



Reasonable Accommodations for Diabetes Management in the Workplace

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I. Introduction

For individuals with diabetes, life is an ongoing balancing act. Diabetes is a persistent, serious, and chronic disease that in the short term may cause serious illness, and in the long term may lead to dangerous complications. Diabetes must be managed at work, just as during other daily activities, and management needs, while they vary from person to person, can impact the work environment. For this reason, people with diabetes sometimes need accommodations on the job to allow them to properly manage their condition. This paper explores the types of accommodations that can benefit people with diabetes, and the legal standards governing when such accommodations must be provided under federal disability discrimination laws. This paper focuses on accommodations that may be needed for diabetes management; but also briefly discusses other accommodations that may be needed due to complications related to diabetes, such as mobility impairments and vision loss.

Section II of this paper gives a brief overview of the science and medicine of diabetes, and Section III introduces the legal concepts of reasonable accommodations, undue hardship and the interactive process, Section IV examines the reasonableness of self-care accommodations in the workplace, and Section V takes a brief look at common accommodations for long-term complications, and Section VI addresses reassignment, which may be required as an accommodation if the person is not able to perform a job due to diabetes or another condition.

II. The Science and Medicine of Diabetes

A. Basic Information on Diabetes

Diabetes is a serious, chronic endocrine system disorder that affects over 29 million individuals in the United States.¹ Diabetes results from the body's inability to produce or utilize insulin, a hormone responsible for regulating glucose (sugar) levels in the bloodstream. The pancreas is

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¹ CTRS. FOR DISEASE CONTROL & PREVENTION, DEP'T OF HEALTH AND HUMAN SERVS., NATIONAL DIABETES STATISTICS REPORT (2014), available at <http://www.cdc.gov/diabetes/pubs/statsreport14/national-diabetes-report-web.pdf>.

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. 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 without diabetes, this is a finely tuned system that keeps blood glucose levels within the normal, healthy range. Yet for individuals with diabetes, this well-regulated process is disrupted, because the pancreas does not produce insulin, or because the insulin present in the body cannot be used properly.

B. Types of Diabetes

There are three common types of diabetes: type 1, type 2, and gestational diabetes. Type 1 diabetes is an autoimmune disorder in which the body's immune system attacks beta cells in the pancreas, the cells responsible for producing insulin. As a result, the pancreas either no longer produces insulin at all, or produces it in very small quantities. Thus, a person with type 1 diabetes needs to receive insulin from an outside source, generally through insulin injections or an insulin pump, in order to survive.²

In type 2 diabetes, the pancreas is still able to produce insulin, but either it cannot make enough, or the insulin that is produced is not fully utilized by the body. Researchers believe that type 2 diabetes results from a condition known as insulin resistance, in which the body's cells are unable to recognize insulin or use it effectively. Over time, this hampers the ability of the pancreas to make insulin and causes blood glucose levels to rise. Some individuals with type 2 diabetes are able to regulate their diabetes through diet and exercise alone. Other individuals need medications to help control their diabetes. Some individuals with type 2 diabetes need to manage their diabetes with insulin as individuals with type 1 diabetes do.

Gestational diabetes is diagnosed during pregnancy. Researchers believe that gestational diabetes develops when hormones produced during pregnancy reduce the effectiveness of insulin, which results in insulin resistance and high blood glucose levels. Gestational diabetes occurs in about 18 percent of pregnancies and usually resolves when the pregnancy ends, though individuals who develop gestational diabetes are at greater risk for developing type 2 diabetes later.

² 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 alternative terms are no longer favored by the diabetes health care community and should be avoided because they are ambiguous.

C. Complications Associated with Diabetes

1. Hypoglycemia

Hypoglycemia, or low blood glucose, is a serious condition associated with diabetes that can develop very suddenly. Hypoglycemia most often occurs in individuals using insulin or certain types of oral medications (sulfonylureas).³ Symptoms of mild to moderate hypoglycemia include tremors, sweating, lightheadedness, irritability, confusion, and drowsiness. Symptoms of severe hypoglycemia include inability to swallow, convulsions, and unconsciousness. Mild to moderate hypoglycemia can generally be treated easily and effectively, often by consuming a source of fast-acting carbohydrates. If left untreated, hypoglycemia can be life-threatening.

2. Hyperglycemia

As discussed above, diabetes occurs when an individual's pancreas no longer makes insulin for the body or fails to properly utilize the insulin that is produced. As a result, glucose collects in the bloodstream causing high blood glucose levels or hyperglycemia. Symptoms of hyperglycemia include thirst, dry mouth, frequent or increased urination, changes in appetite and nausea, blurry vision, and fatigue. Hyperglycemia can be caused by too little insulin or other glucose-lowering medications, food intake that has not been properly covered by insulin, or decreased physical activity. Hyperglycemia may also be triggered by illness, infection, injury, or stress. Unlike hypoglycemia, hyperglycemia usually onsets slowly, occurring over several hours or even days. If left untreated, acute hyperglycemia can lead to diabetic ketoacidosis, a buildup of ketones in the blood and dehydration. Signs of ketoacidosis include abdominal pain, vomiting, dry mouth, extreme thirst, fruity breath, heavy breathing, shortness of breath, lethargy, and disorientation. If left untreated diabetic ketoacidosis can be life-threatening.

3. Long term complications

Over the long term, diabetes increases a person's risk for heart disease, stroke, eye disease and blindness, kidney failure, neuropathy (nerve disease), gum disease and dental problems, hearing loss, and amputations. Statistics indicate that:

- *Retinopathy*: 28.5 percent of people with diabetes have diabetic retinopathy, and 4.4 % have advanced retinopathy that can lead to severe vision loss;
- *Kidney disease*: diabetes is the leading cause of kidney failure, accounting for 44 percent of new cases in 2011;
- *Cardiovascular disease*: in 2010, death rates from cardiovascular disease are 1.7 times higher for adults with than those without diabetes, and hospitalization rates for heart attacks are 1.8 times higher for those with diabetes;

³ 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 that make muscle cells more sensitive to insulin (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.

- *Cerebrovascular disease*: hospitalization rates for stroke are 1.5 times higher among people with diabetes;
- *Hypertension*: about 71 percent of adults with diabetes have high blood pressure; and
- *Amputations*: about 60 percent of non-traumatic lower-limb amputations occur in people with diabetes, and in 2010 about 73,000 such amputations were performed on people with diabetes.⁴

D. Importance of Diabetes Management and Treatment

Given these statistics and information, it is easy to understand why diabetes management is so important. Diabetes management is a 24/7 process and requires careful attention, balance, and monitoring. While each individual will have different needs, individuals with diabetes need to regularly monitor blood glucose, eat a balanced diet, monitor exercise, and take medications on schedule. Even with careful monitoring, diabetes may still lead to long-term complications, so regular medical attention and appointments are necessary, both to monitor diabetes management and to treat complications.

III. Reasonable Accommodations: The Legal Framework

A. Legal Definition

The Americans with Disabilities Act (ADA) defines discrimination to include failure to provide reasonable accommodations to individuals with disabilities.⁵ Section 504 of the Rehabilitation Act also imposes the same duty upon employers receiving federal funding.⁶ A reasonable accommodation is defined within the statute as:

- (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.⁷

⁴ NATIONAL DIABETES STATISTICS REPORT, *supra* note 1.

⁵ 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9(a). The law now does not require employers to provide accommodations to individuals who qualify for the ADA's protection only because they are regarded as disabled. 42 U.S.C. § 12201(h); 29 C.F.R. § 1630.2(o)(4). Before the passage of the ADA Amendments Act of 2008, courts were split on whether the accommodation requirement extended to those regarded as disabled, but the new law made clear that it does not. For this reason, plaintiffs alleging that they were denied reasonable accommodations must show that they had an actual disability or a record of a disability, and attorneys should plead accordingly. For more information on proving that diabetes is a disability under the ADA, see American Diabetes Ass'n, *Demonstrating Coverage under the ADA Amendments Act of 2008 for People with Diabetes* (Jan. 2015), available at <http://main.diabetes.org/dorg/PDFs/Advocacy/Discrimination/atty-demonstrating-coverage-adaaa.pdf>.

⁶ See *Sanchez v. Vilsack*, 695 F. 3d 1174, 1177 (10th Cir. 2012); Thus, the analysis in this paper is also applicable to claims under the Rehabilitation Act.

⁷ 42 U.S. C. § 12111; see also 29 C.F.R 1630.2(o).

Employers must provide reasonable accommodations to assist otherwise qualified individuals with disabilities to perform the essential functions of their jobs, or to “enjoy equal benefits and privileges of employment.”⁸

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Taken together, these definitions point to three general categories of reasonable accommodations: 1) physical changes to a workplace to make the building or facility accessible to individuals with disabilities; 2) modifications to company policies and procedures to accommodate the needs of persons with disabilities; and/or 3) the provision of special equipment, technology or support services that assist individuals with disabilities to perform specific job tasks.

Employers are required to provide accommodations unless doing so would pose an undue hardship.⁹ An employer need only provide a reasonable accommodation, not the ideal accommodation or the one the employee would prefer. For example, in *Lors v. Dean*, 591 F. 3d 831, 835 (8th Cir. 2010), the court held that the employer was not required to place the plaintiff in a team lead position simply because this would allow him to better control his diabetes, where it had offered other accommodations the court viewed as reasonable. *See also Bellino v. Peters*, 530 F. 3d 543, 550 (7th Cir. 2008 (no discrimination in failing to provide preferred accommodation when accommodation offered was reasonable and effective); *Jenkins v. Cleco Power LLC*, 487 F. 3d d09, 316 (5th Cir. 2007) (similar).

