NO. 04-2170

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRENT DARNELL,

Plaintiff-Appellant,

v.

THERMAFIBER, INC.,

Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Indiana, South Bend Division
Case No. 3:02-CV-663 RM
The Honorable Robert L. Miller, Jr., Chief Judge

REPLY BRIEF OF PLAINTIFF-APPELLANT, BRENT DARNELL

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I.
SUMMARY OF THE ARGUMENT

Thermafiber attempts to spin the facts of this case into its favor by weaving after-acquired evidence into the record. Dr. McCann did not obtain or consider Darnell's prior medical records, blood glucose level or A1C test results in connection with the August 9, 2001 pre-employment physical. Thermafiber may not use Darnell's attitude about treatment of his disease or his past record of compliance as a substitute for Dr. McCann's failure to perform a statutorily required individualized assessment.

Thermafiber has also gone to great lengths to divert the Court's attention from Darnell's actual medical condition on August 9, 2001 to stereotypical generalizations about "insulin-dependent diabetics" in support of its direct threat argument. There is no indication in Darnell's pre-employment physical records that he would have been a significant risk of substantial harm at Thermafiber. The evidence shows he would not have been any more unsafe than any other Thermafiber employee.

Thermafiber took many liberties with the testimony of John O. Levine, M.D., Darnell's expert and treating physician. Under Thermafiber's reading of the doctor's medical records and testimony, it would not be reasonable for a trier of fact to conclude without issue that Darnell's diabetes was uncontrolled. There is no uniform medical definition for the term "uncontrolled." It is a complicated medical concept. According to Dr. Levine's definition, Darnell's diabetes was not uncontrolled.

In support of its direct threat argument, Thermafiber relies on Dr. McCann's unreasoned and unsupported medical judgment. It is not professionally appropriate for Dr. McCann to rely on Darnell's subjective reports of self-treatment as "objective" evidence. Nor is it proper for Dr. McCann to make a determination about Darnell's level of "control" based on his perception of

Darnell's temper or attitude and on Darnell's past history of compliance and frequency of doctor visits. Those factors are not determinative of a safety risk.

Finally, Darnell contends that Thermafiber waived its argument regarding Darnell's *prima facie* "regarded as" claim by failing to raise it in the district court below. Darnell had no opportunity to submit affidavits or other evidence and contest the issue at the summary judgment stage. As a result, there is no record of this issue from which this Court may properly affirm or reverse. In the alternative, Thermafiber's new argument fails on its merits. Darnell designated sufficient evidence in the record to show that he is a qualified individual who was regarded by Thermafiber as unable to perform the major life activity of working. Thermafiber perceived Darnell to be unable to perform a broad range or class of jobs at its facility. The district court properly assumed, for purposes of summary judgment, that Darnell could establish a *prima facie* case.

II.
ARGUMENT

A.

Thermafiber May Not Use After-Acquired Information To Satisfy The Requirements Of An Individualized Assessment.

Thermafiber repeatedly references evidence in medical records that were never considered by Dr. McCann when he made the decision to disqualify Darnell from employment. See Appellee's Br., pp. 7-10, 27-29. More specifically, Dr. McCann never knew or considered Darnell's blood glucose ranges or his A1C readings, Darnell's work history, or whether Darnell was taking his insulin as prescribed, eating properly, or showing up for laboratory blood tests. To overcome the company doctor's abysmal lack of knowledge (and almost cavalier disregard of the need to acquire such knowledge), Thermafiber simply cites evidence from medical records

never seen by Dr. McCann (either because Dr. McCann had no interest in looking at Darnell's then-existing medical records or because the evidence is contained in medical records created after Darnell's bid for employment was rejected).

By weaving such after-acquired evidence into the record, Thermafiber attempts to create a distasteful picture of Darnell's character. Thermafiber intends for this Court to shift its focus from Dr. McCann's failure to perform the requisite individualized assessment of Darnell's ability to perform the duties of the job to an irrelevant assessment of Darnell's attitude toward his disease and compliance with his doctor's advice. Thermafiber wrongfully places the burden on Darnell and this Court to separate the after-acquired knowledge from the medical facts and other objective evidence actually considered by Dr. McCann on August 9, 2001, knowing that if a negative impression of Darnell is created in the process, the Court may be influenced to overlook the shortcomings of Thermafiber's individualized assessment.

