IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	**Case No. C2-02-591**
	)	**JUDGE GRAHAM**
Plaintiff,	)	
v.	)	**MAGISTRATE JUDGE ABEL**
OVERNITE TRANSPORTATION COMPANY,	)	
Defendant.	)	

Plaintiff Equal Employment Opportunity Commission's Motion
for Partial Summary Judgment on the Issue of Liability

Pursuant to Rule 56(a)(c) and (d) of the Federal Rules of Civil Procedure and S.D. Ohio Civ. R. 7.2(a)(1), (b)(1)-(4), (e) and (f), Plaintiff Equal Employment Opportunity Commission (the "Commission" or "EEOC") by and through its attorneys, respectfully moves this Court for partial interlocutory summary judgment in the Commission's favor regarding the issue of liability. Because there are genuine issues as to the amount of damages, this Motion and Memorandum addresses only issues of liability.

Plaintiff's Motion for Summary Judgment is based upon the following:

(a) The Pleadings;

(b) The deposition testimony of the following individuals:

1. Thomas A. Blackstock, Jr., Defendant's Director of Compensation and HRIS
2. Philip A. Bowen, Defendant's Columbus, Ohio Service Center Manager
3. Jeffery Bowman, Charging Party
4. Craig Cairns, M.D., Charging Party's Family Care Physician

5. John G. Cametas, M.D., Defendant's Medical Review Officer
6. Tim Carlyle, Defendant's Columbus, Ohio Service Center Manager
7. H. Frank Entwisle, P.E., Defendant's Engineer Expert
8. James Santiago Grisolia, M.D., Plaintiff's Medical Expert
9. Pamela Lewis, PhD, Plaintiff's Vocational Rehabilitation Expert
10. Michael D. Privitera, M.D., Defendant's Medical Expert
11. John Reed, Defendant's former Columbus, Ohio Service Center Manager
12. Carol Silvania, Defendant's Regional Administrative Assistant
13. Jeremy Smith, Class Member
14. John A. Spindler, Dockworker at Defendant
15. Kenneth Thomas, Defendant's Employee Relations Manager
16. Regis Worley, Jr., Plaintiff's Engineer Expert

(c) Expert reports prepared by the following individuals:

1. H. Frank Entwisle, P.E., Defendant's Expert Engineer
2. James Santiago Grisolia, M.D., Plaintiff's Medical Expert
3. Pamela Lewis, PhD., Plaintiff's Vocational Rehabilitation Expert
4. Michael D. Privitera, M.D., Defendant's Medical Expert
5. Regis Worley, Jr., Plaintiff's Expert Engineer

(d) The Declaration of James R. Neely, Jr., Director (Acting) of EEOC's Cleveland District Office and accompanying exhibits; and

(e) The Declaration of Teresa A. Personen, Paralegal Specialist and accompanying exhibits.

WHEREFORE, the Commission respectfully requests that this Court enter judgment as a matter of law on the liability issues in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel certifies that the foregoing EEOC's Motion and attached Memorandum in Support of Motion for Interlocutory Summary Judgment on the Issue of Liability was electronically filed this 15th day of March, 2004. Notice of this filing will be sent to all parties by operation of the Court's electronic case filing system. Parties may access these filings through the Court's electronic case filing system.

s/Solvita A. McMillan
Trial Attorney (0040011)

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Plaintiff Equal Employment Opportunity Commission's Memorandum in Support of Motion for Partial Summary Judgment on the Issue of Liability

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Plaintiff Equal Employment Opportunity Commission's Memorandum in Support of Motion for Partial Summary Judgment on the Issue of Liability

I. Introduction

This Action was commenced on June 12, 2002, when the Equal Employment Opportunity Commission (hereinafter "Commission" or "EEOC"), an agency of the United States, filed a Complaint alleging that Overnite Transportation Company ("Defendant" or "Overnite"), committed violations of Title I of the Americans with Disabilities Act of 1990 and Title I of the Civil Rights Act of 1991. In this action the Commission seeks to correct unlawful employment practices on the basis of disability and to provide appropriate relief to Jeff Bowman and a class of similarly situated persons who were adversely affected by such practices.[1]

In paragraph 8 of its June 12, 2002 Complaint, the Commission alleges the following:

> Since at least on or about September 23, 1993, Defendant Employer has engaged in unlawful employment practices at its facilities nationwide, in violation of Section 102(a) of Title I of the ADA, 42 U.S.C. 12112(a). The

[1]In addition to Charging Party Jeff Bowman, the Commission has identified one additional individual, Jeremy Smith, on whose behalf it will seek victim-specific relief in this case.

practices include failing and refusing to hire qualified individuals with the disability of epilepsy into any position (not including commercial motor vehicle operation) involving the operation of tow motors and/or forklifts and/or which is performed at, near or around heavy equipment, including without limitation the position of dockworker.

On March 5, 2003, the Commission filed its Motion to Amend its Complaint and Amended Complaint. The Commission's unopposed Motion to Amend its Complaint was granted by Order of the Court dated April 18, 2003.

The Commission's Amended Complaint alleges Defendant has violated Section 102(a) of Title I of the ADA, 42 U.S.C. 12112(a) by discriminating against individuals with disabilities as defined in 42 U.S.C. 12101(2)(A)-(C) and by engaging in unlawful employment practices as follows:

1. Rejecting qualified individuals with a medical history or clinical diagnosis of epilepsy and/or diabetes mellitus for employment based upon a generalized or blanket exclusion without individually assessing the individual's ability to perform the essential functions of the job with or without a reasonable accommodation;

2. failing and refusing to hire qualified individuals with a medical history or clinical diagnosis of epilepsy and/or diabetes[2] mellitus into any position (not including commercial motor vehicle operation) involving the operation of tow motors and/or forklifts and/or which is performed at, near or around heavy equipment, including without limitation the position of dockworker; and,

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[2]Based upon the Commission's evaluation of documents produced by Defendant, it appears that during the relevant period there were no qualified individuals with a "clinical diagnosis of diabetes mellitus currently requiring insulin for control" who were rejected for the position of dockworker on account of such a medical diagnosis. Therefore, no monetary relief is being sought in this case on behalf of any individual with such a clinical diagnosis of insulin-dependant diabetes mellitus. However, the Commission is seeking appropriate injunctive relief to preclude Defendant from relying upon any DOT or similar regulation which would operate as a blanket exclusion so as to preclude an individual from being employed in any position (not including commercial motor vehicle operation) without providing such individual an individualized assessment of his or her qualifications to perform the essential functions of the job.

3. based upon reference to standards established by the U.S. Department of Transportation for drivers of commercial motor vehicles, rejecting individuals for employment because the individual was regarded as not suitable for employment in a position which requires the operation of a forklift (or similar motorized vehicle), and/or was regarded as not suitable for employment in a job position which requires the performance of work at or around heavy machinery because the individual has a medical history or clinical diagnosis of epilepsy or diabetes mellitus.

In the event the Commission prevails on the issue of liability, the Commission requests that matters concerning relief be addressed in separate "stage two" proceeding.

II. Issues

Based upon the applicable ADA statutory provisions and the facts before the Court, the following constitutes the issues pertinent to this motion:

(1) Whether the Commission has made a prima facie showing through the record in this case that Defendant rejected Jeff Bowman for employment as a dockworker pursuant to its generalized or blanket exclusion policy of rejecting individuals with certain disabilities for employment as dockworkers without individually assessing Mr. Bowman's ability to perform the essential functions of the job with or without a reasonable accommodation;

(2) Whether at the time he sought and was rejected for employment as a dockworker at Defendant: (a) Mr. Bowman was a qualified individual with a disability who could perform the essential functions of the dockworker position with or without a reasonable accommodation, or in the alternative, (b) Mr. Bowman was qualified to perform the essential functions of the position of dockworker and rejected by Defendant because it *mistakenly* believed that Mr. Bowman had a physical impairment that substantially limits one or more major life activities or believed that Mr. Bowman has an actual, non-limiting impairment that substantially limits one or more major life activities.

