

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

STEVE KAUFMAN,)	Case No. 7:06cv5017
)	
Plaintiff,)	
)	
v.)	PLAINTIFF'S TRIAL BRIEF
)	
THE WESTERN SUGAR)	
COOPERATIVE, Inc.,)	
)	
Defendant.)	

STATEMENT OF FACTS

Summary: Plaintiff is a Type I diabetic who worked as an electrician for defendant. Upon the advice of his treating medical provider(s), he requested numerous times both personally and through written requests provided by those advising physicians and medical provider(s), to be transferred from his rotating shift schedule to one of the two straight day shift electrician positions available at defendant's facility. Defendant repeatedly denied plaintiff's request(s).

Background: Defendant, The Western Sugar Cooperative is a sugar beet co-op comprised of six (6) sugar processing plants located in Colorado, Montana, Nebraska and Wyoming. Plaintiff, Steve Kaufman worked for defendant at its Scottsbluff, Nebraska facility from approximately 1986 -2004, initially, as a welder, then as an electrician, the position that he held for the overwhelming majority of his tenure with defendant. During all or most times relevant to the case, defendant maintained six (6) electricians at its Scottsbluff facility, four (4) worked rotating shift schedules where they would alternate every few days between the day and night shifts and two (2) worked straight day shift schedules. Plaintiff was one of the four rotating shift electricians.

Plaintiff is a Type I diabetic, indeed, he is what is termed a "labile" diabetic. The term "labile" denotes a diabetic who is particularly susceptible to erratic or unstable

blood sugar levels. In order to attempt to stabilize his blood sugar levels, at least three of plaintiff's medical providers indicated, inter alia, the need to adopt and maintain a set daily routine. A rotating shift work schedule is the polar opposite of a set daily routine and, consequently, was inimical to plaintiff's efforts to stabilize his blood sugar levels. Pursuant to the instruction(s) that he received from his medical providers, plaintiff repeatedly requested to be placed in one of the two day shift electrician positions and his medical providers provided correspondence directed to defendant indicating the medical necessity of his being placed in a straight day shift position and requesting the same on his behalf. There was complete and independently determined (these were separate and unaffiliated medical professionals) unanimity in the opinions of all medical professionals who treated plaintiff's diabetes as to the need for a set daily routine and the cessation of his working a rotating shift schedule. Based upon defendant's expert witness disclosure, it has enlisted the services of an endocrinologist who, apparently, believes that plaintiff did not require an accommodation to control his blood sugars.

Defendant's responses ranged from ignoring his responses to various arbitrarily constructed excuses for refusing to place him on a straight day shift position. On one occasion, former Human Resource representative, Becky Stitt indicated that he could "possibly" be placed in the requested day shift position if he obtained an electrician's Journeyman's License, despite the fact that there was no requirement that the day shift electricians possess Journeyman's Licensure. Nevertheless, plaintiff, dutifully obtained his Journeyman's License; upon receipt of said license he was not placed as a day shift electrician. On another occasion, one of the rotating shift electricians indicated that he would be willing to work a straight night shift schedule so that plaintiff could be placed in a straight day shift position. Again, defendant, summarily refused. On another occasion, defendant indicated that if plaintiff's medical providers cleared his return to work, that he would be placed on the requested straight day shift position. Upon presentation of medical notes and a letter from plaintiff's medical provider(s) duly clearing plaintiff's return to work, defendant, nevertheless refused to place plaintiff on the straight day schedule.

Despite its previous representations regarding his discussed placement on the day shift, defendant now denies that Steve Kaufman was qualified to be placed in one of the

day shift electrician positions. It claims, inter alia, that the ability to cover night shifts comprised an essential function of the day shift electrician's position and that this disqualified Steve Kaufman from placement as a day electrician. However, the evidence is expected to show that night shift coverage was not an essential function of the day electrician position. Specifically, when night shifts were left vacant by an absent employee, coverage for the vacated night shift electrician was first sought from the available stand-by rotating shift electricians. If no stand-by rotating shift electrician could cover the empty shift, the next coverage option was either the "lead man", generally, Duane Lucke or one of the straight day shift electricians. In the event that a day electrician had to cover a night shift, day electrician Darrell Kemple would provide such coverage an overwhelming majority of the time. Former long time day electrician, Lyle Belgium very rarely covered night shifts.

In addition to anticipated witness testimony indicating the rarity in which Lyle Belgium would cover night shifts, the electricians, among other job designations at defendant's Scottsbluff facility, were required to complete logs indicating, generally, the work that they performed during their work shift as well as indicating whether the shift time(s). These logs were sought by plaintiff, but, never produced and, in their stead, plaintiff anticipates that defendant will attempt to introduce "analyses" or summa(ies) produced by E&I Supervisor John Araujo to indicate the number of night shifts that were actually covered by Lyle Belgium. Plaintiff believes that the evidence will not indicate that night shift coverage was an essential function of the day electrician's job. However, his medical providers cleared him to occasionally cover night shifts and he was willing to cover such shifts as his health permitted.