B.

Thermafiber May Not Establish That Darnell Is A Direct Threat With Generalizations About Diabetes.

Thermafiber has cleverly shifted the focus of its direct threat affirmative defense from the issue of safety in the workplace to the issue of Darnell's blood glucose control and compliance with his physician's instructions, neither of which are determinative of a safety risk. There is no evidence to suggest that Darnell would have been more unsafe in the factory environment than any other Thermafiber employee. See Appendix, p. 0197 (Levine Depo., p. 112, ln. 7-22). Because Thermafiber is unable to attack Darnell's extraordinary health and totally asymptomatic medical history, the company goes to great lengths to shift the Court's attention to just the sort of stereotypical generalizations the ADA seeks to avoid, i.e., that insulin-dependent diabetics who have difficulty regulating their blood sugars pose a greater risk to themselves or others than non-

insulin-dependent diabetics or diabetics who are consistently able to keep their blood glucose levels within normal limits. By focusing on the possible long term consequences of diabetes generally, Thermafiber sidesteps the need to reconcile its imminent safety risk assessment with Darnell's actual medical health.[1]

Thermafiber was required to make an individualized assessment of Darnell at the time the employment decision was made. See *Koshinski v. Decatur Foundry, Inc.,* 177 F.3d 599, 602 (7th Cir. 1999). Nothing in Darnell's specific medical history and health status could reasonably support a determination that he was a significant risk of substantial harm on August 9, 2001.[2]

C.

Thermafiber Distorted Or Misrepresented The Testimony
And Records Of John O. Levine, M.D.

Thermafiber has distorted or misrepresented the testimony of Darnell's expert and treating physician, John O. Levine, M.D. Thermafiber claims Darnell's medical history is "paved" with "wild fluctuations" of blood sugar. Appellee's Br., p. 27. In its proper context, the phrase "fluctuating wildly" was used one time by Dr. Levine to describe the blood sugar diary presented to him by Darnell at their first meeting on February 22, 1999. At that time, Darnell

[1] The "generalized principals of medical science" championed by Thermafiber on pages 31 and 32 of its brief, by their very definition, effectively eviscerate the purpose of an *individualized* assessment. Generalizations tend to treat all people with certain disabilities alike and force employers to make disability determinations that are not based on the individual's actual condition. See Appellant's Br., p. 19, citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S. Ct. 2139, 144 L.Ed.2d 450 (1999), *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 119 S. Ct. 2162, 144 L.Ed.2d 518 (1999), *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 121 S. Ct. 1879, 149 L.Ed.2d 904 (2001). The fact that these generalizations were repeated by Thermafiber's expert, Dr. Cavanaugh, does not make an assessment based on them any more "individualized."

[2] The allegation that harm might be substantial is not dispositive. "Substantial harm" is only one prong of the standard set forth in 29 C.F.R. § 1630.2(r) (1993) ("*Direct Threat* means a significant risk of substantial harm to the health or safety of the individual or others … ."). Darnell does not dispute that Thermafiber could be a dangerous working environment for any employee; but just because the harm that might be suffered could be substantial does not mean that the risk of such harm occurring is significant for a given individual.

reported that his blood sugars ranged from the 60's up to the 300's. Appendix, p. 0073. Dr. Levine decided to immediately follow up on Darnell's report by measuring Darnell's blood glucose level and performing an A1C test. Those results were reported to be "grossly well" by Dr. Levine: glucose of 180 and A1C of 6.6%. Appendix, p. 0073. (The blood glucose level was only slightly above the target range, while the A1C was within normal limits.) [3]

Both Thermafiber and the district court have misinterpreted Dr. Levine's deposition testimony regarding his opinion of Dr. Cavanaugh's risk assessment.[4] Thermafiber's assertion that Dr. Levine "expressly declined to find Cavanaugh's risk assessment unreasonable" is in conflict with the record. Appellee's Br., p. 30 (emphasis added). In his deposition, Dr. Levine testifies, "… to say that [Darnell is] a risk at work I think is a reach." See footnote 4. Dr. Levine says, in substance, that he has difficulty understanding, in the absence of a "face-to-face evaluation", how Dr. Cavanaugh could have found a significant risk of injury merely from his review of Dr. Levine's and Dr. McCann's data.