(3) Whether Defendant has established the "direct threat" affirmative defense to the Commission's claim for relief on behalf of Mr. Bowman by showing that Mr. Bowman cannot meet the ADA's qualification standard that he not pose a "direct threat to the health or safety of other individuals in the workplace" because he cannot perform the job safely with reasonable accommodation.

(4) Whether the Commission has made a prima facie showing through the record in this case that Defendant rejected Jeremy Smith for employment as a dockworker pursuant

to its generalized or blanket exclusion policy rejecting individuals with certain disabilities for employment as dockworkers without individually assessing Mr. Smith's ability to perform the essential functions of the job with or without a reasonable accommodation;

(5) Whether: (a) at the time he sought and was rejected for employment as a dockworker at Defendant, Mr. Smith was a qualified individual with a disability who could perform the essential functions of the dockworker position with or without a reasonable accommodation, or in the alternative, (b) Mr. Smith was qualified to perform the essential functions of the position of dockworker and rejected by Defendant because it mistakenly believed that Mr. Smith had a physical impairment that substantially limits one or more major life activities or believed that Mr. Smith has an actual, non-limiting impairment that substantially limits one or more major life activities.

(6) Whether Defendant has established the "direct threat" affirmative defense to the Commission's claim for relief on behalf of Mr. Smith by showing that Mr. Smith cannot meet the ADA's qualification standard that he not pose a "direct threat to the health or safety of other individuals in the workplace" because he cannot perform the job safely with reasonable accommodation.

III. The Facts

A. Defendant's Generalized or Blanket Exclusion Policy

As will be set forth more fully in the following sections, the evidence in this case is that Mr. Bowman and Mr. Smith were rejected for employment as dockworkers based upon Defendant's application of a generalized or blanket exclusion policy which was derived by its corporate medical officer from regulations established by the United States Department of Transportation ("DOT"). These regulations are known as the Federal Motor Carrier Safety Regulations (the "FMCSR") and are "applicable to all employers, employees, and commercial motor vehicles, which transport property or passengers in interstate commerce." 49 C.F.R. 390.3-5.

Under the FMCSR, individuals with a medical history or clinical diagnosis of epilepsy, or any other condition which is regarded as likely to cause loss of consciousness or any loss of ability to control a commercial motor vehicle, including insulin-dependant diabetes, are precluded from

driving a commercial motor vehicle.

The FMCSR define "commercial motor vehicle" or "CMV"as "any self-propelled or towed vehicle used on public highways in interstate commerce to transport passengers or property when: (a) The vehicle has a gross vehicle weight rating or gross combination weight rating of 10,001 or more pounds . . ." *Id.* The FMCSR also provide that a person shall not drive a CMV unless he is physically qualified to do so. 49 C.F.R. 391.43(e). Under the FMCSR, a person is physically qualified to drive a motor vehicle if, among other things, that person –"(h)as no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control." 49 C.F.R. 391.49(b)(2)(3). Also, under the FMCSR, a person is physically qualified to drive a motor vehicle if, among other things, that person – "(h)as no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a commercial motor vehicle;" 49 C.F.R. 391.49(b)(2)(3)(8).

Defendant has applied a form of the above generalized or blanket exclusion policy to at least two qualified individuals seeking employment as regular dockworkers. It is undisputed that regular dockworkers at Overnite are not required to drive commercial motor vehicles as defined in the FMCSR.[3]

B. Overnite Extended a Conditional Offer of Employment to Mr. Bowman While He Was Working at Overnite as a Temporary Manpower Employee

This case arises from the withdrawal of a conditional offer of employment which was

[3]Overnite has a "separate classification" for dockworkers who carry a commercial driver's license. Overnite dockworkers who also perform as drivers of commercial motor vehicles are in a "different classification from just a regular dockworker." (Deposition of Thomas A. Blackstock, Jr. ["Blackstock Dep."], p. 22:6-31) The "separate classification" of dockworkers who carry a commercial driver's license is not at issue in this case.

extended by Overnite to Mr. Bowman in July, 1996.

Defendant Overnite describes itself as "a leading provider of less-than-truckload (LTL) transportation, offering coast-to coast long-haul services, as well as regional and interregional services nationwide." According to its web site, Defendant's 171 service centers serve 45,000 cities and towns across the United States, Canada, Mexico, Puerto Rico and the U.S. Virgin Islands. (www.overnite.com). Defendant's facility on Refugee Road in Columbus, Ohio is both a service center and a district or regional office which serves a multi-state area. (Deposition of Carol Silvania ["Silvania Dep"], p. 7:2-22).

Mr. Bowman applied for employment as a dockworker at Defendant's Columbus, Ohio service center in July, 1996. (Deposition of Jeffery Bowman ["Bowman Dep."], p. 71; Plaintiff EEOC's Appendix ["EEOC Appx."] at Attachment A, Declaration of James R. Neely, Jr., EEOC Cleveland District Office District Director (Acting) ["Neely Dec."], October 8, 1996 Overnite Transportation Company position statement, at Exhibit A of Position Statement, Jeffery Bowman Application for Employment with Post-Offer Medical Questionnaire dated July 11, 1996).

At the time Mr. Bowman applied for employment with Defendant, he was working at Defendant's Columbus, Ohio facility as a temporary employee on assignment from Manpower. (Bowman Dep., 71-73; Neely Dec., October 8, 1996, Overnite position statement at Exhibit F, correspondence dated from Carol Silvania, Overnite's Columbus, Ohio Regional Administrative Assistant Overnite's to Ken Thomas, Overnite's Manager, Overnite Human Resources Manager).

Dockworkers at Overnite are required to perform various duties which are listed on Defendant's "ADA Essential Job Functions - Dock Worker." (Neely Dec., October 8, 1996

Overnite position statement at Exhibit F).[4]

As a temporary dockworker at Overnite, Mr. Bowman worked first shift unloading inbound freight. (Bowman. Dep., p. 72:9-23). Mr. Bowman operated a forklift for a day or two and passed the preliminary examination necessary to be certified as an Overnite forklift operator. (Bowman Dep., p. 73:4-19).[5] During his temporary employment as a dockworker, Mr. Bowman successfully performed his job duties and John Reed ("Reed"), Overnite's Service Center Manager, told Mr. Bowman that he "liked [Mr. Bowman's] work." (Bowman Dep., 77:20-23).

