bus in the actual work environment"); *EEOC v. Houston Area Sheet Metal Joint Apprenticeship Comm.*, 2002 U.S. Dist. Lexis 10393, *26 (S.D. Tex. May 31, 2002) (no individualized assessment where defendant failed to inquire as to plaintiff's past work performance or how he communicated on the job despite his hearing impairment).

⁸¹ See *Darnell v. Thermafiber*, 417 F. 3d 657, 660 (7th Cir. 2005) (review of medical history is important, but here could not refute evidence that plaintiff was noncompliant with his diabetes treatment, which the court believed was tantamount to a finding that he was a direct threat); *Altman v. N. Y. C. Health & Hosps. Corp.*, 903 F. Supp. 503, 510 (S.D. N.Y. 1995) (no need to examine plaintiff's treatment records and medical history when employer already knew of his recent relapse into alcohol use).

*20 (E.D. Mich. Sept. 22, 2014) (defendant's physician admitted that he did not consult a specialist, even though plaintiff's treating physician had recommended doing so, and did not conduct further tests of plaintiff's vision that could have been useful); *Hussey, supra*, 2010 U.S. Dist. Lexis 22920 at *39 (“Hussey does not dispute that a neuro-cognitive examination was available to assess [the employee's] ability to safely perform the job, that [defendant's doctor] had used such a test in the past, and that it was not utilized in this case.”); *EEOC v. Browning-Ferris Indus.*, 262 F. Supp. 2d 577, 588 (D. Md. 2002) (physician did not send plaintiff to see a specialist in Crohn’s disease to evaluate her risk, even though he did not specialize in the disease and despite statement from employer that it would have authorized such a specialist referral); *EEOC v. Union Pacific R.R.*, 6 F. Supp. 2d 1135, 1139 (D. Idaho 1998) (doctors who examined plaintiff with monocular vision and restricted him from working did not consult any vision experts or specialists and did not look at any scientific studies to support their conclusion).

Again, however, courts also hold that gathering evidence from specialists is not necessary when the evidence before the employer or doctor is already adequate. *See Darnell v. Thermafiber*, 417 F. 3d 657, 661-62 (7th Cir. 2005) (rejecting argument that doctor should have sought follow up tests after urine glucose test results suggested that plaintiff might not have control of his diabetes, and holding that plaintiff’s “noncompliance” supported doctor’s conclusion without the need for further tests); *EEOC v. Blue Cross Blue Shield of Conn.*, 30 F. Supp. 2d 296, 307 (D. Conn. 1998) (employer does not have a duty under the ADA to do follow up testing when it has sufficient reliable information on which to form a reasonable medical judgment). And where the employer has gone through a process of evaluation that appears comprehensive and reasonable, courts will be reluctant to require further follow-up or to question the results of that process. *See Wurzel, supra*, 482 Fed. Appx. at 15 (where employer had evaluated plaintiff’s medical records and consulted with several of his treating physicians as well as an independent cardiologist who had examined him, the employer’s determination that plaintiff posed a safety risk was upheld as reasonable even though it contradicted the conclusions of plaintiff’s physicians). While a doctor’s or employer’s failure to gather all available information during an assessment can be powerful evidence in cases where the final result of the assessment appears wrong or unsupported, it is unlikely to be enough on its own to convince a court to set aside a medical conclusion that appears adequately supported to the court.

F. Interpreting Medical Data

The ultimate conclusion reached as part of an assessment also matters. It would make little sense if an employer could fulfill its obligation to perform an individualized assessment by reviewing and considering all available evidence, including the plaintiff's individual history and the most current opinion in the field, and then render a decision that ignored all that evidence and relied on generalizations or stereotypes. To that end, courts will deny summary judgment in cases where the conclusions reached by a doctor or an employer are not in line with the evidence considered. In *Keith v. Oakland County*, 703 F. 3d 918, 924 (6th Cir. 2013), the court concluded that the employer, in considering the application of a deaf individual to be a lifeguard, had conducted an individualized inquiry of his ability by observing him in its lifeguard training program and discussing accommodations that would allow him to perform the job, but then decided that he could not safely perform the job. The court reversed summary judgment for the employer because there was no explanation for its conclusion, which was at odds with the