B. When is an Accommodation Reasonable?

The Supreme Court’s only decision construing the reasonable accommodation requirement since the ADA passed in 1990 outlined how courts should go about determining whether a proposed accommodation was reasonable. In *U.S. Airways v. Barnett*, 535 U.S. 391, 401-402 (2002), the Court held, on a motion for summary judgment, that the initial burden of proof rests with the plaintiff to demonstrate that a requested accommodation is reasonable. To meet this burden, the Court held that a plaintiff needs only to show that the requested accommodation “seems reasonable on its face, i.e. ordinarily or in the run of cases.” *Id.* at 401. If a plaintiff can demonstrate this, then the burden shifts to the defendant- to show that the requested accommodation is somehow an undue hardship for the employer. To meet this burden, a defendant “must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances.” *Id.*

In order to be reasonable an accommodation must, at minimum, be effective in permitting the individual to perform the job’s essential function or access other benefits of employment. An ineffective accommodation can hardly be called an accommodation at all. *See id.* at 400 (“An ineffective modification or adjustment will not accommodate a disabled individual's limitations”) (internal quotations omitted); *EEOC v. UPS Supply Chain Solutions*, 630 F. 3d 1112-1113 (9th Cir. 2010) (deaf plaintiff raised issue of fact as to whether written notes were effective as an accommodation for communication during weekly meetings, where plaintiff had limited ability to read written English and had requested an interpreter).

⁸ 29 C.F.R. § 1630.2(o)(1)(ii), (iii).

⁹ 42 U.S.C. § 12112(b)(5)(A);

Courts both before and after *Barnett* have formulated various standards guiding the decision about whether an accommodation is reasonable. A detailed discussion of most of these rules is beyond the scope of this paper, but several general principles are worth mentioning. First, employers need not eliminate or reassign essential job functions as an accommodation.¹⁰ Second, employers are not required to lower performance or quality standards in order to accommodate a disabled employee.¹¹ Also, courts have stated that employers need not provide accommodations that would require other employees to work significantly longer or harder.¹²

C. Undue Hardship

As noted above, employers are required to provide employees with disabilities with reasonable accommodations unless doing so would pose an undue hardship.¹³ Undue hardship is defined as an action that would create “significant difficulty or expense” for an employer.¹⁴ The statute sets forth a list of factors to help determine whether the costs and demands imposed by a requested accommodation rise to the level of undue hardship. These include:

- (i) the nature and cost of the accommodation needed under this Act;
- (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.¹⁵

The EEOC regulations contain the same list of factors to be considered in the cost-balance analysis of a requested accommodation. However, these regulations also add two small considerations: (1) that the availability of outside funding or tax credits be considered in offsetting the costs of a requested accommodation, and (2) that the analysis should also consider the potential impact of a requested accommodation on the ability of

¹⁰ 29 C.F.R. § 1630.2(o) App.; *Richardson v. Friendly Ice Cream Corp.*, 594 F. 3d 69, 81 (1st Cir. 2010).

¹¹ *See, e.g., Timmons v. General Motors Corp.*, 469 F. 3d 1122, 1128 (7th Cir. 2006); *Milton v. Scrivner, Inc.*, 53 F. 3d 1118, 1125 (10th Cir. 1995).

¹² *See, e.g., Rehms v. Iams Co.*, 486 F. 3d 353, 358 (8th Cir. 2007) (allowing plaintiff a modified shift would require other employees to work longer and harder); *Anderson v. Coors Brewing Co.*, 181 F. 3d 1171, 1177 (10th Cir. 1999) (employer not required to remove physically demanding tasks from plaintiff’s job, since these tasks would then burden other employees);

¹³ “Undue hardship is the proper statutory term under Title I of the ADA (relating to employment discrimination). Many courts also use the term “undue burden” to refer to this concept, although that term is actually more properly used only in Title III of the ADA, governing places of public accommodation. 42 U.S.C. § 12182(b)(2)(A)(iii). This paper generally uses the term “undue hardship:”, although where specific court cases use the term “undue burden” that term will be used here as well.

¹⁴ 42 U.S. C. § 12111(10)(A).

¹⁵ 42 U.S. C. § 12111(10)(B).

other workers to perform their jobs as well as the facility's ability to conduct business.¹⁶

From both the statute and the regulations, it is clear that financial costs may be the primary consideration in determining whether a requested accommodation poses an undue hardship on an employer. Of course, the mere fact that an accommodation costs the employer money does not render it an undue hardship. *See Barnett, supra*, 535 U.S. at 398 (rejecting the idea that workplace rules such as budget rules would automatically render an accommodation unreasonable); *Borkowski v. Valley Cent. Sch. Dist.*, 63 F. 3d 131, 138 n. 3 (2d Cir. 1995) (accommodation requirement may mean that it costs an employer more to get the same level of performance from a disabled employee as from a non-disabled employee). And financial costs are only one piece of the undue hardship analysis. A requested accommodation may also be considered an undue hardship if granting the accommodation would cause the employer to fundamentally alter the nature or operation of the business being conducted. For example, in *Reigel v. Kaiser Foundation Health Plan of North Carolina*, 859 F. Supp. 963, 973 (E.D. N.C. 1994), the court wrote that the ADA "cannot be construed to require an employer to make fundamental or substantial modifications in its operation to assure every disabled individual the benefit of employment."¹⁷ Further, employers may not be required to make requested accommodations, even if the accommodation is not cost-prohibitive. For example, in *Vande Zande v. Wisconsin Dep't. of Administration*, 44 F 3d 538 (7th Cir. 1995), an employee who used a wheelchair requested that the kitchenette sink on the floor where her office was located be lowered two inches so that she could wash her dishes in the sink. Though the proposed accommodation would only have cost the agency \$150, the court found this request unreasonable, holding that Vande Zande was able to wash her dishes in the bathroom sink on her floor. The court wrote that "we do not think an employer has a duty to expend even modest amounts of money to bring about an absolute identity in the working conditions between disabled and nondisabled workers." *Id.* at 546.

Employers sometimes provide an accommodation on a temporary basis, but refuse to do so permanently. Accommodation decisions sometimes change when a new supervisor or management team takes over. While the fact that an employer provided an accommodation in the past will not require it to continue to do so if the accommodation is not reasonable,¹⁸ past conduct can be strong evidence that an accommodation will not pose an undue hardship.¹⁹

D. The Interactive Process

The reasonable accommodation process begins with an accommodation request by the

¹⁶ 29 C.F.R. § 1630.2

¹⁷ *See also, e.g., Smith v. Ciba-Geigy Corp.*, 1996 U.S. Dist. Lexis 11182 (S. D. Tex. 1996) *aff'd* 114 F.3d 1181 (5th Cir. 1997); *Harmer v. Virginia Elec. & Power Co.*, 831 F. Supp. 1300 (E.D. Va. 1993).

¹⁸ *See Wood v. Green*, 323 F. 3d 1309, 1314 (11th Cir. 2003) (past efforts to accommodate do not by themselves make an accommodation reasonable).

¹⁹ *See Stone v. City of Mt. Vernon*, 118 F. 3d 92, 101 (2d Cir. 1997) (fact that employer had provided light duty assignments for many years to some other employees suggested that a permanent light duty position might be a reasonable accommodation for plaintiff).

employee. While requests can be informal and need not use precise language, it must convey the need for modifications in the workplace that relate to a disability.²⁰ Generally requests must be made before an adverse employment decision is made; courts hold that an employer need not honor an accommodation request made only after the employer has already made a decision to discipline or terminate the employee for performance or other reasons.²¹ Once a request is made, the employer should engage in an interactive process with the employee to determine whether a reasonable accommodation exists and how it can be implemented.²² As noted above, an employer need only provide a reasonable accommodation, not the employee's preferred or ideal accommodation.

IV. Self-Care Accommodations

As described in Section II above, diabetes is a complex disorder that can cause serious short-term and long-term consequences if not properly managed. Diabetes management is highly individualized and treatment regimens can vary depending on the type of diabetes and whether insulin is used to manage the disease. Often this regimen will focus on monitoring of blood glucose levels and balancing insulin with food intake and physical activity. Diabetes management during the work day can lead to a need for reasonable accommodations. This section examines some commonly requested accommodations that pertain directly to diabetes self-care and self-management, including: (1) blood glucose monitoring; (2) storage and access to diabetes care supplies; (3) access to food, water, and meal breaks; and (4) bathroom breaks.

A. Blood glucose monitoring

Blood glucose self-monitoring is one of the most important diabetes management tools available. For individuals with diabetes, blood glucose self-monitoring helps to assess their blood glucose patterns on a daily and monthly basis, as well as to check for immediate problems. Blood glucose monitoring also allows individuals to measure where their blood glucose is at any point during the day and to take corrective action if their numbers fall outside their target range. In the long term, this leads to better blood glucose control, which helps avert the long-term consequences of the disease. In the short term, it helps to keep individuals from experiencing debilitating episodes of hypoglycemia or hyperglycemia.²³ Individuals with diabetes may monitor their blood glucose at set times each day, such as before or after meals, but also may undertake additional checks if they feel symptoms of high or low blood glucose.

²⁰ *EEOC v. C. R. England, Inc.*, 644 F. 3d 1028, 1050 (10th Cir. 2011); *Reed v. Lepage Bakeries, Inc.*, 244 F. 3d 254, 261 (1st Cir. 2001).