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[4]Defendant's Essential Job Functions list for the Dockworker position indicates that the incumbent must be at least 18 years of age and be able to: (1) "read, understand, and write, in order to analyze and complete all required paperwork, and to comprehend Company written materials, and must be able to communicate with supervisors, co-workers, and customers;" (2) "pass a drug test and must not be a current user of controlled substances or an abuser of drugs or alcohol;" (3) "sit and ride for extended periods of time on a forklift;" (4) "stand for extended periods of time on a concrete floor or other level or non-level surface;" (5) "handle hazardous, or non-hazardous, materials;" (6) "walk, bend, reach, push, pull, stoop, squat, kneel, as well as grasp, lift, as high as above the head, and carry heavy objects frequently and continuously, and handle heavy equipment as necessary;" (7) "walk, bend, reach, push, pull, stoop, kneel, and squat to transport, load and unload freight, as well as climb and balance on varying, and sometimes slippery, even or uneven surface levels, and climb upon trailer when necessary;" (8) "report for work at all specified times;" (9) "familiarize self with, and be able to comply with, the proper methods of loading and unloading for the various cargos to be transported, and must be able to support 50 lbs. frequently and up to 100 lbs. occasionally, other than personal body weight." (10) "comply with company guidelines, procedures, rules and policies regarding acceptable conduct when dealing with customers and fellow employees, and the adequate performance of assigned duties;" (11) "work shifts that consist of days or nights, and/or weekends, and overtime hours as required by the Company;" (12) "have mental, physical, and analytical capabilities in order to use a telephone, mechanical or electronic equipment, weigh and measure, draw conclusions from written and computer-generated materials, analyze data or report information, perform mathematics, and search for solutions to accomplish goals;" and (13) "work at a rapid pace and under time pressure, as necessary, in order to complete loading and unloading on time, indoors or outdoors in inclement weather, and otherwise perform assigned duties in an adequate and timely fashion." In terms of heavy equipment, Dockworkers are expected to operate a forklift, mechanical lift and tow motor. (Blackstock Dep., 17:3-8).

[5]Mr. Bowman had also received training and certification in forklift operation from his prior employer (Bowman Dep., 25:3-16).

Mr. Bowman and six other individuals who were also working as temporary dockworkers were told if they wished to continue working for Overnite, "they would need to be hired as permanent employees." (Bowman Dep., 75). Mr. Bowman was provided with an Overnite employment application which he completed and returned to Mr. Reed. Mr. Bowman was then interviewed by Mr. Reed. Mr. Reed told Mr. Bowman that "as far as he [Mr. Reed] was concerned, [Mr. Bowman] had a job, but that [Mr. Bowman] had to go through the medical portion of it, fill out the medical papers." (Bowman Dep., 77:18-25). Mr. Bowman was then given Overnite's "Post-Offer Medical Questionnaire" which he completed and returned. (Neely Dec., October 8, 1996 Overnite position statement at Exhibit A, Bowman Post-Offer Medical Questionnaire and Overnite Application for Employment and Information Record).

C. Overnite's Medical Review Process

Overnite's post-offer medical questionnaire asks candidates to whom a conditional offer of employment has been extended to provide information about their past medical history. On Mr. Bowman's questionnaire form, in response to the question whether in the past five years he had "epilepsy/fainting spells/severe headaches," Mr. Bowman responded by checking the "yes" block.[6] In the "comments" section of the form, Mr. Bowman wrote the following:

> I am epileptic. I am under a doctor's care. I rarely have seizures and they do not create a problem for me being able to do any type of work. (Neely Dec., October 8, 1996 Overnite position statement at Exhibit A)

Mr. Bowman's post-offer medical questionnaire response was forwarded by Overnite's

[6]Mr. Bowman had also filled out a Manpower "inventory of handicaps" questionnaire form prior to beginning his assignment at Overnite. The Manpower "inventory of handicaps" form does not seek any information regarding epilepsy or seizures. (Neely Dec., October 8, 1996 Overnite position statement at Exhibit C, Manpower Temporary Services Handicaps Recognized by the Industrial Commission of Ohio).

Columbus, Ohio service center to Dr. John Cametas ("Dr. Cametas"), Overnite's Medical Review Officer or "MRO."[7] (Silvania Dep., p. 11:17). In his capacity as Overnite's MRO, Dr. Cametas is responsible for screening the medical questionnaires of all post-offer candidates to determine whether the candidate is suitable for a freight handling position with Overnite. (*Id.*). Overnite's human resource officials rely upon Dr. Cametas' recommendation when making hiring decisions and are unaware of anyone ever being hired contrary to Dr. Cametas' recommendation. (Blackstock Dep., 35:9-11; Deposition of Kenneth Thomas ["Thomas Dep."], 16:1-10; Deposition of John Reed, ["Reed Dep."], p. 13:3-11; Silvania Dep., p. 11:18-25, 12:1-2).[8]

In Overnite's hiring process, once a candidate returns his post-offer medical questionnaire to the Service Center's manager, the manager forwards it to Dr. Cametas at his Richmond, Virginia office which is known as Pembrooke Occupational Health. Overnite's headquarters office is also located in Richmond, Virginia. Dr. Cametas and his staff members then make the medical assessment which determines whether the candidate is suitable for employment. (Reed Dep., pp. 6-14; Silvania Dep. 11:6-17). Post-offer candidates also must pass a criminal background check and drug test. (Reed Dep. 12:9-25; Silvania Dep., p. 10:12-15).

In Dr. Cametas' office, Overnite's post-offer medical questionnaires are first reviewed by one

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[7]Dr. Cametas has a long-standing contract with Overnite to provide, among other things, medical screening for Overnite's post-offer candidates for employment. (Deposition of John G. Cametas, M.D. ["Cametas Dep."], p. 8:1-5). Dr. Cametas, through a company he owns known as Pembrooke Occupational Health, has been Overnite's nationwide Medical Review Officer since 1989 or 1990. (Dep., pp 4-5, 11:2-6). Dr. Cametas was also "the major architect" of Overnite's post-offer medical form and "mostly" designed it himself. (Cametas Dep., p. 9:11-22).

[8]According to Carol Silvania, Regional Administrative Assistant at Overnite's Columbus, Ohio service center, "Mr. Reed [the Columbus service center manager] couldn't make a decision. It has to come, you know, we have to get the okay from [Dr. Cametas at] Pembrooke and we can't fight that." (Silvania Dep., 16:17-23).

of Dr. Cametas' staff members. Dr. Cametas' staff handles from 1,000 to 2,000 employment-related medical assessments a year for the clients they serve.[9] Typically, the completed post-offer medical questionnaires are faxed by Overnite to Dr. Cametas' office. (Silvania Dep., 11:10-17) The questionnaire responses are then reviewed by either a nurse practitioner, another employee who is certified in reading x-rays, or staff clerical help. (Dr. Cametas Dep., p. 11:1-20). If one of Dr. Cametas' staff members sees something "abnormal," the questionnaire is also reviewed by Dr. Cametas who determines whether additional information will be necessary regarding the candidate.

In order to further evaluate such a candidate, depending upon the particular case, Dr. Cametas tries to get x-ray reports, EEG reports, the doctor's office notes and sometimes will talk to the individual's doctor. (*Id.*). Dr. Cametas attempts to make the candidate's doctor aware of "the type of work that this man has been offered and to see if the doctor agrees that the man can do this work." (*Id.* p.12:20-25). Dr. Cametas also talks to the candidate "to discuss with the candidate his past medical problems and also if [Dr. Cametas] think[s] that he can do or not do the job, and [tries] to explain to them usually why they can or cannot do the job." (Dr. Cametas Dep., 13:5-22). The time frame required for Dr. Cametas' to complete the assessment of a post-offer candidate whose questionnaire indicates there is "something wrong" is anywhere from "one day to three weeks" depending upon how quickly the potential employee can get records to Dr. Cametas' office. (*Id.*).

In reviewing the post-offer medical questionnaires of candidates seeking employment as dockworkers, certain conditions trigger closer scrutiny by Dr. Cametas:

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[9]Notwithstanding the volume of MRO work which passes through Dr. Cametas' office as described above, Dr. Cametas devotes only approximately fifteen to twenty percent of his professional time to doing employment-related MRO work and administrative duties and the remaining eighty to eighty-five percent is devoted to his family medical practice. (Dr. Cametas' Dep., p. 6:19-25).

> If they have a cardiac condition, if they've had back pain or discomfort in their backs, if they've had surgery to their backs, if they've had some inability to be able to move easily and to be able to move what [Dr. Cametas] consider[s] heavy freight. If they are diabetics, [Dr. Cametas] looks at that. If they have psychiatric or seizure disorder, [Dr. Cametas] look[s] at that. . . [T]he job is very taxing for these people. . . (Dr. Cametas Dep., p. 15:21-25; 16:1-4).