evidence from its assessment. *See also Nevitt v. U.S. Steel Corp.*, 2014 U.S. Dist. Lexis 61758, *28 (N.D. Ala. May 5, 2014) (summary judgment denied where employer's doctor, even though he performed an individualized assessment, based his conclusions on medical records which were contradictory and which in some cases may have been stale); *Bender v. Norfolk Southern Corp.*, 2014 U.S. Dist. Lexis 4460, *44 (M.D. Pa. Jan. 14, 2014) (defendant may have relied too heavily on generalized guidelines in reaching its conclusion, even though it did make an individual inquiry).

A proper individualized assessment must be based on the best available scientific and medical evidence. Therefore, when physicians misinterpret or ignore what is understood in the relevant field to be the best evidence regarding the disease or its risk, or rely on evidence that is rejected in the field as being obsolete or irrelevant, courts will often reject the conclusions of such an assessment. Individual physicians or health care providers may disagree with the practices in the field, but they must provide a medical basis for that disagreement to make that judgment supportable. In *Doe v. Deer Mtn. Day Camp*, 682 F. Supp. 2d 324 (S.D. N.Y. 2010), a camp prohibited a child with HIV from attending because of fears about the disease's transmission. Even though public health authorities and the medical community generally agreed that there was little chance of transmission of the virus in the camp's activities and facilities, a nurse who considered the plaintiff's case ignored this evidence. In rejecting the nurse's opinion, the court concluded:

Nurse Gloskin did provide deposition testimony that HIV in stool can survive in swimming pool water and that HIV can be transmitted by blood on a toilet seat. However, while a health care professional, such as a registered nurse like Gloskin, may disagree with "the prevailing medical consensus," she must provide "a credible scientific basis for deviating from the accepted norm." Opinions from health care workers do not constitute objective medical evidence absent such a basis. Defendants, however, have not supported Gloskin's position with any medical evidence.

Id. at 348 (quoting *Bragdon v. Abbott*, 524 U.S. 650 (1998)). It is critical in these cases to establish (generally through expert testimony) what the medical consensus and standard of care is for the relevant disease, and show that the health care provider deviated from this standard of care without evidence or justification.

In *Echazabal v. Chevron, U.S.A.*, 336 F. 3d 1023 (9th Cir. 2003), plaintiff with hepatitis was disqualified from his job (which he had performed for years) after lab tests during a medical examination indicated elevated levels of three enzymes. Defendant's doctors believed that these enzyme levels represented evidence of compromised liver function, and that chemicals at the plant posed a risk to plaintiff's health. The court, in reversing a grant of summary judgment, found that there was no medical basis for this opinion, and therefore, it was not the product of an individualized assessment. Testimony from plaintiff's experts (who, unlike defendant's doctors, were specialists in liver disease) showed that there is no correlation between elevated enzyme levels and liver function, and that the tests that do measure liver function indicated no problems with plaintiff's health. Plaintiff's experts also testified that there was no medical basis for believing that his exposure to the chemicals at his workplace increased his risk of liver disease,

and so there was no medical basis for the contrary findings of defendant's doctors. These doctors also did not know the specific harmful exposure levels to the toxins they recommended that plaintiff avoid, even though not all levels of exposure to these toxins are dangerous. *Id.* at 1029-31. Here, plaintiff's expert testimony was able to thoroughly discredit the conclusions of defendant's doctors as not being based on the best available medical evidence.