Thermafiber also fails to accurately present Dr. Levine's comments regarding Darnell's medical records. See Appellee's Br., p. 33. Contrary to Thermafiber's claim, Dr. Levine did not

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[3] On April 24, 2001, Darnell reported to Dr. Levine in the course of a routine exam that his blood glucose level may at times range as high as 400. See Appellee's Br., p. 7 and Appendix, p. 0069. Dr. Levine actually tested Darnell that day and found that his blood glucose level was 269. Appendix, p. 0184 (Levine Depo., p. 57, ln. 17-23). There is no evidence in the record of Darnell's blood glucose level on August 9, 2001 because Dr. McCann did not perform the test. But 13 days later, Dr. Levine recorded Darnell's blood glucose level at 183. Appendix, p. 0069.

[4] Q. … I believe you testified earlier that you had no dispute with Dr. Cavanaugh's conclusion other than he did not, unlike you, have the ability to personally interview and care for Mr. Darnell?

A. Right. … It's unclear to me what his thought process was in moving from his review of my data and Dr. McCann's data to that there's a substantial risk of injury.

His conclusion of uncontrolled I think is reasonable, and that's based on the A1C testing. But to say that he's a risk at work I think is a reach. Personally I think I'd be a little more comfortable, being that he's an endocrinologist, that he would have at least asked to or have the opportunity to evaluate the patient and then arrive at that conclusion. Then I'd be more comfortable with it.

I will defer to the findings of a consultant in cases such as these because they have the additional expertise. But a lot more weight is placed, I believe, on a face-to-face evaluation. Appendix, p. 0203 (Levine Depo., pp. 133, ln. 16 through 134, ln. 20).

concede that a physician reviewing Darnell's medical records could reasonably conclude he posed a danger to himself and others. *Id*. In deposition testimony cited by Thermafiber, Dr. Levine says that he did not believe another physician simply looking at Darnell's raw data, without examining him, could come to the reasoned medical judgment that he was potentially a danger to himself or others in the Thermafiber environment. See Appendix, p. 0189 (Levine Depo., pp. 78, ln. 9 through 80, ln. 3).

Thermafiber also claims Dr. Levine "repeatedly admitted that in August 2001, Darnell's diabetes was uncontrolled." Appellee's Br., p. 28. A fair reading of Dr. Levine's entire deposition testimony does not establish this alleged fact. Dr. Levine says the use of the terms "uncontrolled" and "poorly controlled" is "a word game." Appendix, p. 0203 (Levine Depo., p. 136, ln. 5-7). The term "uncontrolled" or "poorly controlled" may be used to describe a patient whose only diabetic symptom is a sporadic blood glucose level or A1C reading higher than an optimum target level as well as a patient whose blood glucose level and A1C reading are consistently high and the patient is experiencing a number of medical complications resulting in frequent hospitalizations. See, e.g., Appendix, p. 0189, 0190 and 0203 (Levine Depo., pp. 80, ln. 24 through 81, ln. 10; 134, ln. 8-9; and 136, ln. 4-5).

Dr. Levine testifies, and Thermafiber concedes, that there is no uniform medical definition for the term "uncontrolled". See Appendix, p. 0190 (Levine Depo., pp. 81, ln. 11 through 82, ln. 5); and Appellee's Br., p. 34. At times, Darnell has had blood glucose and A1C levels outside of the target range, but Darnell has never had any complications or hospitalizations that would support a finding that his *diabetes* is "uncontrolled" as Dr. Levine defines it. See Appendix, p. 0190 (Levine Depo., p. 81, ln. 2-6).

D.