Dr. Cametas testified that he would probably recommend hiring a post-offer candidate with poorly controlled diabetes for employment as a dockworker. (Id. p. 20:14-24). If the individual had "very brittle diabetes, meaning that he went into comas frequently," Dr. Cametas "would probably get on the phone and talk to [the individual's] doctor about the situation on the dock" and see if the doctor could "help him get better controlled." (*Id.*). Notwithstanding, comas and frequent lapses of consciousness, Dr. Cametas testified he does not think that he would stop someone with brittle diabetes from being employed as a dockworker at Overnite. (*Id.*).

In evaluating a post-offer candidate with a past history of back surgery, Dr. Cametas testified that if his own opinion were to differ from that of a physician who said his or her patient was capable of doing the strenuous lifting required of dockworkers, Dr. Cametas would "probably get some other advice either locally from a doctor, . . . or try to get the person examined in his own environment." (Id. p. 23:16-25).

Dr. Cametas also testified that he would "not really" be concerned about an individual with a hearing impairment who is totally deaf and mute working as a dockworker. Dr. Cametas reasoned that while such an individual's risk of being run over by a tow motor or hurt is "probably a little bit higher than somebody who could hear very well," he "couldn't see" where other forklift operators "would not know that this man in the terminal is deaf and would take precautions to help not run over him because he didn't hear the tow motor or hear the activity on the dock." (Dr. Cametas Dep.,

p. 89:10-25; 90:1-10).

Dr. Cametas also testified that hiring an individual who is blind in one eye is an acceptable risk in Overnite's work environment and that he would "have no problem" with an individual who is blind in one eye driving a forklift and being employed as a dockworker. (Id. p. 90:24).

Despite his testimony that the above-described impairments would not cause him to reject a post-offer candidate from being employed as a dockworker at Overnite, Dr. Cametas admitted that when considering individuals with epilepsy for employment, he is influenced by a particular worry he has about "epileptics." (Cametas Dep., p. 28-31). Dr. Cametas confessed that he is "possibly a little biased and fearful of epileptics killing themselves and killing other people." (Id. p. 28:10-16).

Dr. Cametas attributes his fear and bias regarding epileptics killing themselves and other people to his having "three or four" patients who had automobile wrecks driving as a result of their epilepsy. (Cametas Dep. 30:17-20). However, during his deposition the only incident regarding which Dr. Cametas had any specific recollection was one where a patient of his who had epilepsy drowned when he had a grand mall seizure while drawing bath water. This single incident involving an individual with epilepsy took place over thirty years ago.[10] (*Id*). According to Dr. Cametas' testimony, an incident such as the one where his patient drowned in the bath tub "biases you to being very fearful of people who can hurt themselves." (Id., p. 30:9-11). Dr. Cametas recalled the incident (which would have been in approximately 1972) "because it was a vivid experience in [Dr. Cametas'] life. (*Id.*, p. 30:18-20; 31:4-14).[11]

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[10]The only other incidents involving an accident where the patient had a seizure which Dr. Cametas was able to cite involved situations where the individual had a hematosis to the brain, or an aneurism, and angioma rather than epilepsy. (Dr. Cametas Dep., p. 32:24-25, 33:1-6).

[11]Despite Dr. Cametas fear and bias against individuals with epilepsy working in Overnite's dock environment, Overnite does not perform periodic medical evaluations of

If an individual with epilepsy has not had their medication changed in a period of 15 to 20 years Dr. Cametas indicated that would be a very positive factor in terms of his deciding whether that individual should be employed as a dockworker. (Cametas Dep., 29:20-23). Dr. Cametas also testified that when considering whether an individual with epilepsy is suitable for employment as a dockworker it would be significant for him to know that the candidate had been "seizure free for a period of time." *(Id.*, p. 29:14-17; 29:3-10). However, Dr. Cametas was unable to articulate whether the seizure free interval should be "one year or five years or fifteen years." (*Id*., 29:14-17).

Another factor Dr. Cametas considers when deciding whether an individual with epilepsy is qualified to hold the position of dockworker is whether the individual has had a seizure "recently." For purposes of evaluating an individual with epilepsy for employment, Dr. Cametas defines recent as within the past two to six years. (Id., 37:12-17).

Dr. Cametas has never looked at any of the scientific studies which examine the likelihood of an individual with epilepsy having a seizure after a shorter seizure-free interval. (Id., p. 38:10-22). Nor has Dr. Cametas consulted any outside sources such as the Epilepsy Foundation regarding the employment of individuals with epilepsy. Dr. Cametas' own belief is that individuals with epilepsy can never predict when the next seizure is going to happen. (Id., 38:23-25). For purposes of determining whether an individual with epilepsy presents an unacceptable level of risk in a work environment, Dr. Cametas relies exclusively upon his own personal judgment. (*Id.,* p. 39:1-4).

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incumbent employees, nor does Overnite instruct Manpower to include epilepsy among the twenty medical conditions identified on Manpower's medical survey. (Cametas Dep., 61:2-11; Thomas Dep. 12:16-19; 14:3-19).

D. Mr. Bowman

1. Dr. Cametas' Reason for Rejecting Mr. Bowman

Dr. Cametas was interviewed by the Commission during its investigation of Mr. Bowman's discrimination charge. (Dr. Cametas Dep., p. 25:21-25; 26:1-2, Dep. Exhibit 1). During his March 23, 1999 telephone interview, Dr. Cametas was asked by the Commission's investigator why he rejected Mr. Bowman for the position of dockworker. Dr. Cametas responded as follows:

> He was an epileptic and he was on medication, and he has had two other seizures recently that were documented in his medical records and I felt that because of this history that if we put him on the dock and he's on a piece of machinery, he could hurt himself or some other employee. So, I used the same guidelines that the Department of Transportation uses for its truck drivers, sometimes I am a little more lenient with people who are on the dock because they are not driving continuously but statistically if someone hasn't had a seizure for a long time I let them work as opposed to Mr. Bowman here who has had two previous seizures. That is why I did not want him to be on that dock. (Dr. Cametas Dep. Exhibit 1, p. 3).[12]

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[12]During discovery, by letter dated March 19, 2003, Defendant provided Plaintiff with a spreadsheet identifying all Overnite applicants not approved for hire by Dr. Cametas' Pembrooke Occupational Medicine office. (Plaintiff's Appx., Attachment A, Personen Declaration ["Personen Dec."], March 19, 2003 Letter from Robert L. Stewart, counsel for Overnite, to Solvita A. McMillan, counsel for the EEOC). The foregoing discovery response was provided to Plaintiff as part of Defendant's compliance with this Court's January 22, 2003 Order requiring Defendant to advise Plaintiff what records it has relevant to determining the identity of job applicants not approved for hire because of epilepsy and diabetes. Defendant's spreadsheet provides the names of 161 applicants who were rejected for dockworker positions during the relevant period. Each individual applicant's name appears with a code number indicating the basis for rejection as one of the following: (1) This Individual Presents a Health and Safety Hazard to Himself; (2) Applicant Did Not Respond to Request for Medical Records or Review with Medical Review Officer; (3) Cannot Perform the Essential Functions Necessary for Employment; (4) Per Employer, This Applicant Will Not Be Hired or Is No Longer Working Records not Needed or Are Unavailable (5) Applicant Gave Cold Specimen Sample at Collection Site Would Not Stay and Produce Another Fresh Sample; (6) Applicant Could Possibly Present A Danger to Himself and Others in the Applied for Position; (7) Per Employer, Employee Has Quit. The reason indicated for Mr. Bowman's not being hired by Overnite is number three: "Cannot Perform the Essential Functions Necessary for Employment."