²¹ *Lowery v. Hazelwood Sch. Dist.*, 244 F. 3d 654, 660 (8th Cir. 2001); *Dewitt v. Southwestern Bell Tel. Co.*, 2014 U.S. Dist. Lexis 111973 (D. Kan. Aug. 13, 2014) (plaintiff who was disciplined for hanging up on callers when she was allegedly experiencing hypoglycemia had no reasonable accommodation claim because the only thing she asked for was to have the termination rescinded due to her diabetes and to have another chance to avoid diabetes-related problems).

²² 29 C.F.R. § 1630.2(o)(3).

²³ See National Diabetes Education Program, *Helping the Student with Diabetes Succeed: A Guide for School Personnel* (2010) at 33-35, available at <http://ndep.nih.gov/publications/PublicationDetail.aspx?PubId=97#main>; see also *supra* Section II.

To monitor blood glucose, most individuals with diabetes use a procedure that involves pricking the skin with a lancet, placing a drop of blood on a test strip, and inserting this strip into a blood glucose meter. The meter will read the strip and display the blood glucose level as a number on a screen.²⁴ This entire process usually takes, at most, a few minutes. Many blood glucose meters take only a few seconds.

Some individuals also wear a continuous glucose monitoring systems (CGMs) that record blood glucose levels throughout the day.²⁵ This monitor works through a sensor inserted under the skin to measure interstitial blood glucose (glucose found in the fluid between cells). The monitor displays blood glucose levels at regular intervals and may sound an alarm if glucose levels become too high or too low. CGMs are a newer technology and are generally used along with, not in place of, self-monitoring using a lancet and meter.²⁶

No matter what setting they work in, many employees with diabetes will need accommodations that permit them to check their blood glucose at regular intervals. Generally speaking, blood glucose monitoring is an accommodation that should pose relatively little cost or difficulty to an employer. The entire process of testing using a meter and a lancet takes between a few seconds and a few minutes. Employees supply their own testing materials, and perform their own testing procedure, requiring no expenditure by an employer.²⁷ Further, it is safe for an employee to perform a blood glucose test almost anywhere, and at any time.²⁸ Some employees may request a private place to perform testing, or, depending on their worksite, a more sanitary place to perform the test, but monitoring can also happen at the employee's desk or regular work station.

At least one court has held that blood glucose monitoring may be a reasonable accommodation. In *Nawrot v. CPC Int'l.*, 259 F. Supp 2d 716, 717-719 (N.D. Ill. 2003), the court denied summary judgment for the employer on a failure to accommodate claim. Plaintiff Ralph Nawrot worked as a warehouse manager for Bestfoods, Inc., a food production and distribution company (and a subsidiary of CPC International). Nawrot had diabetes and used insulin to treat his condition. To remain healthy, Nawrot's doctor suggested that he check his blood glucose, on average, ten times a day. Nawrot requested an accommodation that would permit him to check his blood glucose at regular intervals, and if he was experiencing hypoglycemia or hyperglycemia, to suspend his work to treat his condition.²⁹ Bestfoods denied the

²⁴ See American Diabetes Ass'n, Living with Diabetes: Checking your Blood Glucose, <http://www.diabetes.org/living-with-diabetes/treatment-and-care/blood-glucose-control/checking-your-blood-glucose.html>; see also, National Diabetes Education Program: Know Your Blood Sugar Numbers (revised 2011), available at <http://www.ndep.nih.gov/media/NDEP-10-508.pdf>.

²⁵ See, e.g., *Continuous Glucose Monitors 2014*, DIABETES FORECAST, January 2014, available at <http://www.diabetesforecast.org/2014/Jan/continuous-glucose-monitors.html>.

²⁶ See *Helping the Student with Diabetes Succeed*, *supra* note 23, at 33-35.

²⁷ See, e.g., Program on Employment and Disability, Cornell School of Industrial and Labor Relations, *Employment Considerations for People who Have Diabetes* (2008), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1303&context=edicollect> ("It is important that employers make the reasonable accommodations that allow people with diabetes to check their blood glucose level by self-administering a finger stick test (which takes less than a minute) and then administering medication (for high glucose levels) or a source of sugar (for low glucose levels). It only takes a few minutes for the person's blood sugar to return to normal.")

²⁸ 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

²⁹ 259 F. Supp. 2d at 717-19.

accommodation, and Nawrot became severely ill several times while at work. In a motion for summary judgment, Bestfoods argued that Nawrot had failed to state a claim under the ADA because the accommodations he requested were not directly linked to his ability to perform the essential functions of his job.³⁰

The court found, first, that there was a question of material fact about whether or not the accommodations Nawrot had requested affected his ability to perform the essential functions of his job. The court reasoned that Nawrot had become severely ill at work several times due to diabetes, resulting in incoherent thoughts and irrational behavior that likely interfered with his ability to perform his job.³¹ However, the court also held that Nawrot's requested accommodations need not be directly linked to his ability to perform his job. The court wrote:

Whether Nawrot is employed as a warehouse supervisor, an airline pilot, or an accountant, he will need to check his blood sugar levels and administer insulin several times a day. No matter what his job duties, he will always need this accommodation. To hold that a person with potentially life-threatening diabetes is not entitled to accommodations so that he may monitor his blood sugar levels would force diabetics like Nawrot to choose between working while risking physical harm and death, or unemployment. The ADA was created to prohibit placing disabled persons in this position.³²

However, without medical orders supporting the need for monitoring of blood glucose or evidence of problems related to the inability to monitor, court may be reluctant to require additional time during the work day for diabetes treatment. In *Chambers v. Secretary of Veterans Affairs*, 2013 U.S. Dist. Lexis 118746, *12-*13 (S.D. Ohio Aug. 21, 2013), plaintiff requested breaks to take care of his diabetes but alleged that he was pressured by his manager not to take such breaks. However, he provided no medical documentation to show that he actually needed additional breaks for diabetes care, and admitted that he was successfully able to manage his diabetes by testing his blood glucose before and after work and during lunch and his scheduled break. Because there was no evidence that he required additional breaks to manage his diabetes, his accommodation claim failed.³³

In at least one case involving a question of direct threat,³⁴ a court found that frequent blood glucose testing might be a reasonable accommodation that would permit an employee to perform the essential functions of her job safely. *Amick v. Visiting Nurse and Hospice Home*, 2006 U.S.

³⁰ *Id.* at 725.

³¹ *Id.*

³² *Id.* at 726.

³³ *Cf. Montemerlo v. Goffstown Sch. Dist.*, 2013 U.S. Dist. Lexis 143826, *27 (D. N.H. Oct. 4, 2013) (plaintiff teacher was denied permission to test blood glucose in front of students but school was willing to provide coverage from other staff when she needed to test; court rejected accommodation claim because plaintiff never actually asked for such coverage, believing the request would be futile, but produced no evidence that the accommodation would not have been granted).

³⁴ Courts analyzing claims that an individual would pose a direct threat must examine whether that threat could be addressed through reasonable accommodations. This paper does not address direct threat and other safety-related issues. For more information on this topic, see Brian Dimmick, *Safety Concerns Related to Diabetes in the Workplace: An Analysis of Federal Law*, American Diabetes Association (2014), available at <http://main.diabetes.org/dorg/PDFs/Advocacy/Discrimination/direct-threat.pdf>.

Dist. Lexis 76326 (N.D. Ind. Oct. 18, 2006), involved a social worker who experienced frequent bouts of hypoglycemia. Her doctor suggested that checking her blood glucose every 15 minutes might allow the plaintiff to identify an episode of low blood glucose and to treat any symptoms she might be experiencing before choosing to drive a car or visit clients. The court denied summary judgment to the employer in this case, reasoning that there was a question of material fact about whether such an accommodation would have been effective. *Id.* at *30 (“Amick makes the requisite showing that if VNHH would have allowed her to check her blood sugar levels every fifteen minutes, its concerns regarding the possibility of her having another severe hypoglycemic reaction would have been allayed.”)

Employers may raise objections to blood glucose monitoring accommodations based on concerns about time, cost, service, or production. While each workplace is unique, and every request for accommodation must be analyzed on an individual basis, as a general matter most such concerns are misplaced or inaccurate. As stated above, blood glucose monitoring takes very little time, and time away from work may be minimized by permitting employees to test at their desk or work station. In addition, frequent blood glucose monitoring permits employees to address problems immediately, to treat episodes of low or high blood glucose early, and possibly to avoid some of the more serious side effects associated with bouts of hypoglycemia or hyperglycemia.

Employers may resist the concept of blood glucose monitoring in the workplace based on inaccurate information and unfounded fears about the safety of the procedure. For example, employers may deny a request to test blood glucose on the production floor of a factory or at an employee’s desk citing safety concerns. Some may cite worries about bloodborne pathogens or contamination. It should be noted that the Occupational Safety and Health Administration’s (OSHA) Bloodborne Pathogen Standards do not apply to self-administered blood glucose test or self-administered insulin shots in most workplaces.³⁵ OSHA recommends that most insulin syringes and blood glucose lancets can be safely disposed of in special sharps containers provided by a variety of community programs.³⁶

³⁵ Letter from Richard E. Fairfax, Director, Directorate of Enforcement Programs to Mr. Craig D. Munson, President, Craig Medical Distribution Inc., Standard Interpretation Letter on OSHA’s Position on the Use of Lancets or Lancing Devices Without Safety Engineered Features for Finger Prick Sampling in the Workplace (Sept. 9, 2008), available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=27298 (“[T]he Bloodborne Pathogens Standard, 29 CFR 1910.1030, does not apply to the self-administered personal tests by employees or residents of an establishment. An employee who is diabetic, for instance, may have the need to self-administer finger pricks to periodically test his/her own blood glucose level); Letter from Richard E. Fairfax, Directorate of Enforcement Programs to Keith Dill, Standard Interpretation Letter on Whether Diabetics who Self-Administer at Work Can Dispose of Capped Insulin Syringes in an Office Trash Container (June 29, 2007), available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=25890 (citing a similar analysis with respect to insulin syringes in the workplace). For a comprehensive analysis of this issue see Victoria Thomas, *The Occupational Safety and Health Act Bloodborne Pathogens Standard: Application to Diabetes Care Tasks at School and in Employment*, American Diabetes Association (2008), available at <http://main.diabetes.org/dorg/PDFs/Advocacy/Discrimination/atty-osha-in-school-and-employ-june2008.pdf>.