The Direct Threat Determination Is Not Based On A Reasonable Medical Judgment That Relies On The Best Available Medical And/Or Other Objective Evidence.

Dr. Cavanaugh's and Dr. McCann's "belief" that Dr. McCann's medical judgment was reasonable is not sufficient to satisfy the legal standard set forth in 29 C.F.R. § 1630.2(r). A doctor's medical judgment must be supported by "the most current medical knowledge and/or … the best available objective evidence." *Id*. Generalized evidence of Thermafiber's complex manufacturing processes and national occupational safety statistics are irrelevant to the direct threat issue. None of this evidence supports a finding that Darnell is a direct threat to his health or safety or the health or safety of others. Evidence that might have supported a direct threat determination, such as Darnell's current blood glucose and A1C measurements were not obtained by Dr. McCann at the time of the pre-employment physical.[5]

1.

Darnell's Reports Of Self-Treating Are Not "Objective Evidence" That May Be Relied Upon For An Individualized Assessment.

Thermafiber contends that any information related by Darnell to his doctor is objective evidence sufficient in and of itself to support the doctor's individualized assessment. Appellee's Br., pp. 23-24. Thermafiber is mistaken. Objective evidence is derived from tests or measurements or patient reports of actual test results: for example, A1C = 6.2%; blood glucose level = 220; blood pressure = 120/80; and vision = 20/20. On the other hand, subjective evidence which is reported to the doctor by his patient is not as precise and may call for further

[5] Thermafiber argues that Dr. McCann did not need this objective evidence because Darnell told Dr. McCann he was not under control. See Appendix, p. 0149 (McCann Depo., p. 32, ln. 12-15). Darnell disputes this contention. See Appendix, p. 0032 (Darnell Depo., pp. 38, ln. 13 through 39, ln. 10) (Darnell disagreed with Dr. McCann's assessment that his sugar was out of control. Darnell told Dr. McCann he felt fine, he had never had any complications, and he had just performed similar work in 100-degree weather without any problems).

investigation: for example, a report by a patient that his diabetes is "out of control;" or his blood sugars run "high;" or he has "high" blood pressure; or his vision is "good." It is not professionally appropriate for a medical doctor to rely solely on a patient's subjective statements in determining whether his diabetes is under control. Appendix, p. 0195 (Levine Depo., p. 101, ln. 13-18).

The objective information obtained by Dr. McCann actually favored Darnell. The physical examination showed no abnormalities (i.e., 20/20 vision, blood pressure 120/79, heart rate of 72, temperature of 97.6º, and no history of fainting or passing out at work or in the heat). Appendix, pp. 0054-0056, 0144 and 0145 (McCann Depo., pp. 11, ln. 15-25; and 13, ln. 23-14, ln. 17). Dr. McCann relied solely on subjective evidence to determine that Darnell was uncontrolled. Darnell told Dr. McCann that his blood sugars ran "high," Darnell did not tell Dr. McCann that his blood glucose measurement was 130 or 230 or 430; and he did not tell Dr. McCann how often or at what times his sugars ran "high."[6] Darnell's subjective statements to Dr. McCann about his blood sugar levels and self-treatment cannot establish objectively that Darnell was a direct threat.

2.

Darnell's "Temper" Does Not Make Him A Direct Threat In The Workplace.

Thermafiber attempts to meet its direct threat burden of proof by pointing out to the Court that Darnell was irritable with Dr. McCann. See Appellee's Br., p. 23. Thermafiber uses Dr. Levine's general statement that high or low blood sugars can increase irritability to insinuate

[6] Dr. McCann did not measure Darnell's blood glucose level. Appendix, p. 0149 (McCann Depo., p. 31, ln. 7-12). Dr. McCann did not "look at the whole patient", as he says he should do, by determining the patient's A1C. See Appendix, 0145 and 0146 (McCann Depo., pp. 13, ln. 7-13; 16, ln. 4-10; and 17, ln. 1-12). He did not even ask Darnell about his A1C history. See Appendix, p. 0144 (McCann Depo., p. 11, ln. 15-21). (In any event, the A1C results found in Darnell's history are not determinative of his levels on August 9, 2001 -- as Thermafiber admitted, those are only averages. See Appellee's Br., p. 26.)