However, during his deposition, Dr. Cametas denied using Department of Transportation guidelines when deciding whether to recommend a post-offer candidate for employment as a dockworker. (Dr. Cametas Dep., p. 15:10-17).

2. The Sequence of Events Regarding Mr. Bowman's Post-Offer Medical Assessment

Mr. Bowman's completed post-offer medical questionnaire form was faxed by Overnite's Columbus service center to Dr. Cametas' office on July 11, 1996 and received by Dr. Cametas' staff on that same date. (Cametas Dep., p. 69:3-9, 70:1-8; Silvania Dep., p. 11:1-17, Silvania Exhibit 1; Thomas Dep. Exhibit 1, at p. 5).

Dr. Cametas' review of Mr. Bowman's medical questionnaire generated a total of three standardized messages forms regarding Mr. Bowman which were faxed by Dr. Cametas' office to the attention of John Reed (the Columbus service center manager) or Carol Silvania (Mr. Reed's Administrative Assistant). On each of the aforementioned messages, a date and time stamp appears at the top of the page indicating the messages were sent by Dr. Cametas' office in the following (EST) sequence: July, 11, 1996 at 16:00 hours (or 4:00 p.m.); July 19, 1996 at 9:28 a.m. and July 19, 1996 at 11:55 a.m.. (Silvania Exhibit 2; Silvania Dep., p.10:22-25, 11:1-9, 15:2-25, 16:1-25; Cametas Dep., p. 68:1-15; Thomas Dep. Exhibit 1 at p. 18-20).

In the first message dated July 11, 1996, Dr. Cametas' office asks that the applicant [Mr. Bowman] to "call Tinky" at Dr. Cametas' 800 telephone number. The message also indicates Dr. Cametas' office would make a determination regarding whether Mr. Bowman should be hired upon receipt of his medical records and history. (*Id.*). After receiving this message, Mr. Reed made a handwritten notation near the bottom of the page which indicates "called 7-16 [at]11:35 a.m." (Silvania Dep., *Id.*). The notation indicates that Mr. Reed communicated the message to Mr.

Bowman at that time. (*Id.*).

The following day, on July 17, 1996, apparently after speaking with Mr. Reed and "Tinky," Mr. Bowman signed a form authorizing his family physician, Dr. Craig Cairns, to release medical information to Overnite. (October 8, 1996 Respondent Position Statement at Exhibit D). Mr. Bowman recalls sending his medical records to Dr. Cametas' office but is uncertain as to whether the records were sent before he was notified of his rejection for employment by Overnite or afterwards in an attempt to persuade Dr. Cametas to change his mind. (Bowman Dep. 82:1-7).

Dr. Cametas' second message regarding Mr. Bowman (which is the first of two July 19, 1996 messages sent by Dr. Cametas' office to the Columbus service center), says "please have applicant [Mr. Bowman] call Dr. Cametas" at his 800 telephone number." The message was faxed by Dr. Cametas' office to Overnite's Columbus service center at 9:28.[13] a.m. on July 19, 1996 At the bottom of the page on which the message appears, Mr. Reed wrote "10:05 7/19" indicating that the message asking that Mr. Bowman call Dr. Cametas was communicated to Mr. Bowman by Mr. Reed on July 19, 1996 at 10:05 a.m.

After receiving the message from Mr. Reed, Mr. Bowman, who was then still working at Overnite as a temporary dockworker, called Dr. Cametas. (Bowman, Dep., 80:1-4). Dr. Cametas told Mr. Bowman that he could not recommend him for employment with Overnite because he was epileptic and he "could have a seizure, . . . pass out, . . . and could get hurt or cause someone else to get hurt." (Bowman Dep., pp. 78:19-25, 79:1-9). Dr. Cametas did not ask Mr. Bowman about the frequency of his seizures nor anything about his medical history other than, possibly, asking Mr.

[13]Although the "9:28" a.m. time is partially obscured on the copy of the document submitted with these pleadings, it is clearly legible on the original as received from Defendant during discovery and will be produced upon request.

Bowman when he had his last seizure. Dr. Cametas "just basically told Mr. Bowman he couldn't allow [Mr Bowman] around forklifts because [he] was epileptic." (*Id.*). Notwithstanding Mr. Bowman's expressed disagreement, Dr. Cametas made no effort to explore or make further inquiry regarding how Mr. Bowman's disability might be accommodated or what measures could be taken to reduce Dr. Cametas' fears regarding Mr. Bowman's ability to safely perform the job. (*Id.*).

After the above-described telephone conversation when Dr. Cametas communicated his decision to Mr. Bowman, Mr. Bowman attempted to persuade Overnite's management to reconsider hiring him. When Mr. Bowman spoke to Mr. Reed, Mr. Reed said he could not help because "his hands were tied" in light of Dr. Cametas' negative recommendation. (Reed Dep., p. 80:1-15). Mr. Reed suggested that Mr. Bowman talk to Ken Thomas who worked in human resources at Overnite's headquarters office in Richmond, Virginia. Mr. Bowman called Mr. Thomas and "tried to do what [he] could to appeal" Dr. Cametas' decision. Bowman Dep., 80:10-14, 82:1-8). Mr. Bowman was led to believe that someone from Overnite's headquarters would contact him. However, Mr. Bowman "never did get another phone call" from Overnite. (*Id.*).

The third and final message regarding Mr. Bowman was sent by Dr. Cametas' office to the Columbus service center by a facsimile transmission dated July 19, 1996 at 11:55 a.m. In pertinent part the message reads as follows:

> Pembrooke Occupational Health 7/19/96 11:55
> Employer Overnite Transportation
> Employee Name: Bowman, Jeffrey (*sic*) Bowman
> Recommend to hire? No
> Reason for Negative Recommendation:
> Cannot perform the essential functions necessary for employment
> (Silvania Dep. Exhibit 2, p.1).

This above message confirms what Dr. Cametas told Mr. Bowman during the above-

described telephone conversation when Dr. Cametas "basically told [Mr. Bowman] that he couldn't allow [Mr. Bowman] to work around forklifts because he was epileptic." (*Id.*, pp. 78:19-25, 79:1-9). The telephone conversation between Mr. Bowman and Dr. Cametas apparently occurred on July 19, 1996 sometime between 10:05 a.m. (when Mr. Reed informed Mr. Bowman of Dr. Cametas' message asking that Mr. Bowman call Dr. Cametas) and 11:35 a.m. (when Dr. Cametas' office faxed its negative recommendation to the Columbus service center).

In an attempt to convince Dr. Cametas to reconsider his negative recommendation, Mr. Bowman called his family physician, Dr. Cairns. A July 19, 1996 telephone message taken by Dr. Cairns staff indicates that Mr. Bowman called Dr. Cairns' office and asked that Dr. Cairns speak to Dr. Cametas regarding "Dr. Cametas' . . .concerns about pt. [Mr. Bowman] running a forklift." (Deposition of Craig Cairns, M.D. [Cairns Dep."], exhibit 4). Next to the message, Dr. Cairns wrote "[h]ow am I to get in touch [with] Dr. Cametas?"[14] (Dr. Cairns Dep., pp. 16:10-25; 17:1-2). The message was taken by Dr. Cairns staff at 3:30 p.m. on the afternoon of July 19, 1996, roughly four hours after Dr. Cametas' communicated his negative recommendation to Overnite's service center by facsimile.