³⁶ David C. Klonoff & Joseph F. Perz, *Assisted Monitoring of Blood Glucose: Special Safety Needs for a New Paradigm in Testing Blood Glucose*, J. DIABETES, SCI & TECH (2010), available at <http://dst.sagepub.com/content/4/5/1027.full.pdf+html>.

B. Access to Diabetes-Care Supplies

Most individuals with diabetes carry some sort of supply kit. Common diabetes care supplies include: a blood glucose meter, lancets, and test strips to monitor blood glucose; glucose tabs, candy, or some form of fast-acting carbohydrate; insulin supplies or medications; urine test strips to monitor for ketones; and a glucagon kit to be used in the event of an emergency. On the job, workers need access to supplies to manage their diabetes throughout the day. This might involve keeping supplies in a bag, purse, or backpack that is carried with the employee at all times. It might involve permission to store supplies in a desk, at a work station, or in a safe location that is easily accessed. For some individuals it might include a temperature-controlled environment to store medications or a refrigerator to store some forms of insulin.

Granting individuals access to diabetes-care supplies is generally a straightforward issue that poses little or no cost to an employer. Courts have found that granting individuals with diabetes access to their supplies is a form of reasonable accommodation. In *Berard v. Wal-Mart Stores East*, 2011 U.S. Dist. Lexis 114394, *13 (M.D. Fla. Oct. 4, 2011), plaintiff worked as a meat sales associate at Wal-Mart. Originally, she was permitted by her manager to keep her diabetes-care supplies (including blood glucose monitoring supplies and insulin) on a desk near her work station. However, plaintiff was later told by one of her managers that she needed to store her supplies in a back storage room, a good distance away from her work station, and that if she went to retrieve her supplies, she would be terminated. Berard explained the storeroom was too warm for her insulin and too great a distance from her work station, but management simply told her that if she stored her insulin in the refrigerator at work, it would be thrown away before the end of her shift. Berard later suffered a seizure at work, become violently ill, and was taken to the hospital. After the incident she did not return to work at Wal-Mart. The court denied Wal-Mart's motion for summary judgment finding there was a genuine issue of material fact about whether Berard needed to store her diabetes care supplies closer to her work station.

Similarly, in *O'Donnell v. Pa. Dept. of Corrections*, 790 F. Supp. 2d 289, 302 (M.D. Pa. 2011), plaintiff was a teacher in a correctional facility classroom. She requested that she be permitted to keep her supplies on her person at all times. The correctional facility granted O'Donnell an accommodation that permitted her to bring her supplies into the facility, but required her to store the supplies in a closet that was not immediately adjacent to her classroom. The correctional facility claimed that this accommodation was reasonable and cited security concerns about O'Donnell keeping her supplies on her person. The court denied the correctional facility's request for summary judgment, finding there was a factual dispute about whether the alternate accommodation granted by the correctional facility was reasonable, or whether O'Donnell's requests to keep her supplies on her person was a reasonable request.

In another case with an unusual set of facts, a court found that it may be a reasonable accommodation to assign an individual with diabetes an air-conditioned vehicle to facilitate storage of insulin. In *Gooden v. Consumers Energy Corp.*, 2013 U.S. Dist. Lexis 127970 (E.D. Mich. Sept. 9, 2013), Plaintiff worked as a service technician and requested the vehicle both because his diabetes limited his ability to tolerate hot temperatures and because his insulin needed to be kept cold. He also requested that his work area be geographically restricted to areas near his home so that he could more conveniently return home and retrieve his refrigerated

insulin. The court found providing an air-conditioned vehicle might be a reasonable accommodation, because plaintiff had a medical need for access to air conditioning and needed a place to keep his insulin cool. The company claimed that it had offered to allow him to keep a cooler in his vehicle to store his insulin, but he disputed that this had been offered and stated that a cooler would be ineffective in a hot vehicle.³⁷ However, the court found the geographic restriction on plaintiff's work to be unreasonable. While plaintiff felt it was inconvenient and unsanitary to have to administer insulin in his vehicle, the court found that the geographic restriction was not medically necessary because plaintiff had been able to successfully perform his job and had no evidence that traveling to distant work sites had restricted his access to insulin.³⁸

C. Changes to Diabetes Treatment Regimen

People with diabetes sometimes need to make changes to their treatment regimen, especially where they are having difficulty meeting their treatment goals or are experiencing complications of the disease. For example, if a person is experiencing frequent episodes of hypoglycemia, the insulin dose may be changed or its timing altered to attempt to better match insulin with food intake and physical activity. This process can sometimes take time as different adjustments are tried in an attempt to reach optimal results. Normally these will be initiated by the person with diabetes in consultation with their treating physician, and do not require the employer's permission or directly affect the work environment. However, in certain situations where the employer has significant concerns about the employee's work performance or safety, it may be a reasonable accommodation to permit the employee to modify his or her treatment regimen, based on the recommendations of the treating physician. The employee can then return to work, hopefully with better diabetes management and improved results.

One recent case illustrates how this situation can arise. In *Rednour v. Wayne Township*, 2014 U.S. Dist. Lexis 134319 (S.D. Ind. Sept. 24, 2014), the plaintiff, a paramedic, had multiple incidents of hypoglycemia on the job, including one driving an emergency vehicle and one that compromised patient care. The plaintiff submitted a request from her doctor that she be given a trial period of two to four weeks after returning to work to improve her blood glucose levels. She also suggested that beginning use of a continuous glucose monitoring system could help prevent hypoglycemia. The employer instead terminated plaintiff. The court found that plaintiff had raised a triable issue of fact as to whether the trial period was reasonable, given that two doctors supported the idea that it might have prevented future hypoglycemia.³⁹ The court made this finding despite evidence that plaintiff's blood glucose did not in fact improve in the weeks after her termination, noting that plaintiff's management might have been different had her job been on the line.⁴⁰ The court also found that the testimony of plaintiff's medical expert created an issue of fact as to whether the continuous glucose monitoring system could have improved her diabetes management, and therefore could have been a reasonable accommodation.⁴¹

³⁷ 2013 U.S. Dist. Lexis 127970 at *13-*14.

³⁸ *Id.* at *16-*17.

³⁹ 2014 U.S. Dist. Lexis 134319 at *38.

⁴⁰ *Id.* at *39.

⁴¹ *Id.* at *48-*49.

This case may be in tension with some older cases holding that it is not a reasonable accommodation merely to allow an individual with diabetes a “second chance” to control the condition after the employee has experienced severe hypoglycemia on the job.⁴² However, *Rednour* is distinguishable from these cases (which in any case rest on questionable legal interpretations) because plaintiff presented expert medical evidence that changes to her management could lead to better results, rather than simply asking to be allowed to “try again” with the same techniques. If a claim like this needs to be made, attorneys should focus on providing clear and supportive expert testimony to demonstrate to the court that changes in diabetes management are likely to succeed in addressing the employer’s concerns.⁴³

D. Access to Food and Water

Maintaining proper and healthy food intake, and coordinating food with insulin for those who use it, can be very important for daily diabetes management. An employee might need to eat a meal at a specific time to balance an insulin dose, or might need to have quick access to candy or snacks as a fast-acting source of sugar to treat an oncoming hypoglycemic episode. Employers may perceive these requirements as in conflict with work rules or job schedules, but in most cases an employee’s needs can be accommodated with little disruption to the employer’s operations. Of course, employers should look to the individual needs of the employee, rather than assuming that all people with diabetes need certain accommodations relating to food. This section first looks at the need for access to food while on the job, and then considers an individual’s need for meal breaks.

1. Quick access to food in emergencies

For individuals with diabetes, having ready access to food, water, and snacks is vital. For those prone to hypoglycemia, consuming a snack (such as a sugar source) may help to prevent the onset of hypoglycemia, or may prevent the condition from progressing from mild to severe. In the instance that an individual does experience hypoglycemia, access to a source of fast-acting carbohydrates such as candy, juice, or glucose tabs is essential.⁴⁴ Mild or moderate hypoglycemia can generally be treated easily, but when left untreated, severe hypoglycemia can be life-threatening. In *U.S. v. Miss. Dept. of Public Safety*, 309 F. Supp. 2d 837, 841 (S.D. Miss. 2004), plaintiff (Collins) was a highway patrol candidate attending a cadet training program. During a training exercise, Collins was sucking on a peppermint because his blood glucose had become low. He was confronted by a supervisor, who told him that candy was not allowed during training. Collins explained he had the peppermint to counteract low blood sugar. Though Collins finished the peppermint, he claims that he was later punished for the candy with a reprimand, and a requirement to perform extra push-ups. Later that evening, Collins asked his

⁴² See *Burroughs v. City of Springfield*, 163 F.3d 505, 508 (8th Cir. 1998); *Siefken v. Village of Arlington Heights*, 65 F.3d 664, 667 (7th Cir. 1995). For analysis of these cases, see *Safety Concerns Related to Diabetes in the Workplace*, *supra* note 34, at 42.