Legal Standards: Initially, plaintiff notes that the Americans with Disabilities Act ("ADA") prohibits an employer from adversely treating an employee or applicant when such adverse treatment is motivated by the employee or applicant's disability or the employer's perception of the employee or applicant as disabled. However, in addition to prohibiting discrimination, the ADA also places on employers an affirmative duty to reasonably accommodate employees who suffer disabilit(ies) as that term is defined by the ADA. The instant case is of the latter variety.

Plaintiff must show that he is a qualified individual, with or without an accommodation, who requested a reasonable accommodation that was reasonably related to his disability/impaired major life activit(ies), that the defendant failed and/or refused to provide the requested reasonable accommodation and, of course, his damages. Plaintiff's impaired major life activit(ies) are, viewed specifically, controlling his blood sugars¹ and, viewed more broadly, caring for himself. In *Fiscus v. Wal-Mart Stores, Inc.*², 385 F.3d 378, 384 (3rd Cir. 2004) a 3rd Circuit appellate panel indicated “[u]nder *Bragdon*³ the touchstone of a major life activity is its importance or significance. An activity which is “central to the life process” expressly meets that test.”. The measured metabolization or processing of carbohydrates into energy i.e. blood sugar control/management is, undeniably, “central to the life process”. As indicated above, rotational shift work schedules are inimical to a diabetic's efforts to control blood sugars, thus, the requested accommodation is directly related to the impaired major life activit(ies) for which relief was sought. The requested accommodation would not have imposed undue hardship on the defendant, indeed, it would not have cost defendant anything. The requested accommodation would have allowed a skilled and experienced electrician to keep his job and much needed health insurance benefits and, indeed, would have benefited the defendant as it has struggled to locate and/or maintain employment of experienced and/or

¹ Controlling blood sugars may also be thought of as processing carbohydrates in a measured manner. Type I diabetes is a pancreatic disease in which the pancreas fails to produce insulin which is necessary to the process of converting carbohydrates into energy. Mere introduction or provision of insulin, unresponsive to a diabetic's constantly changing metabolic needs does not remedy the problem created by the malfunctioning pancreas. Specifically, the introduction of too little insulin to the diabetic's metabolic needs results in high blood sugar levels which is known as hyperglycemia. Long term consequences of unchecked hyperglycemia include atherosclerosis (hardening of the arteries), diabetic retinopathy (a condition in which blood vessels in the eyes burst causing blindness), and diabetic neuropathy (circulation problems). Immediate danger associated with hyperglycemia includes the condition known as ketoacidosis, which, can cause the diabetic to lose consciousness and even death. Alternatively, the over administration of insulin can lead to low blood sugar levels, known as hypoglycemia. Hypoglycemia is an acute condition which incapacitates the sufferer and, if not treated immediately, can be fatal.

² In *Fiscus*, the plaintiff suffered from kidney failure (the impairment) which substantially limited her ability in the major life activit(ies) of blood cleansing, waste elimination and caring for herself. Thus, just as Ms. Fiscus' impairment of kidney disease substantially limited her in the major life activities of blood cleansing, waste elimination and caring for oneself and just as an individual with lung disease (impairment) is substantially limited in the major life activity of breathing, Steve Kaufman's impairment consisting of the pancreatic disease of Type 1 diabetes substantially limits him in the major life activities of blood sugar control and caring for oneself.

³ *Bragdon v. Abbott*, 524 U.S. 624 (1998)

qualified electricians since the departure of the plaintiff as well as both former straight day shift electricians, Darrell Kempel and Lyle Belgum.⁴

Remedies: Plaintiff seeks damages provided by the ADA including, lost wages/income and lost benefits, including, lost pension/retirement contributions and lost health insurance, as well as damages for emotional pain and suffering, punitive damages and attorney fees and costs. The Court also has jurisdiction to award equitable relief which would include an award of front pay to offset any prospective lost wages/income incurred by plaintiff despite his mitigative efforts and the resumption of his health insurance coverage.

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CERTIFICATE OF SERVICE

The foregoing Trial Brief was filed electronically on or before November 16, 2007 via the cm/ecf system and, consequently, served by email on defendant's counsel, Howard P. Olsen, Jr., 1502 2nd Ave., Scottsbluff, NE 69361

/s/Paul D. Boross

⁴ Mr. Belgum's voluntary departure from the defendant's employ in the spring of 2007 created a natural opening for a day shift electrician at the facility. The plaintiff inquired into whether it would simply bring him back and place him in the vacant day shift electrician following Lyle Belgum's departure which would have solved the plaintiff's problem with working a rotating shift schedule as well as the defendant's labor dilemma in replacing an experienced electrician. Defendant indicated at Mr. Araujo's deposition that it would "consider" the plaintiff for placement in the vacant day shift electrician position. Specifically, defendant indicated that plaintiff could apply and would receive consideration like anyone else. However, defendant did not provide plaintiff notice of the period in which applications were being accepted until after the application deadline(s) had expired. Upon receipt of the delinquent job posting from the defendant, plaintiff, nevertheless attempted to apply for Mr. Belgum's vacated day shift position only to be denied opportunity to apply for the cited reason that the application deadline had passed. Mr. Kempel very recently left the defendant's employ.