Based upon the foregoing sequence of events, it is apparent that Dr. Cametas, negative recommendation regarding Mr. Bowman was based upon the following: (1) Mr. Bowman's post-

[14]Although Dr. Cametas denies speaking with Dr. Cairns prior to making his July 19, 1996 negative recommendation regarding Mr. Bowen, there is evidence in the record that Dr. Cairns wrote a letter a letter dated July 30, 1996 in support of Mr. Bowman's efforts to obtain employment at Overnite which Dr. Cametas ignored. (Cametas Dep., p. 75:7-11; Dr. Cairns Dep., p. 16:10-23, Dr. Cairns Dep. Exhibit 3). As will be set forth in more detail in the following sections, had Dr. Cametas been willing to engage in an interactive process and have further dialogue with Mr. Bowman and with Overnite's Columbus service center, he would have learned that the Columbus service center had been successfully accommodating one of its dockworkers who has epilepsy.

offer medical questionnaire indicating that he had epilepsy; (2) Dr. Cametas' personal opinions about the employability of individuals with epilepsy; and (3) possibly ten pages of Mr. Bowman's medical records which cover the two-year period prior to Mr. Bowman's July 11, 1996 application for employment with Overnite.

During his deposition Dr. Cametas testified that in order to review an individual who had a history of having a number of seizures over a 19 year period, he would want to know the following information:

> When was the last one? . . .[I]t's not just how many. It's how many, how often, what was being done to him during that time, what medicines he was having, whether he was under the care of a specialist who was correctly checking his medications and giving him the right dose. [I]t's not just one factor. It's how often, how frequently, what was happening to him at the time that he was having the seizures, what medicine was being used, what concentrations of medicines, what his level – blood levels with the medicines were. So there's many different factors that you look at to evaluate how safe I personally think he would be on the dock. . . How diligent, how good this patient is in taking his medication would also determine whether he's a liability to put in a bad environment. . . Can he afford his medicines?

In order to obtain the above-described information, Dr. Cametas testified that he would "[a]sk the patient, ask the doctor." Notwithstanding the foregoing, Dr. Cametas also acknowledged that he did not speak with Mr. Bowman's physician, Dr. Cairns. (Cametas Dep., p. 75:7-11). Nor did Dr. Cametas have any information about the history of Mr. Bowman's epilepsy except for possibly the two-year period covered by the medical records which Mr. Bowman sent to Dr. Cametas' office.

3. Mr. Bowman's Work History

Prior to seeking employment at Overnite, Mr. Bowman worked as a Warehouse Operator at Nissan Motor Corp. ("Nissan") for over fourteen and a half years from March 1981 through mid-October, 1995. Operating a forklift was one of the job duties Mr. Bowman was required to perform

as a Nissan Warehouse Operator. Mr. Bowman has worked around forklifts most of his life. (Bowman Dep., 81:3-11). The amount of time Mr. Bowman spent operating a forklift at Nissan depended upon the nature of his assignment and "what they needed to get the orders out."[15] (Bowman Dep., p. 28:17). There were occasions when Mr. Bowman spent the entire day operating a forklift at Nissan and other times when use of a forklift was not necessary to perform his job duties. (Bowman Dep., pp. 27-28). Although the percentage of time Mr. Bowman spent operating a forklift varied over the years, on average Mr. Bowman spent an hour a day operating a forklift during his employment at Nissan. (Bowman Dep., p. 20:15-25, 21:1-8). At Nissan, Mr. Bowman also worked in close proximity to hazardous materials which included flammables and corrosives such as paint, batteries and other materials which had to be specifically identified as hazardous prior to shipping. (Bowman Dep., p. 3-18).

Mr. Bowman became unemployed in October,1995 when Nissan closed the plant where he worked. (Bowman Dep., pp.11:19-21).[16] When employees at the Nissan facility where Mr. Bowman worked were notified they would be losing their jobs as a result of the impending plant shutdown, Mr. Bowman began taking a general machinist course at the Licking County Joint Vocational School Adult and Continuing Education Program ("LCJVS"). In May 1996, after attending the nine-month program, Mr. Bowman received a certificate indicating he had successfully completed the general

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[15]As a Warehouse Operator at Nissan, Mr. Bowman was assigned to perform various job duties which included "picking," "packing" and "depot transfers" with most of his time spent in the packing classification (Bowman Dep., p 20:17-23).

[16]After Mr. Bowman was rejected for employment by Overnite, while searching for regular full time employment, he found temporary work in various factory and warehouse settings through a number of employment placement agencies. (Bowman Dep., 101-105). Mr. Bowman also received machine operator training through the Licking County Pre-Employment Training Program on two separate occasions. (Bowman Dep., pp. 13:16-18; 101:23-25; 102:1-12).

machinist course. Mr. Bowman also received training for employment in factory and warehouse work provided by the LCJVS through a pre-employment training program known as "PET" in which local employers participated.[17] (*Id*., pp. 13-14).

In May 1997, Mr. Bowman was hired as a machine operator at Rockwell Automotive-Meritor Heavy Vehicle Systems, LLC ("Rockwell"). (Bowman Dep., p. 105:10-11). Mr. Bowman's job duties at Rockwell included driving a forklift every day for "at least one to maybe two hours a day." (Bowman Dep., p.107:5-18). Mr. Bowman was laid off from his position at Rockwell effective May 3, 2003. (Bowman Dep., pp.135:16-24, 135:1). The only accommodation Mr. Bowman needed in order to work at Rockwell was "the company nurse [kept] extra medicine for [him]" in the event Mr. Bowman need to increase his level of Depakote. (Neely Dec., February 22, 1999, Jeffery Bowman Affidavit).

4. Mr. Bowman's Seizure Disorder

Mr. Bowman began having grand mal seizures at the age of 12. (Bowman Dep., p.36:1:11; November 28, 2003, Neurologic Review of Records and Opinion, James S. Grisolia, M.D., ["Report of Dr. Grisolia"]). As a teenager, on average, Mr. Bowman had seizures probably more than once a year, but less than once month. Mr. Bowman's seizures are preceded by an "aura" and a "prodrome" which occurs in advance of the aura. (Bowman Dep., p.36:1-24).

In 1985 Mr. Bowman was referred to Dr. Miles Drake at the Epilepsy Clinic at Ohio State

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[17]Mr. Bowman graduated from Newark High School in 1974. Afterwards, Mr. Bowman attended the Newark branch of Ohio State University for approximately one year but could not continue because he was unable to "keep [his] grades up enough to be able to stay." (Bowman Dep., p. 11). Mr. Bowman has spent most of his adult life working around forklifts. (Bowman Dep., 81:3-11). In 1976 Mr. Bowman spoke with recruiters for all four branches of the military and was told that by each branch that he could not join because of his epilepsy and/or because he was on medication for epilepsy. Mr. Bowman's selective service status is "F-4." (Bowman Dep., p. 34:9-23). Mr. Bowman "has always believed in supporting his family" (Id., p. 65:2-3).

University. (*Id*., p. 37:4-24). At that time Mr. Bowman's medication was changed from Phenobarbital to Depakote. Depakote has been effective in controlling Mr. Bowman seizures since 1985 and no further changes in his medication were required. (*Id*. p. 37:14-17, 53:20-25, 26:1-5).[18]

Since he began taking Depakote in 1985, Mr. Bowman experiences an aura prior to his seizure as well as a "prodromal syndrome." The prodromes which Mr. Bowman experiences are specific physical conditions or sensations which occur prior to his aura and alert Mr. Bowman to begin taking appropriate precautionary measures. The prodromes which Mr. Bowman can recognize include a bad taste in his mouth, a sense of disquiet, or dread, followed by small jerking movements and tremor, later accompanied by a slowing of thinking prior to the actual seizure with loss of consciousness. This prodrome typically lasted at least 4-6 hours prior to the seizure, and in no case less than 30 minutes. (Bowman Dep., p. 42-44; Report of Dr. Grisolia, p. 1).