that Darnell was either hyperglycemic or hypoglycemic at the time of his August 9, 2001 physical. Appendix, p. 0175 (Levine Depo., pp. 23, ln. 25 through 24, ln. 8). In its proper context, Darnell was merely upset with Dr. McCann because he was tired and hungry and had waited 45 minutes to see the doctor. Darnell became irritated and spoke out when Dr. McCann began lecturing him for the second time about smoking rather than proceeding with the physical. Appendix, p. 0033 (Darnell Depo., pp. 41, ln. 18 through 42, ln. 9; and 43, ln. 18 through 44, ln. 4).

Thermafiber exaggerates the evidence of Darnell's behavior to support a conclusion not otherwise reachable by an impartial fact finder, i.e., that Darnell was a direct threat to himself or others. This is yet another attempt by Thermafiber to attack Darnell's character rather than face head-on its own failure to conduct a proper assessment of Darnell's medical condition.

3.

Darnell's "Compliance" History Does Not
Make Him A Direct Threat In The Workplace.

Thermafiber attempts to make much of the fact that Darnell was, at times, a "poorly compliant" patient. See Appellee's Br., pp. 28-29. Darnell does not deny that at times he has failed to eat properly, to measure his blood sugars, or to take insulin on a timely basis. But there is no evidence in the record that Darnell purposely chooses to ignore his doctor's advice. Despite best intentions, patients routinely fail, or find themselves unable, to heed their doctors' warnings to stop smoking or lose weight or test blood sugars three times per day. Yet, it cannot be fairly said with regard to any one particular individual that a failure to heed warnings places the patient at imminent risk of harm to himself or others. The statistical probability of long-term harm may exist without ever crossing the direct threat threshold. Darnell worked at Thermafiber for nearly ten months without any problems or negative performance reviews. (When he came

back, he was offered the job again.) He has lived with diabetes for years without any complications or reactions. Compliance and frequency of doctor visits are not determinative of a safety risk.

In an attempt to retroactively bolster its position, Thermafiber points out that Darnell failed to return for blood tests or follow-up appointments with Dr. Levine subsequent to August 22, 2001, after Dr. McCann rejected him for employment. Unfortunately for Darnell, he did not have health insurance after leaving Thermafiber for the first time in May of 2001. See Appendix, p. 0030 (Darnell Depo., pp. 29, ln. 20 through 30, ln. 1; and 32, ln. 1-6). Darnell had to make a tough choice given his lack of funds; he felt that he did not need to make regular visits to the doctor because he was not having any health problems. See, e.g., Appendix, p. 0032 (Darnell Depo., pp. 38, ln. 19 through 39, ln. 1-10). Darnell's past history of occasionally being a poorly compliant patient does not mean that he is at risk of having a dangerous diabetic episode.[7]

E.

Thermafiber's *Prima Facie* Case Argument.

1.

Thermafiber Waived The Argument By Failing To Raise It Below.

For the first time in this case, Thermafiber argues (in the Appellee's Brief) that Darnell cannot make out a *prima facie* case for "regarded as" discrimination because he failed to designate any evidence showing that Thermafiber believed his diabetes substantially limited activities of central importance to his daily life. Given the untenable nature of the appellee's

[7] It is important to note that high blood glucose is at issue in this case, not low blood glucose. There is no evidence in the medical records that Darnell has ever had a problem with low blood glucose. The distinction is important because low blood glucose causes unconsciousness. High blood glucose levels generally cause long-term complications, not short-term difficulties. *Amicus* Br., p. 5.

position in this appeal, it is not surprising that Thermafiber has attempted to throw the proverbial "Hail Mary pass" at the end its brief. "Although the Court of Appeals may affirm a grant of summary judgment 'on any ground that finds support in the record, … the ground must have been adequately presented in the trial court so that the non-moving party had an opportunity to submit affidavits or other evidence and contest the issue.'" *Smurfit Newsprint Corp. v. Southeast Paper Mfg.*, 368 F.3d 944, 954 (7th Cir. 2004), reh. denied, citing *Box v. A&P Tea Co.,* 772 F.2d 1372, 1376 (7th Cir. 1985). The Court of Appeals will not consider arguments that are presented for the first time on appeal. *Glass v. Dachel,* 2 F.3d 733, 740 (7th Cir. 1993); *Matter of Excello Press, Inc.*, 967 F.2d 1109, 1115 (7th Cir. 1992).