⁴³ The plaintiff in *Rednour* did not contest that the employer’s concerns were legitimate, and did not argue that she was able to perform the essential functions of the job while experiencing frequent hypoglycemia. Of course, plaintiffs and their attorneys need not always accept safety concerns expressed by an employer. For more information on addressing employer safety concerns, see *id.*

⁴⁴ American Diabetes Association, Living with Diabetes: Hypoglycemia, <http://www.diabetes.org/living-with-diabetes/treatment-and-care/blood-glucose-control/hypoglycemia-low-blood.html>.

training supervisor for permission to make a second trip through the cafeteria line, explaining that he needed more food to stabilize his blood glucose. His training supervisor denied Collins' request and gave him an extra piece of fruit instead. That night, Collins experienced a bout of hypoglycemia, became violent, and was expelled from the program. The court denied summary judgment for defendant. "[T]his court cannot find as a matter of law that Defendant provided reasonable accommodations to Collins by providing him with a few pieces of fruit instead of another meal." *See also Bellofatto v. Red Robin Int'l, Inc.*, 2014 U.S. Dist. Lexis 177341, *30-*31 (W.D. Va. Dec. 24, 2014) (triable issue of fact on plaintiff's accommodation claim where plaintiff, a server at a restaurant, was required to work through requested breaks when she was experiencing hypoglycemia, and was yelled at when she drank a high-sugar drink to treat hypoglycemia).

Employees with diabetes should be permitted to keep their own source of food to treat hypoglycemia, but in situations such as retail environments where food is readily available, it may be a reasonable accommodation to permit employees to have access to this food. For example, in *EEOC v. Walgreen Co.*, 2014 U.S. Dist. Lexis 52061 (N.D. Cal. Apr. 11, 2014), the EEOC brought suit on behalf of Josephina Hernandez, an employee of Walgreen's who took food she needed to treat a serious episode of hypoglycemia, violating the store's policy that forbade employees taking merchandise before paying for it. The defendant argued that this was a neutral policy, enforced without exceptions, and that Hernandez had never requested an accommodation allowing her to take food. However, the court held that a jury could find that, because of her hypoglycemic condition, she may have been unable to make an accommodation request on the day in question, and so should be permitted to make the request after the fact. "Whether Hernandez was really suffering from a hypoglycemic attack that required her to eat the chips and whether the timing of that attack reasonably prevented Hernandez from seeking an accommodation from her managers prior to eating the chips are questions of fact for the jury to decide."⁴⁵

To prevent episodes of hypoglycemia, individuals with diabetes may request to keep food or snacks at their work station, or to carry food with them on the job. For example, in *Jackson v. City of N. Y.*, 2011 U.S. Dist. Lexis 43861 (E.D. N.Y. Mar. 3, 2011), a police officer who had experienced several bouts of hypoglycemia and seizures on the job requested that she be permitted to return to work with two possible accommodations: first that she be allowed to eat on duty, and second that she be allowed to work light duty in the event she began experiencing hypoglycemia. In denying the police department's motion for summary judgment, the court noted that there was no evidence that permitting a police officer to consume food or beverages while on patrol would pose an undue burden for the police department.⁴⁶

2. Meal Breaks

Regular, healthy meals are important for individuals with diabetes, just as they are for all people. And for some people with diabetes, it can be particularly important to be able to consume a meal during the work day. Some people may need to eat at a specific time so that their carbohydrate intake will match the effect of an insulin dose. Others may not need to eat at a specific time, but

⁴⁵ 2014 U.S. Dist. Lexis 52061 at *24.

⁴⁶ 2011 U.S. Dist. Lexis 43861 at *44.

need a break to eat a full meal in order to consume enough food to work through their shift. Not all individuals with diabetes will require a regular meal break, but it is usually possible to grant this accommodation when it is needed.

For some individuals with diabetes, it may be important to eat meals and administer medications on a regular schedule. For example, in *Bell v. Owens-Illinois, Inc.*, 2002 U.S. Dist. Lexis 26481, *36 (W.D. Pa. 2002), plaintiff's doctor asserted that he needed to work a regular shift and to have regular breaks and meal times. Defendant placed him on a regular shift schedule and company management sent a memo to his supervisors stating that he was to have regular break times and a lunch break at 11:00 a.m. each day. Plaintiff asserted that this memo was not enforced and that he never had a regular lunch schedule. The court denied defendant's motion for summary judgment, holding that defendant may have failed to provide plaintiff with a reasonable accommodation by failing to provide a regular lunch schedule. In *Lee v. District of Columbia*, 920 F. Supp. 2d 127 (D. D.C. 2013), plaintiff had informal conversations with co-workers and supervisors about his diabetes and his need to take meal breaks, but had never made a formal accommodation request for a specific break. One day, he called his supervisor after his regular lunch time to request a break, stating that he had diabetes and needed to eat. His supervisor did not grant a break but told him to wait and that someone would relieve him. Ninety minutes later, he was found asleep on the job, having never been given a break. The court found that a question of fact existed as to whether his employer had denied a reasonable accommodation, since his supervisor admittedly knew that he needed a meal break due to his diabetes but had failed to grant him one for ninety minutes after he stated that he needed one.⁴⁷

However, the employee may need to provide medical evidence supporting the need for a consistent meal break. For example, in *Martin v. Yokohama Tire Corp.*, 2013 U.S. Dist. Lexis 161228, *42 (W.D. Va. Nov. 12, 2013), plaintiff, a personnel supervisor in a manufacturing plant, requested a regular meal break, but the court granted summary judgment because he produced no evidence that he was not permitted to eat when he needed to. Plaintiff could eat in his office or on the production floor, had access to a vending machine, refrigerator and microwave, and had never been denied the ability to eat (although he sometimes had to perform other work while eating). Even though he may have preferred a regular meal break, he produced no evidence that one was necessary for him. And in *Llanos v. City of N. Y.*, 2012 U.S. Dist. Lexis 160531, *47-*48 (S.D. N.Y. Nov. 7, 2012), plaintiff was required to respond to calls and customer complaints during her lunch break, and asked her supervisors for an uninterrupted meal break so that she could properly eat, take medications and manage her diabetes. However, the court granted summary judgment for defendant because plaintiff failed to present any medical documentation to her employer to support her need for an uninterrupted meal break. And providing an inflexible meal break may not always be reasonable, depending on the employer's needs, and especially where less rigid accommodations could still meet the employee's needs. For example, in *Emch v. Superior Air-Ground Ambulance Serv. of Mich.*, 2012 U.S. Dist. Lexis 132397, *46 (E.D. Mich. Sept. 17, 2012), plaintiff, an emergency medical technician, requested that four hours into his shift, his supervisor pull his ambulance out of service to give him a scheduled lunch break. Defendant (Air-Ground Ambulance) claimed this would be an undue

⁴⁷ 920 F. Supp. 2d at 136-137. *But see Gonzalez v. Sears Holding Co.*, 980 F. Supp. 2d 170, 185 (D. P.R. 2013) (evidence that plaintiff had her meal break delayed for approximately a half hour on one day was not sufficient to show that she had been denied a reasonable accommodation).

burden and offered Emch several alternative accommodations, including working with his dispatchers to ensure he was prompted to eat, allowing him to eat during downtime and purchase food from a hospital cafeteria or medical center, permitting him to eat in the ambulance, and offering to install a refrigerator in the ambulance. Emch countered that he preferred hot foods from restaurants and needed a scheduled break. The court granted summary judgment to defendant finding that granting plaintiff a regular meal break by pulling his ambulance out of service would compromise patient safety and the company's contractual obligations. The court also noted that plaintiff had not shown that the alternative accommodations proposed by defendant were unreasonable. The court noted in particular that while plaintiff preferred hot foods from restaurants, this was not a dietary requirement, and there was no reason why he could not pack enough food for his needs and eat in the ambulance.

Similarly, in *Hughes v. Southern New Hampshire Servs. Inc.*, 2012 U.S. Dist. Lexis 167148, *14-*15 (D. N.H. Nov. 26, 2012), plaintiff, a preschool teacher, was required to sit with children during their lunch hour, with a tray of food in front of her, and to encourage the students to eat their food. She requested that she be allowed to eat food she brought in from home with the children, or that the kitchen staff prepare her a special tray with low-carbohydrate food. Instead, defendant offered to allow plaintiff to eat the food she brought from home, during a break, in the preschool's kitchen. During the children's lunch break she would be required to sit with her tray of food in front of her, but not required to eat any of the food during the children's meals. While plaintiff found sitting with the children with a plate of high-carbohydrate food in front of her that she could not eat unpleasant, the court held that this solution was reasonable in that it served the schools' program needs but still allowed plaintiff to eat the food she needed. The court therefore granted summary judgment to defendant, finding that the proposed accommodation was reasonable.⁴⁸

Emch and *Hughes* suggest that, while courts will routinely require employers to accommodate dietary needs caused by diabetes, they are less willing to accommodate what they view as mere preferences for the way the food is consumed. Where employers propose alternative ways of scheduling or accommodating meals, employees should evaluate these proposals and try to work within them, so long as they allow the consumption of needed food, rather than refusing them and insisting on one preferred arrangement. Where the proposed alternative is in fact medically unacceptable, this should be demonstrated to the employer with medical evidence such as a doctor's note, not just a statement by the employee. Most challenges can be resolved by engaging in the interactive process to determine if an alternative reasonable accommodation is available. For example, in certain professions, scheduling a regular meal break for employees may prove challenging (i.e. emergency response or law-enforcement positions). However, even in these situations there is usually enough flexibility to rearrange schedules, permit employees to carry food and drink with them, or to eat on the job.