Although Mr. Bowman has responded well to the treatment of his seizure disorder with Depakote, he has suffered a wide variety of side effects which persist to the present time and which vary depending on the dose he is required to take. When Mr. Bowman began taking Depakote, it made him "real sick . . . with nausea" and he also experienced alternating diarrhea and constipation." (Bowman Dep., pp. 53-54). While over the years Mr. Bowman has been able to get over these gastrointestinal symptoms "for the most part," his experience is that the Depakote "really tears up your stomach" depending upon the dose he is required to take. (*Id.*).

Also, Depakote continues to have undesirable effects on Mr. Bowman's personality.

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[18]Depakote received FDA approval in approximately 1976. (Deposition of Michael D. Privitera, M.D., [Dr. Privitera Dep.], p. 86:22-25, 87:1-6). Many people with seizure disorders responded to Depakote that did not respond to other medications. (*Id.*). Thus, Depakote, as well as many other anticonvulsant medications have become available to treat individuals with epilepsy since the time of the unfortunate incident which gave rise to Dr. Cametas' fear about individuals with epilepsy killing themselves or others. (Id., p. 86:2-21).

Depending on the dosage of Depakote, Mr. Bowman has experienced symptoms which range from paranoia to what Mr. Bowman's doctor describes as a "flat affect." At the higher dosage level - around 4000 milligrams, Mr. Bowman experiences moodiness and irritability. Also, at the 4000 level, Mr. Bowman thought people were looking at him "and laughing . . . making fun of him." (*Id.* p. 54). When Mr. Bowman's dosage was lowered, he realized it was the Depakote that caused him to think people were looking at him "in ways they really weren't." (*Id.*).

While the "flat affect" which Mr. Bowman experiences when taking the Depakote at 3500 milligrams has not interfered with his ability to hold a job, Mr. Bowman believes it may have kept him from getting a job. Career counselors at the Licking County Pre-Employment Training program discussed Mr. Bowman's "personality" with him. Mr. Bowman was told that he did very well in a team interview except that "he had a poor personality" and "need[ed] to liven it up or something." Bowman Dep., p. 52:16-25, 53:1-5."

Mr. Bowman's seizures are described by medical experts as being only "partially controlled" by the Depakote because even with the medication, he remains vulnerable to having seizures when certain identifiable precipitating factors are present such as the following: (1) when he is experiencing an inordinate amount of stress (as on one occasion when his wife had a miscarriage, and on another occasion, when he had two seizures within a 12 hour period shortly after losing the job he held for over fourteen and a half years due to a plant shut down); (2) when he is sleep deprived; (3) when he experiences illness such as the flu.

When Mr. Bowman has a grand mal seizure he experiences the following: loss of muscle control and every muscle function, loss of bowel and bladder control, biting his tongue and violent tonic clonic jerking of all of his limbs at the same time. (Bowman Dep. 152).

E. Mr. Smith

1. Overnite Extended a Conditional Offer of Employment to Mr. Smith

Mr. Smith applied for employment as a dockworker at Defendant's Memphis, Tennessee terminal in March, 1996. (Deposition of Jeremy Smith ["Smith Dep."], p. 27:17-23). Mr. Smith was interviewed by David Argyle. (Id. p. 22-23). Like Mr. Bowman, Mr. Smith received a conditional offer of employment. Mr. Argyle told Mr. Smith that he "had the job" but that he, Mr. Smith, would need to take the drug test and fill out a post-offer medical questionnaire. (*Id.*). Mr. Smith completed and returned the questionnaire and took the drug test. (*Id.*)

On Mr. Smith's questionnaire form, in response to the question whether in the past five years he had "epilepsy/fainting spells/severe headaches," Mr. Smith, like Mr. Bowman, responded by checking the "yes" block. In the "comments" section, Mr. Smith wrote the following: "controlled by medication." Mr. Smith's questionnaire response was forwarded by Overnite's Memphis, Tennessee terminal to Dr. Cametas' office for review. (Dr. Cametas Dep., 80:79:7-24; Dr. Cametas Dep., Exhibit 2).

2. Dr. Cametas Reason for Rejecting Mr. Smith

During his deposition Dr. Cametas testified that he did not recommend Mr. Smith for employment for the following reasons:

> He's had a seizure disorder, and he'd been followed with repeated change of his medications. He complained on one occasion to his doctor that he was sleepy from it, and also on one of the notes from his doctor from the neurological clinic he had an abnormal EEG. And I felt that he would be a hazard on the dock. (Dr. Cametas Dep., p. 80:7-14).[19]

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[19]As previously indicated in footnote 12 *supra*, during discovery Defendant provided a spreadsheet which identifies, by code numbers from one to seven, the reason for rejecting individuals who applied for dockworker positions during the relevant period. The reason

Dr. Cametas acknowledged the records he reviewed regarding Mr. Smith reflect the only change of medication which occurred was from June to August 1994 when Mr. Smith's medication was changed from Depakote to Felbatol and back to Depakote. (Smith Dep., p. 83:7-22). Mr. Smith's medication was changed from Depakote to Felbatol because he developed problems with headaches which occurred shortly after taking a dose of Depakote. (Dr. Cametas Dep. Exhibit 2, p. 7). [20] The side effects Mr. Smith experienced from Felbatol were "not much better" than with Depakote. The Felbatol caused Mr. Smith to feel "drowsy and fatigued" so his medication was changed back to Depakote as of August 3, 1994. (*Id*., p. 10).

Dr. Cametas also acknowledged, based upon the records he had before him when he made his decision, it appeared that Mr. Smith had been seizure-free for approximately six years as of the date of Mr. Smith's March, 1996 application for employment with Overnite. (*Id.* 14-22). The medical records reviewed by Dr. Cametas at the time he considered Mr. Smith as a post-offer candidate for employment consist of five pages of office notes from Dr. Gaines who was then Mr. Smith's neurologist.[21] The five pages of Dr. Gaines' office notes upon which Dr. Cametas based his negative decision regarding Mr. Smith are dated as follows: June 17, 1994; June 21, 1994; July

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identified for Mr. Smith's rejection is number one, "This Individual Presents a Health and Safety Hazard to Himself." (Personen Dec., March 19, 2003 Letter from Robert L. Stewart, counsel for Overnite, to Solvita A. McMillan, counsel for the EEOC).

[20]Mr. Smith continues to experience migraines and mood swings when taking Depakote. (Smith Dep., p. 73:8-14).

[21]Mr. Smith testified at his deposition that in approximately 1995 he had a seizure which was precipitated by exposure to strobe lights. (Smith Dep., p. 51:2-24). Thus, the five pages of records which Dr. Cametas reviewed did not provide a complete record of Mr. Smith's seizure history in that the 1995 seizure is not mentioned. The 1995 seizure may have occurred when Mr. Smith changed neurologists after Dr. Gains transferred to another hospital. (Id., p. 56:7-25).

29, 1994; August 3, 1994; October 31, 1994 and October 20, 1994. (Dr. Cametas Dep. Exhibit 2, pp. 7-12).

Dr. Gains' June 17, 1994 office note also indicates that Mr. Smith "had no seizures in almost four years.".[22] (*Id.*). Thus, assuming the records were complete up through the date of Mr. Smith's March, 1996 application for employment at Overnite, Mr. Smith would have had a seizure-free interval of approximately six years.[23] With nothing more that the five pages of office notes suggesting a seizure-free interval of approximately six years, Dr. Cametas gave Mr. Smith a negative recommendation.