A similar situation occurred in *EEOC v. Browning-Ferris Indus.*, 262 F. Supp. 2d 577, 589-590 (D. Md. 2002). In that case, an individual with Crohn's disease was removed from her position when defendant's examining doctor concluded, based on evidence of infections and the immunosuppressant drugs she was taking, that her exposure to trash in her job would increase her risk of further infection. In response, the EEOC introduced expert testimony that the individual's infections were caused by Crohn's disease, not by exposure to trash, and that there was no medical link between the medications she was taking and an increased infection risk. In short, defendant's physician, who had no expertise in the disease and did very little research before making his decision, had simply misinterpreted the individual's medical history and rendered an opinion unsupported by any evidence. And in *EEOC v. Chrysler Corp.*, 917 F. Supp. 1164, 1171 (E.D. Mich. 1996); *rev'd on other grounds*, 1998 U.S. App. Lexis 30607 (6th Cir. Nov. 25, 1998), defendant's doctor disqualified an individual who has type 2 diabetes from his position based on three blood glucose tests taken over a two week period, which the court concluded was not an adequate individualized assessment.⁸²

As these cases make clear, where a decision is based on obviously invalid medical findings, and where plaintiff can demonstrate that the decision is clearly outside the medical mainstream, courts are much more willing to second-guess the employer's decision to rely on the assessment. For people with diabetes, the medical community has made clear that certain practices are not properly part of an individualized assessment, at least when used as the sole or primary basis for making a decision. These conclusions are outlined in the American Diabetes Association's position statement. See Employment Position Statement, *supra* note 7, at S114-S115.⁸³ These practices include:

⁸² See also *Garr v. Union Pacific R. R. Co.*, 2013 U.S. Dist. Lexis 1274, *22-*23 (N.D. Ill. Jan. 4, 2013). (summary judgment denied where defendant's doctor had relied on incorrect evidence about the risk of cardiac events, which was in fact lower than the defendant believed it was); *Holiday v. City of Chattanooga*, 206 F.3d 637, 644 (6th Cir. 2000) (employer apparently based its findings on doctor's conclusion that plaintiff had AIDS, when in fact there was no evidence his HIV infection had proceeded past the asymptomatic stage); *EEOC v. Union Pacific R.R.*, 6 F. Supp. 2d 1135, 1138 (D. Idaho 1998) (defendant's doctor's interpretation of vision test results was contradicted by the doctor who actually performed the test); *EEOC v. Texas Bus Lines*, 923 F. Supp. 965, 979-980 (S.D. Tex. 1996) (court rejected doctor's conclusion disqualifying morbidly obese woman as bus driver because it was clearly at odds with federal transportation medical guidelines and there was no medical basis for the decision other than the doctor's subjective opinion that plaintiff walked slowly).

⁸³ The consensus recommendations of medical professionals specializing in a particular field, such as those expressed in the Association's Position Statement, should be entitled to great weight and deference. The Supreme Court and other courts have stated that courts should ordinarily defer to the reasonable medical judgments of public health officials. See *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 288 (1987); *Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F. 3d 1261, 1266 (4th Cir. 1995) (deferring to CDC guidelines regarding the likelihood of transmission of HIV through surgical procedures). While there are no public health guidelines addressing the assessment of individuals with diabetes, courts have held that the recommendations of private medical groups are entitled to some deference as well. See *Abbott v. Bragdon*, 163 F. 3d 87, 89 (1st Cir. 1998) (dismissing concerns about deference to guidelines of professional organizations where the recommendations were clearly medical in nature and did not address ethical considerations); *Knapp v. Northwestern Univ.*, 101 F.3d 473, 485 (7th Cir. 1996) ("the consensus