Thermafiber admits it never raised the issue of Darnell's inability to establish a *prima facie* "regarded as" claim at the trial court level. Appellee's Br., p.19 n.11. As Thermafiber stated in its summary judgment memorandum, "… this case is not about disability discrimination but unacceptable risk." Suppl. App., p. 2. If Thermafiber had actually briefed and argued this issue in its initial summary judgment motion, Darnell would have submitted affidavits, deposition testimony, or other relevant evidence showing that Thermafiber regarded him as having an impairment substantially limiting his ability to perform a broad range of jobs at its production facility. Because Thermafiber's argument regarding the *prima facie* "regarded as" claim was not made in the district court, it is waived. *Gagan v. American Cablevison, Inc.*, 77 F.3d 951, 966 (7th Cir. 1996); *Perry v. Sullivan*, 207 F.3d 379, 383 (7th Cir. 2000); and *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse – Wisconsin, Inc.*, 991 F.2d 1249, 1258 (7th Cir. 1993), *cert.* denied by 514 U.S. 1096, 115 S. Ct. 1823, 131 L.Ed.2d 745 (1995).

Thermafiber is attempting to raise for the first time, in the context of Darnell's appeal, an issue not raised in its summary judgment motion and not decided by the lower court, i.e., whether Thermafiber regarded Darnell as disabled within the meaning of the ADA, 42 U.S.C. § 12102(2)(A) and (C). Because Thermafiber never questioned Darnell's ability to establish a *prima facie* claim of disability, the district court properly assumed that all of the elements of Darnell's *prima facie* case had been established or stipulated, and the court proceeded to decide the summary judgment motion on other grounds. See Memorandum and Order, p. 5. Thermafiber, not Darnell, filed the motion for summary judgment. As a result, there was no reason for Darnell to submit evidence on an issue never raised by Thermafiber at the summary judgment stage.

Whether Darnell could have established the elements of a *prima facie* case of disability at the summary judgment stage was never considered or decided by the lower court; consequently, there is no decision on this issue for an appellate court to affirm or reverse.

2.

Even If Thermafiber's Attack On Darnell's
Prima Facie Case Is Not Waived, It Fails Nevertheless.

Thermafiber argues in its summary judgment memorandum that Darnell is not a "qualified individual" as defined by the ADA because Darnell poses a direct health and safety threat to himself or others. See Suppl. App., p. 2. Darnell, on the other hand, argues that he was a qualified individual with a disability in that he was regarded by Thermafiber as having a physical or mental impairment that substantially limited the major life activity of working. Suppl. App., p. 33-34. More specifically, Darnell claims Thermafiber regarded him as unable to perform a broad range of jobs at its facility. Supp. App., pp. 34-35. (Dr. McCann testified that he did not know of any position at Thermafiber into which he would place Darnell, a statement echoed by Thermafiber's production manager, Daniel Wakefield, who stated that Darnell would be required to climb ladders, work in confined spaces, operate various machines including a baler, compression packer, trim and recycler system, stacking machine and table conveyor, and then work around finishing ovens and rapidly spinning packaging machines. Suppl. App., pp. 34-35.)

Whether Thermafiber regarded Darnell as unable to perform a broad range of jobs at its facility is, at a minimum, a genuine issue of material fact precluding summary judgment. See *Coleman v. Keebler Co.,* 997 F. Supp. 1102, 1114 (N.D. Ind. 1998) (court denied employer's motion for summary judgment in an ADA case because there was a genuine issue of material fact as to whether the employer perceived the plaintiff as unable to perform a broad range of jobs in its production plant); and *Taylor v. Pathmark Stores, Inc.,* 177 F.3d 180, 188 (3rd Cir. 1999), citing *id*. (evidence of an employer's perception that an employee cannot perform a wide range of jobs suffices to make out a "regarded as" claim under the ADA).