⁴⁸ Cf. *Odds v. Louisiana*, 2012 U.S. Dist. Lexis 134194, *10 (M.D. La. Sept. 19, 2012) (employee requested that he not be required to work at off-site locations because it made it difficult for him to obtain and eat meals; court rejected accommodations claim because he had never provided any documentation that his request had to do with limitations caused by his diabetes).

D. Bathroom Breaks

One commonly requested accommodation by individuals with diabetes in the workplace is increased access to the bathroom. This accommodation request can take several forms, including permission to take more frequent breaks during the day (for some individuals this may mean “clocking out” or making up time), arranging for a work station or desk that is closer to the bathroom, or providing a system to cover a person’s work station if they need to use the bathroom.

There are a number of reasons individuals with diabetes may need frequent bathroom breaks. For example, when a person experiences hyperglycemia, the kidneys respond by attempting to flush out extra glucose in the urine, which leads to increased urination.⁴⁹ One common complication of diabetes is nerve damage or neuropathy. Autonomic neuropathy can cause damage to the nerves controlling the bladder, intestinal tract, and other organs. This can lead to both bowel and bladder difficulties, leading to a need for bathroom breaks.⁵⁰ Diabetes is a complex condition, and there are a host of reasons individuals with diabetes may need accommodations that involve access to a bathroom.⁵¹

Often employer resistance to providing bathroom accommodations stems from concerns about who will perform the employee’s job responsibilities during breaks. However, the need to provide such coverage cannot by itself justify denying the accommodation. In *Ullah v. N. Y. C. Dep’t. of Educ.*, 2014 U.S. Dist. Lexis 112288, *16-*17 (S.D. N.Y. Aug. 8, 2014), the court denied defendant’s motion for summary judgment arguing that it was an undue burden to permit plaintiff special education teacher to leave the classroom in the care of a paraprofessional when he urgently needed a bathroom break due to diabetes. The district required teachers needing to leave the classroom to find another teacher to cover for them, but plaintiff argued that other teachers were often not available on short notice when he needed to use the bathroom, and the court found defendant had not proved undue hardship as a matter of law. And in *Erjavac v. Holy Family Health Plus*, 13 F. Supp. 2d 737, 751 (N.D. Ill. 1998), plaintiff, a managed care specialist, was responsible for covering incoming phone calls. Plaintiff disclosed her diabetes to her employer, and requested that someone be available to cover her phone calls during bathroom breaks. Her employer responded to this request by permitting her to ask one of three supervisors to cover the phones when she needed to use the restroom. This system failed on several

⁴⁹ American Diabetes Association, Living with Diabetes, Hyperglycemia (High Blood Glucose),

<http://www.diabetes.org/living-with-diabetes/treatment-and-care/blood-glucose-control/hyperglycemia.html>

⁵⁰ American Diabetes Association, Living with Diabetes: Autonomic Neuropathy, <http://www.diabetes.org/living-with-diabetes/complications/neuropathy/autonomic-neuropathy.html>.

⁵¹ See, e.g., U.S. Dep’t of Health and Human Svc’s, National Diabetes and Digestive and Kidney Diseases (NIDDK), National Diabetes Information Clearing House: Sexual and Urologic Problems of Diabetes, <http://diabetes.niddk.nih.gov/dm/pubs/sup/index.aspx>; American Diabetes Association, News & Research, Liu, Guiming, Bladder Dysfunction in Diabetes, <http://www.diabetes.org/news-research/research/research-database/bladder-dysfunction-in.html> (“One of the most common consequences of diabetes is Diabetes Bladder Dysfunction (DBD), which leads to poor emptying of the bladder and urinary incontinence.”); U.S. Dep’t of Health and Human Svc’s, NIDDK, Diabetic Neuropathies: The Nerve Damage of Diabetes, <http://diabetes.niddk.nih.gov/dm/pubs/neuropathies/index.aspx>; Center for Disease Control, Diabetes Public Health Resource, Take Charge of Your Diabetes: (8) Nerve Damage, <http://www.cdc.gov/diabetes/pubs/tcyd/nerve.htm> (“Nerve damage can also cause bowel problems, make it hard to urinate, cause dribbling with urination, and lead to bladder and kidney infections.”)

occasions, with plaintiff soiling herself on one of those occasions. She repeatedly requested that her supervisors provide her with more flexibility by allowing other co-workers to cover the phones when she needed to use the restroom. Her employers denied these requests. The court denied defendant's motion for summary judgment, holding that there was a question of material fact about whether plaintiff had been reasonably accommodated. *See also Wirtz v. Ford Motor Co*, 2008 U.S. Dist. Lexis 14928, *8-*9 (E.D. Mich. Feb. 28, 2008) ("there is a material dispute as to whether Plaintiff's continuous presence is necessary to the assembly position or whether using area supervisors or other employees to cover Plaintiff's bathroom breaks could be a reasonable accommodation.") Frequent bathroom breaks cannot be accommodated in all jobs, however. *See Guardino v. Village of Scarsdale Police Dep't*, 815 F. Supp. 2d 643, 648 (S.D. N.Y. 2011) (holding that plaintiff couldn't perform the essential functions of crossing guard b/c he couldn't be present at his post).

Employers must also consider moving an employee's work location closer to bathroom facilities. In *EEOC v. Cast Products, Inc.*, 2009 U.S. Dist. Lexis 17777 (N.D. Ill. 2009), the EEOC represented Ortega, who worked as a dye cast engineer at Cast Products, was terminated after management observed him urinating in the factory facility. He asserted that he had told his immediate supervisor that his diabetes caused frequent urination and had requested that his work station be moved closer to the bathroom. Ortega claimed that his supervisor had denied this request and told him instead to urinate into a cup at his work station. The court denied employer's request for summary judgment holding that if Ortega had requested that his work station be moved closer to the restroom, that defendant had an obligation to consider this request and work with him to determine if a reasonable accommodation was possible.

Like the other forms of self-care accommodations discussed in this section, in most instances, access to bathroom breaks is unlikely to impose an undue hardship on an employer. While there are limits to such accommodations, rearranging work stations, moving a desk, or asking another employee to cover during a short bathroom break should require only moderate amounts of flexibility and should not pose heavy costs to most employers.⁵²

V. Accommodations for Long-Term Complications

A. Mobility Issues

Individuals with diabetes may request accommodations related to mobility impairments or mobility restrictions for a variety of reasons. One of the most prevalent complications associated with diabetes is neuropathy, damage to nerve systems within the body. Research indicates that as many as 60 to 70 percent of people with diabetes have some form of neuropathy.⁵³ Peripheral neuropathy is the most common form of neuropathy to affect individuals with diabetes.

⁵² For other cases involving bathroom access and diabetes see *Teachout v. N.Y. C. Dep't of Educ.*, 2006 U.S. Dist. Lexis 7405 (S.D.N.Y. Feb. 22, 2006) (failing to consider Teachout's request for a classroom located near a bathroom because his diabetes was not considered a disability under the ADA); *Shirley v. Westgate Fabrics*, 1997 U.S. Dist. Lexis 16545, *15 (N.D. Tex. Mar. 17, 1997) (employer had provided plaintiff with the ability to leave her desk to use the bathroom when needed).

⁵³ U.S. Dep't of Health and Human Svc's, NIDDK, Diabetic Neuropathies: The Nerve Damage of Diabetes, <http://diabetes.niddk.nih.gov/dm/pubs/neuropathies/index.aspx>.

Peripheral neuropathy typically causes numbness, tingling, pain, and loss of sensation and function in the feet, hands, arms, and legs. Peripheral neuropathy may also cause muscle weakness or a loss of muscle control.⁵⁴ Other forms of neuropathy that may impact mobility in individuals with diabetes include: Charcot's joint or neuropathic arthropathy (causing joints to break down in the foot and ankle as a result of nerve damage); compression mononeuropathy (affecting a single nerve, of which carpal tunnel syndrome is a common example); femoral neuropathy (affecting muscles in the thighs and causing muscle wasting); thoracic/lumbar radiculopathy (affecting the torso and chest); and unilateral drop foot (a condition making it impossible to lift the foot).⁵⁵ Individuals with diabetes are also susceptible to peripheral artery disease, a condition in which arteries in the legs are narrowed or blocked by fatty deposits, decreasing blood flow to feet and ankles.⁵⁶ Individuals with diabetes, especially those with peripheral neuropathy, are more likely to develop blisters and slow-healing foot ulcers. The consequences of poor circulation, foot ulcers, and neuropathy can be quite severe. Not only must individuals live with pain, tingling, and a loss of sensation, but these conditions restrict mobility, cause muscle wasting, and make it difficult to perform manual tasks. In the long run, individuals with diabetes are also prone to lower-extremity amputations. In fact, 60 percent of all non-traumatic amputations performed in adults are related to diabetes.⁵⁷ Finally, other complications associated with diabetes (e.g., kidney disease and swelling in the feet) may cause physical issues that affect mobility.

Employees with diabetes and related complications may have difficulty standing, walking, and performing various types of manual tasks, and as a result, may need specialized accommodations. For example, such accommodations might include permission to sit on a stool or chair; permission to take frequent rest breaks; access to assistive devices that may help with lifting or transporting goods; access to ergonomic chairs or computer equipment; or provision with accessible buildings, bathroom facilities, and work stations. The reasonableness of any of these accommodations will require an individualized analysis based on the specific costs, the particular setup of the workplace, and the resources available.⁵⁸ A full discussion of mobility restrictions, and employment accommodations is beyond the scope of this paper, which highlights a few key issues that can arise for individuals with diabetes.⁵⁹

Because diabetes-related complications particularly impact the feet, legs, and lower extremities, many employees may have difficulty standing for long periods of time and may request the

⁵⁴ American Diabetes Association, Living with Diabetes: Peripheral Neuropathy, <http://www.diabetes.org/living-with-diabetes/complications/neuropathy/peripheral-neuropathy.html>.