- **Blood glucose test results.** A single blood glucose test result (or a very limited number of results) is of little value because blood glucose levels (for all people) fluctuate throughout the day, and one result is only a snapshot which can say little about overall risk. In some circumstances, of course, looking at a series of blood glucose results over time, such as a log of results kept by a blood glucose meter, can be useful. But even in such cases, a record of one abnormally low or high level should not be viewed as disqualifying.
- **Urine glucose test results.** Urine glucose levels are medically obsolete and provide little relevant information about an individual’s diabetes. Although readily available as part of standard blood tests often done at pre-employment physicals, urine glucose levels do not correlate well with blood glucose levels and cannot measure risk for hypoglycemia (since the presence of glucose in the urine can only reflect high blood glucose levels). Urine glucose levels have no place in a proper individualized assessment.
- **A1C values:** A1C values are a measure of average blood glucose levels over a period of two to three months. As averages, they indicate nothing about extremely high or low values, and cannot predict risk of severe hypoglycemia. Therefore, decisions should not be based solely or primarily on an individual’s A1C value. A district court recently held that A1C values, standing alone, are insufficient to support a claim that the plaintiff is at significant risk of future hypoglycemia episodes.⁸⁴
- **“Uncontrolled” or “brittle” diabetes:** As discussed earlier, these terms are imprecise and unhelpful in making medical judgments about risk. Judgments also should not be based on an individual’s level of perceived “compliance” with treatment, as a person may fail to follow all physician instructions but still not be at increased risk for hypoglycemia or otherwise pose a risk.

Of course, other medically unsound practices may also be challenged. Testimony from a diabetes expert, as well as evidence that a proper individualized assessment would have found the individual to be qualified and safe, is critical in challenging improper medical evaluations.

recommendations of several physicians in a certain field do carry weight.”) However, just because the employer happens to be a health care facility does not mean that its views are entitled to special deference. *See Sydnor v. Fairfax County*, 2011 U.S. Dist. LEXIS 22287, *25-*26 (E.D. Va. Mar. 3, 2011), *rev'd on other grounds*, 681 F.3d 591 (4th Cir. 2012) (rejecting hospital’s claim that its decision to terminate a nurse should be entitled to the deference granted to public health officials, and distinguishing decisions made by a small group of health care professionals working for the employer from those made by a government agency on a matter of public concern).

⁸⁴ *Lewis v. Pennsylvania*, 2010 U.S. Dist. Lexis 127135, *9-*10 (W.D. Pa. Oct. 5, 2010) (rejecting claim that plaintiff was unqualified because he had a high A1C value, where even defendant did not automatically exclude all individuals with high A1C values); *but see Bender v. Norfolk Southern Corp.*, 2014 U.S. Dist. Lexis 92364, *21, *23 (M.D. Pa. July 8, 2014) (in reviewing plaintiff’s challenge to a jury verdict for employer, court noted that defendant considered extensive medical evidence beyond plaintiff’s A1C test result, and that unspecified evidence presented at trial showed a correlation between A1C levels and episodes of hypoglycemia and/or hyperglycemia).

VII. Conclusion

The legal issues surrounding possible safety threats posed by individuals with disabilities such as diabetes can be complex and are often unsettled. And the law continues to develop, as advances in diabetes treatment and monitoring that make the disease easier to manage on a daily basis come into conflict with increased emphasis by employers on workplace safety, particularly in safety-sensitive positions. Yet great progress has been made in the decades since the passage of the Americans with Disabilities Act, as once-common blanket exclusions of individuals with diabetes from large groups of jobs are increasingly rare. Only in unusual cases involving dangerous and safety-sensitive positions do some courts continue to defer to business judgments made by employers about safety.

Safety cases involve careful factual assessment of diabetes and the risk it poses for future harm. Employers in most cases must perform a careful individualized assessment to determine the characteristics of an individual's condition and whether that individual's diabetes will lead to significantly increased risk on the job. Even where an employer is justifying a generally applicable medical policy rather than an individualized decision, courts generally require that this policy be supported by significant objective medical evidence. For these reasons, it is critical that attorneys pursuing these cases make an adequate and detailed factual record, gathering all possible relevant information about the individual's diabetes and introducing medical testimony from treating physicians and expert medical witnesses to counter an employer's assumptions about the risk of diabetes. Attorneys need to be aware of diabetes and its treatment, and be able to recognize when an employer is making unfounded assumptions or relying on obsolete or unhelpful medical evidence. We at the American Diabetes Association hope that this paper will assist attorneys in evaluating and litigating cases involving individuals with diabetes and safety concerns, and also stand ready to provide further assistance, as discussed at the beginning of this paper.