Thermafiber claims the record contains insufficient evidence to support a finding that Thermafiber regarded Darnell as disabled. Yet the district court reviewed the evidence in the record and specifically found that a *prima facie* case was established for purposes of deciding the summary judgment motion. Memorandum and Order, p. 5.[8]

Citing *Toyota Motor Mfg., Kentucky, Inc. v. Williams,* 534 U.S. 184, 122 S. Ct. 681, 151 L.Ed.2d 615 (2002), Thermafiber says Darnell cannot make out a *prima facie* case of discrimination unless he provides evidence showing Thermafiber believed his diabetes substantially limited him from doing activities of central importance to most people's daily lives. But *Toyota* dealt with the major life activity of performing manual tasks, not the major life activity of working. The Supreme Court held that, to be substantially limited in performing manual tasks such as repetitive work with hands and arms extended out or above shoulder level, the impairment must be one which prevents or restricts the individual from doing tasks that are of central importance to most people's daily lives. Where the major life activity is working, however, the term "substantially limits" means something different. It means "significantly

[8] "Based on those considerations [set forth on pages 3-5 of the Memorandum and Order], and viewing the record in Mr. Darnell's favor, as the court must do at the summary judgment stage, the court will assume Mr. Darnell can establish a prima facie case." Appendix, p. 0352.

restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes…". 29 C.F.R. § 1630.2(j)(3) (Appendix, p. 0386). In summary, even if Thermafiber had not waived its "*prima facie"* argument, Darnell would not have been required to provide evidence of an actual or perceived inability to perform activities of central importance to most people's daily lives.

Thermafiber misrepresents the record when it stats that "Darnell … recites no fact suggesting that Thermafiber regarded him as unable to perform anything more than essential functions of the particular job he sought, and in the particular work environment where he would have performed them." Appellee's Br., p. 51-52. Thermafiber's Human Resources Manager, David Steffen ("Steffen"), affirms that Thermafiber trains all employees to perform all functions in its operations. Appendix, p. 0013; Suppl. App., p. 34. Steffen states that Thermafiber would have "cross-train[ed]" Darnell and expected him to learn additional jobs beyond the entry-level Operator 2 position. *Id.* (Thermafiber has listed all of its job classifications and functions in a chart on pages 0297 and 0298 of the Appendix. It can be inferred from this chart that Thermafiber regarded Darnell as unable to perform more than just the Operator 2 position. The duties of an Operator 2 include the duties for the Utility and Operator 1 positions; and all of the higher positions in the Production Department require the ability to perform the duties of an Operator 2 position as well. By implication, Thermafiber perceived Darnell to be incapable of performing most, if not all, of the production class jobs in the plant (i.e., Utility, Operator 1, Operator 3, Operator 4, Operator 5, Operator 6, Supervisor 1, and Supervisor 2).[9])

Whether or not Thermafiber waived the issue in the district court, the trial court was correct in assuming that Darnell had established a *prima facie* case.

[9] This inference is corroborated by Dr. McCann, who testified that he did not know of any position at Thermafiber into which he would place Darnell. See Appendix, p. 0151 (McCann Depo., p. 37, ln. 22-25); Suppl. App., p. 35.

III.

CONCLUSION

The decision of the district court granting Thermafiber's motion for summary judgment should be reversed and the case should be remanded for further proceedings.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4905 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in 12 pt. Times New Roman type.

Dated this 4th day of November, 2004.

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CERTIFICATE OF SERVICE

I certify that on the 4th day of November, 2004, I dispatched the foregoing Reply Brief of Plaintiff-Appellant, Brent Darnell, to a third-party commercial carrier for overnight delivery to the Clerk and I forwarded a copy of the foregoing Reply Brief of Plaintiff-Appellant, Brent Darnell by First Class United States Mail, postage prepaid to:

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