⁵⁵ American Diabetes Association, Living with Diabetes: Additional Types of Neuropathy, <http://www.diabetes.org/living-with-diabetes/complications/neuropathy/additional-types-of-neuropathy.html>.

⁵⁶ American Diabetes Association, Living with Diabetes: Peripheral Artery Disease, <http://www.diabetes.org/living-with-diabetes/complications/peripheral-arterial-disease.html>.

⁵⁷ NATIONAL DIABETES STATISTICS REPORT, *supra* note 1.

⁵⁸ The Job Accommodation Network provides extensive information on employment accommodations for individuals with mobility impairments. Their resources include: Accommodation Ideas for Leg Impairments, <http://askjan.org/soar/leg/leg.html>; Accommodations for Wheelchair Use, <http://askjan.org/media/whee.htm>; Accommodation Ideas for Renal/Kidney Disease, <http://askjan.org/soar/other/renal.html>; and Back Conditions, <http://askjan.org/soar/back.html>.

⁵⁹ Other organizations have a host of information on mobility impairments and physical restrictions. *See, e.g.*, The American Association of People with Disabilities, <http://www.aapd.com/>; The National Organization on Disability, <http://www.nod.org/>; and the United States Access Board, <http://www.access-board.gov/>.

option of sitting while performing certain tasks, or to minimize the amount of time they spend on their feet. For example, in *Schneider v. Giant of Md., LLC*, 389 Fed. Appx. 263, 272 (4th Cir. 2010), plaintiff worked as a pharmacy manager and developed foot ulcers that were exacerbated by standing during his shift 8-12 hours per day. As a result, he requested that he be transferred to the position of pharmacy supervisor, a position he had held previously, that would not require him to stand for long hours. Plaintiff neither requested nor discussed with store management any other forms of accommodation. However, store management had provided plaintiff with a stool to sit on during his shifts. The court granted summary judgment for the employer in this case finding that a stool was a reasonable form of accommodation to address plaintiff's neuropathy.

As noted earlier, employers have no duty to reassign essential job functions as a reasonable accommodation, so where standing or walking are found to be essential functions of a position, no accommodation may be possible. For example, in *Fry v. Sheahan*, 2009 U.S. Dist. Lexis 70630 (N.D. Ill. Aug. 12, 2009), plaintiff worked as an administrative assistant and had diabetes and kidney disease that caused her to become weak and caused her legs and feet to swell. She requested an accommodation that she be permitted to perform "desk only" duty and be exempted from filing tasks that would require her to stand on her feet for more than 20 minutes at a time. The court granted summary judgment for the employer, finding that filing was an essential function of plaintiff's job, and also finding that plaintiff had been offered an accommodation her restriction by transferring her to a job that required less walking (albeit at a lower pay grade). *See also Clark v. O'Reilly Automotive, Inc.*, 2011 U.S. Dist. Lexis 55558, *24 (E.D. Ark. May 23, 2011) (light to moderate physical exertion and occasional standing were essential function of plaintiff's job as an auto parts specialist, and his request for a sedentary job was therefore unreasonable despite his inability to engage in physical exertion and stand for long periods due to multiple medical conditions); *Hudson v. Potter*, 2011 U.S. Dist. Lexis 143575, *20 (W.D. Mich. Dec. 14, 2011) (no jobs were available at plaintiff's facility that did not require the ability to stand, walk, and pivot, and therefore plaintiff's medical restrictions resulting from a toe amputation could not be accommodated).

In some instances, individuals may assert that walking or other physical exertion may make their blood glucose harder to regulate. For example, in *Loya v. Sebelius*, 840 F. Supp. 2d 245 (D. D.C. 2012), plaintiff worked in an office that was located a good distance away from her colleagues and asserted that she was required to travel between buildings, sometimes several times a day. Though a shuttle bus ran between the buildings, it ran infrequently, making this travel difficult. Plaintiff usually made the trip by foot and claimed that the physical exertion (especially when unplanned) made it difficult for her to regulate her blood glucose. She had made several requests that her office be relocated, but these requests were denied. The court denied defendant's motion for summary judgment, finding that an office move may have been an appropriate accommodation. By contrast, in *Hudson v. Potter, supra*, 2011 U.S. Dist. Lexis 143575 at *16, plaintiff claimed that, prior to his toe amputation, the Postal Service had denied his request that he be permitted to work on an older mail sorting machine. According to plaintiff, the older machine required a consistent amount of exercise, and was more predictable than the newer sorting machine, thus making it easier to regulate his blood glucose. The court held that plaintiff had been provided with reasonable accommodations by allowing him to eat, check his blood glucose, and administer insulin whenever necessary, and that plaintiff had introduced no medical

evidence that he was unable to work on the newer machine or that the change in machines was necessary.

B. Vision Issues

Individuals with diabetes are at increased risk for eye complications that can lead to vision loss and even total blindness. Diabetic retinopathy, a condition that damages the blood vessels surrounding the retina, is the most common eye disease associated with diabetes and is the leading cause of adult blindness in the United States.⁶⁰ Individuals with diabetes have an increased prevalence of vision loss and of cataracts, a condition that clouds the eye, causing blurred vision. In fact, individuals with diabetes are 40 percent more likely than the general population to develop cataracts and may develop this condition at a much younger age.⁶¹ Individuals with diabetes may also be predisposed to glaucoma, increased pressure in the eye that can lead to damage to the optic nerve. Research indicates that individuals with diabetes have a 60 percent greater chance of developing glaucoma than individuals without diabetes.⁶²

Employees who develop vision loss associated with diabetes are likely to need a variety of accommodations in the workplace. The types of accommodations necessary vary largely depending on the work environment and the employee's level of vision. A partial list of such accommodations might include: computer and technology aids (e.g., screen readers, larger computer monitors to display increased font sizes, computer Braille displays, accessible website content, or screen magnification software); access to printed materials (e.g., Braille formatted document, audio versions of printed documents, qualified readers, closed circuit television, enlarged print, or magnifying aids); note-taking equipment (Braille stylus, digital recorder, paper with bold print or low glare); equipment modifications (labeled with Braille or large print); physical accessibility accommodations (building lighting; large print signs or Braille displays, permission to use a cane or guide dog). The list above is incomplete and will, of course, evolve with constantly changing technology.⁶³ A full discussion of vision accommodations under the ADA is beyond the scope of this paper.

The financial costs of such accommodations vary substantially, particularly with respect to equipment and technology aids. Many employers are likely to argue that the costs of assistive technology or staff assistants and readers are particularly onerous. The result may depend on whether the employer is being asked to provide aids to job performance such as technology or software, or whether the request is to reassign essential job functions. At least one court has

⁶⁰ National Institutes of Health, National Eye Institute, Facts About Diabetic Retinopathy, <http://www.nei.nih.gov/health/diabetic/retinopathy.asp>.

⁶¹ American Diabetes Association, Living with Diabetes: Eye Complications, <http://www.diabetes.org/living-with-diabetes/complications/eye-complications/>.

⁶² *Id.*

⁶³ For more information on types of reasonable accommodations see Equal Employment Opportunity Commission, Questions and Answers About Blindness and Vision Impairments in the Workplace and the Americans with Disabilities Act, http://www.eeoc.gov/eeoc/publications/qa_vision.cfm; Job Accommodation Network, Accommodation and Compliance Series: Employees with Vision Impairments, <http://askjan.org/media/sight.html>. See also American Council of the Blind, <http://www.acb.org/>; American Foundation for the Blind, <http://www.afb.org/default.aspx>; National Federation of the Blind, Information About Vision Loss For Employers, <https://nfb.org/employers>.

considered the cost of such accommodations for a plaintiff with diabetes-related eye disease. In *Nagel v. Sykes Enterprises*, 383 F. Supp. 2d 1180 (D. N.D. 2005), plaintiff requested that her employer provide her with computer software and a qualified reader. The court denied defendant's request for summary judgment on the computer software, finding a genuine issue of material fact about whether the software request was a reasonable accommodation.⁶⁴ Yet the court granted summary judgment on the issue of a qualified reader, finding that reading was an essential function of plaintiff's job and that her employer was not obligated to reallocate this function.⁶⁵ In another case involving a physician with diabetes-related eye complications, the court granted employer's motion for summary judgment, finding that plaintiff's request that he be exempted from performing patient examinations was unreasonable. The court found that the ability to perform these examinations was an essential function of the plaintiff's job. *Rosado v. Fondo del Seguro del Estado*, 2012 U.S. Dist. Lexis 16479, *21 (D. P.R. Feb. 8, 2012).

VI. Reassignment or Transfer to a Vacant Position

In addition to accommodations that are related to self-care needs or the limitations caused by the disease or its complications, reassignment or transfer of positions as an accommodation may be relevant regardless of the type or effect of diabetes. The ADA specifically lists reassignment to a vacant position as an example of a reasonable accommodation.⁶⁶ Reassignment to a vacant position should be considered only where other accommodations in the employee's current job are not possible.⁶⁷ For reassignment to be viable, there must be a vacant position available, and the employee must be qualified to perform the job with or without reasonable accommodations. Further, job reassignment is an option only for an existing employee, not for a job applicant.⁶⁸ Promotion to a higher level position is not a reasonable accommodation,⁶⁹ although a demotion may be.

Reassignment will only be reasonable if the employee shows that there was actually a vacant position to which he or she could be reassigned.⁷⁰ Many requests for job transfer are rejected simply because no vacant, comparable position is available. For example, in *Castellani v. Bucks County Municipality*, 2008 U.S. Dist. Lexis 66036, *24 (E.D. Pa. Aug. 27, 2008), plaintiff worked as a 9-1-1 dispatcher for the county. She took leave after she experienced a bout of hypoglycemia at work and was transported to the hospital. Prior to her leave, she had been working 45 minutes away from home. At the time she was set to return to work, her doctor

⁶⁴ 383 F. Supp. 2d at 1194.

⁶⁵ *Id.*

⁶⁶ 42 U.S.C. § 12111(9)(B).

⁶⁷ 29 C.F.R. § 1630.2(o) App. ("In general, reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship"); *Vollmert v. Wis. Dept. of Transportation*, 197 F. 3d 293, 302 (7th Cir. 1999) (employer not entitled to summary judgment that its transfer of employee to a different position was a reasonable accommodation, where there was evidence that employee may have been able to perform her existing job with other reasonable accommodations).

⁶⁸ 29 C.F.R. § 1630.2(o) App. ("Reassignment is not available to applicants. An applicant for a position must be qualified for, and be able to perform the essential functions of, the position sought with or without reasonable accommodation.")

⁶⁹ See *Heiko v. Colombo Savings Bank, FSB*, 434 F. 3d 249, 263 (4th Cir. 2006); *Hedrick v. Western Reserve Care Sys.*, 355 F. 3d 444, 457 (6th Cir. 2004).

⁷⁰ See *Kleiber v. Honda of America Mfg., Inc.*, 485 F. 3d 862, 869 (6th Cir. 2007); *Shannon v. N. Y. C. Transit Authority*, 332 F. 3d 95, 104 (2d Cir. 2003).

submitted a clearance stating that plaintiff could return to work with various restrictions, including that she not be permitted to work as a 9-1-1 dispatcher due to the stress of the job, and that she not be required to work more than 15 minutes away from her home. Plaintiff argued that the county should have transferred her to a comparable position that fit within her doctor's restrictions, but the court found that there was no comparable position available for which she was qualified. Similarly, in *Scott v. City of Yuba City*, 2009 U.S. Dist. Lexis 115482, *36 (E.D. Cal. Dec. 11, 2009), plaintiff maintenance worker was required by city policy to obtain a Commercial Driver's License (CDL), but could not do so because of his diabetes. Because he was not qualified to perform his existing duties without a CDL, plaintiff argued that the city should have transferred him to a comparable position that did not require a CDL. The court, however, granted summary judgment for defendant, finding that plaintiff had failed to identify a comparable position for which he was qualified.

However, where plaintiffs present evidence that an appropriate vacant position was available, courts often permit reassignment claims to go forward. *See, e.g., Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 632-633 (7th Cir. 1998) (reversing grant of summary judgment in case involving individual with diabetes who sought reassignment to a "helper" position when his diabetes rendered him unable to work as a commercial driver, because there were disputed facts about whether there was, in fact, a "Helper" position open at the time plaintiff requested it); *Hoggatt v. Electrolux Home Products Inc.*, 2010 U.S. Dist. Lexis 133936, *24 (M.D. Tenn. Dec. 16, 2010) (summary judgment denied where plaintiff sought a transfer to a forklift operator position in a cooler environment, because his diabetes and hypertension prevented him from working in warm conditions, and presented evidence that a forklift operator position had been open at the time he made the request).

In some instances, employees may request a transfer to a comparable position with a different supervisor. For example, in *Kraus v. Shinseki*, 846 F. Supp. 2d 936, 950 (N.D. Ill. 2012), plaintiff, who worked as a psychology technician at the Veterans Administration (VA), requested a transfer to another position, working in a different unit, with a different supervisor. The VA argued that his request for transfer to a different supervisor was unreasonable as a matter of law. The court disagreed stating: "on this record, and in light of the evidence concerning Kraus's disability, a reasonable trier of fact could conclude that Kraus's continued requests for a transfer were reasonable."

An employer need not reassign an employee where doing so would require "bumping" another employee already in the position.⁷¹ Where a position is vacant, but the company has an established seniority system for filling vacancies, the situation is more complex, although here too reassignment is generally not required. In *Barnett, supra*, the Supreme Court confronted the issue of job transfer versus a business's established seniority system. Plaintiff worked for U.S. Airways as a cargo handler. He injured his back and was transferred to a less physically demanding position in the mailroom, a position he held for two years. After those two years elapsed, the position became open to the company's seniority bidding system, and employees with more seniority requested the position. Plaintiff requested that, given his physical limitations, he be permitted to retain his job, but he was ultimately terminated. Defendant argued

⁷¹ *Dalton v. Subaru Isuzu Automotive*, 141 F. 3d 667, 697 (7th Cir. 1998); *Cassidy v. Detroit Edison Co.*, 138 F. 3d 629, 634 (6th Cir. 1998).

that a seniority system should always overrule a conflicting accommodations request. The Court disagreed, writing:

This argument fails to recognize what the Act specifies, namely, that preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal. The Act requires preferences in the form of reasonable accommodations that are needed for those with disabilities to obtain the same workplace opportunities that those without disabilities automatically enjoy. By definition any special accommodation requires the employer to treat an employee with a disability differently, i.e., preferentially. And the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach. Were that not so, the reasonable accommodation provision could not accomplish its intended objective.⁷²

Nevertheless, the court went on to clarify that a seniority system creates important benefits for a company and heavy deference should be given to such systems. The court opined that a request for accommodations which circumvents a company's seniority system will, in the normal run of cases, be likely to fail.⁷³

While it showed heavy preference for seniority systems, the Court did at least open up the notion that a reasonable accommodation cannot be rejected simply because a company has a seniority system in place. In *EEOC v. Dillon Cos.*, 310 F.3d 1271, 1277 (10th Cir. 2002), the employee, requested to work a 7:30 a.m. to 3:30 p.m. schedule due to her diabetes, and submitted a supporting note from her physician, but defendant claimed no positions were available. The question before the court involved a petition from the EEOC to enforce an administrative subpoena. Nevertheless, the court addressed defendant's argument that violating a well-entrenched system of seniority practices might create an undue hardship. The court concluded that a question of "whether a well-entrenched seniority system suffices to 'take off the table' a position that might otherwise serve as a reasonable accommodation is a context-specific inquiry that cannot be resolved in an informational vacuum, based only on the say-so of the employer."

Requests for transfer may also be denied if an employee is unable to demonstrate he is qualified for the specific job transfer requested. For example, in *Gonzales v City of New Braunfels*, 176 F. 3d 834, 839 (5th Cir. 1999), the court held that a police department had no duty to reassign an individual with diabetes to an evidence technician position. The plaintiff was unable to be certified as an officer because his diabetic neuropathy caused him difficulties in handling a firearm and driving. The city admitted that an evidence technician position was available when plaintiff requested reassignment, but the city required all evidence technicians to be commissioned officers. Because plaintiff could not work as an officer, he was not qualified for the technician position.⁷⁴ Courts are divided on the question of what an employer must do where

⁷² 535 U.S. at 397 (internal quotations omitted).

⁷³ *Id.* at 403-405.

⁷⁴ See also *Davoll v. Webb*, 194 F. 3d 1116, 1131 (10th Cir. 1999).

a disabled employee is qualified but the employer wishes to give the position to what it perceives as a better qualified candidate.⁷⁵

VII. Conclusion

There are over 29 million individuals in the United States who have diabetes and that number is on the rise. In 2012, 1.7 million new cases of diabetes were diagnosed in adults over the age of twenty.⁷⁶ More and more eligible employees in the U.S. workforce are now faced with the complications of this chronic condition.

Diabetes is a challenging condition that does require continuous monitoring and management. Despite this, individuals with diabetes are employed in, and work successfully, in the full range of jobs in the U.S. economy. Diabetes is a highly individualized condition that varies significantly from person to person, however, many employees with diabetes will, at some point, need modifications or adjustments to employment practices or procedures to ensure they remain healthy and productive.

This paper discusses some of the most commonly requested reasonable accommodations made by individuals with diabetes and offers an analysis of the current federal case law. Case law in many of these areas is quite limited. Prior to the passage of the ADAAA, federal courts focused heavily on the definition of disability, and restricted readings of the law's provisions left many individuals with disabilities—including diabetes—outside the scope of the ADA's protections. The ADAAA's expanded definition of disability should mean that new case law focuses primarily on the reasonableness of accommodations. Case law will continue to change and evolve in the coming years. As a result, it is critical that attorneys pursuing cases in this area present the court with adequate and detailed factual records, updated medical information, and reliable scientific data. Attorneys should be familiar with diabetes, its treatment, and the types of modifications available to assist individuals with diabetes in the workplace. The American Diabetes Association hopes this paper provides attorneys with basic information and resources. In addition, the Association stands ready to assist attorneys with further information, resources, and support as necessary.

⁷⁵ See *EEOC v. United Airlines*, 693 F. 3d 760, 768-769 (7th Cir. 2012) (holding that the employer may be required to place an employee in the position as a reasonable accommodation even if there is a better qualified candidate, and citing cases from other circuits taking differing positions on the issue).

⁷⁶ NATIONAL DIABETES STATISTICS REPORT, *supra* note 1, at 3.