Dr. Cametas also expressed a purported concern over Dr. Gains' June 17, 1994 office note indicating that because of abnormal EEG spike wave activity, he recommended Mr. Smith remain on anticonvulsant therapy even though as of the date of this office visit, Mr. Smith had been seizure free for almost four years. However, according to Dr. Privitera, Defendant's expert, Dr. Gains' reference to abnormal spike wave activity on Mr. Smith's EEG "probably [does] not" say anything about the probability of Mr. Smith's having another seizure. (Deposition of Michael Privitera, M.D., ["Dr. Privitera Dep."], p. 54:16, 55, 56:6). According to Dr. Privitera, additional information would

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[22]Dr. Gaines was Mr. Smith's neurologist from approximately 1989, when Mr. Smith had his first seizure, until approximately 1995 or 1996 when Dr. Gains transferred to another hospital and Mr. Smith began seeing Dr. Nadel. (Smith Dep., 56:7-25).

[23]The seizure which Mr. Smith thinks he had in 1995 apparently occurred prior to his March, 1996 application for employment with Overnite. Thus, the five pages of medical records which Dr. Cametas reviewed at the time he made his negative recommendation regarding Mr. Smith did not provide an entirely complete picture of Mr. Smith's history in that the 1995 seizure is not reflected. Nonetheless, as noted above, from the records alone, it would appear that Mr. Smith had a seizure-free interval from some point in 1989 through the date of his March, 1996 application for employment with Overnite. For purposes of determining whether Overnite follows an unlawful policy and practice of summarily rejecting individuals with epilepsy based upon guidelines derived from the FMCSR, Mr. Smith's intervening seizure is irrelevant in that Dr. Cametas would have rejected Mr. Smith in any event.

be necessary in order to evaluate the significance, if any, of the spike wave activity noted by Dr. Gaines. (*Id*.).

Moreover, Defendant's own expert also agrees with the Commission's position that before Mr. Smith was rejected for employment, additional information should have been obtained "either information from [Mr. Smith's] physician's office as to whether [Mr. Smith had been seen or . . . [by] just asking Mr. Smith directly. . ." (Id. p. 60).

Thus, not only did Dr. Cametas reject Mr. Smith with insufficient information regarding his medical condition, the manner in which Dr. Cametas communicated his decision to Mr. Smith foreclosed the opportunity for any further interactive dialogue between Mr. Smith and Overnite regarding possible accommodations for his disability.

3. Mr. Smith's Work History

After graduating from high school in 1993, Mr. Smith attended college for approximately two years with a major in biblical studies. (Smith Dep., pp.21-22). Mr. Smith hoped to eventually be employed as a minister. (*Id*.). Mr. Smith's plan to pursue biblical studies "did not work out" and instead, Mr. Smith sought full time employment which eventually led him to the position which he currently holds as a permanent full-time material handler at Federal Express. (*Id*., p. 39:9-11).

As a material handler, Mr. Smith's job duties include off-loading aircraft. Mr. Smith works on a "late inbound transload team." (*Id*. p. 44:1-10). Mr. Smith off-loads domestic air freight and takes it to either a regional courtyard, the hazardous material building or the international building. (*Id*.). Mr. Smith operates heavy motorized equipment and machinery in order to perform his job duties. For example, Mr. Smith operates and works on top of a piece of equipment known as a "Commander 15," which is somewhat like a crane, and a Commander 30 (a smaller version of the

Commander 15). (Id., p. 40:8-23) The Commander 15 mates up to the upper cargo door of a DC-10 airplane and has an elevator with rollers on it for unloading cargo. (Smith Dep. Exhibit 2). When off-loading freight, Mr. Smith works at heights of approximately "40 to 50 feet in the air." (*Id*. p. 40). While there is guardrail protection at the top of the Commander, it is nonetheless possible to fall over the guardrail and ". . . they've had people pass out and fall." (Id. p. 41:9-16). Also, Mr. Smith stands in the open cargo door area of the planes he is unloading "on a nightly basis." (*Id*. p. 42:9-10).

Mr. Smith's performs his job duties in an active airplane taxi area. Mr. Smith is also responsible for transporting hazardous materials from the aircraft to the hazardous materials building. Mr. Smith works around and transports hazardous materials which include: flammable liquids, radioactive materials, corrosives, dry ice, jet fuel and generally any hazardous material that can be shipped by air. (*Id*. p. 72:1-15).

Prior to applying for work at Overnite, Mr. Smith worked for two months at Southern Estates in a job where he was required to operate a forklift 3 or 4 times a day on a raised platform. (*Id*., pp. 10:12:3-10; 13:1-23). Southern Estates had a large warehouse area with approximately 100 forklifts. In his position as a checker at Southern Estates, Mr. Smith's primary job responsibilities were counting freight and making sure it went to the right storage bin. (*Id*.). Prior to his being rejected for employment at Overnite, Mr. Smith worked around motorized equipment during temporary employment he held as a tire technician at Tire King. (Id. p. 46:4-6; 48). Mr. Smith also worked as a tire technician at Wal-Mart after he was rejected for employment at Overnite. (Id.).

4. Mr. Smith's Seizure Disorder

Mr. Smith began having seizures in approximately 1989 when he was 14 or 15 years old. (*Id.* p. 49:7-11). Mr. Smith has grand mal seizures. During a seizure Mr. Smith has a "black out" and experiences convulsions. (*Id*., p. 72:19; 73:1-14). Mr. Smith describes his seizures as "like being a fish out of water" and he "urinates on [himself]." (*Id*.). Mr. Smith has had seven or eight grand mal seizures in his life. (*Id*. p., 55:1-6).

Prior to the time Mr. Smith applied to work at Overnite, he had experienced a total of three or four grand mal seizures. (*Id*.). Mr. Smith's seizures are controlled by Depakote. Before he has a seizure, Mr. Smith has enough advance warning that he knows that he "need[s] to sit down and get out of the way." Id. p. 53:2-3). Although Depakote is effective in controlling Mr. Smith's seizures, it causes him to have migraines and "[m]ood swings" every once in a while." (*Id.*).

F. Mr. Spindler

Like Mr. Bowman and Mr. Smith, Mr. Spindler sought employment at Overnite as a dockworker. Like Mr. Bowman and Mr. Smith, Mr. Spindler was being treated for a seizure disorder at the time the time he sought employment at Overnite. (Spindler Dep., pp. 6:4-6;). Mr. Spindler began having grand mal seizures in 1973 and has been taking Dilantin to control his seizures since that time. (*Id*. p. 26:19-25;27:1-9; Spindler Dep. Exhibit 11).

Unlike Mr. Bowman and Mr. Smith, Mr. Spindler was hired for the position for which he applied and enjoyed approximately twelve years of employment at Overnite from July, 1991 until November, 2003 at which time he began an extended period of medical leave for reasons unrelated to his seizure disorder. (*Id*., p. 24-25).

Also unlike Mr. Bowman and Mr. Smith, Mr. Spindler did not disclose his seizure disorder

at the time he sought employment at Overnite. Mr. Spindler completed a "Statement of Physical Condition" form at the time he applied for employment at Overnite on June 21, 1991. (Spindler Dep., p. 82:7-25, 83-84; Spindler Dep. Exhibit 13). On the form Overnite asks the applicant to indicate whether they "have or have ever been treated for" thirty-three various medical conditions. The first medical condition listed on Overnite's form is "Epilepsy." In response to the question whether he has, or had ever been treated for epilepsy, Mr. Spindler wrote "NO." (*Id*.).

During his deposition Mr. Spindler testified that he did not "have the slightest damned idea" why he responded negatively to the foregoing question because he was in fact being treated for epilepsy with anti-seizure medication at the time he completed the form. (Spindler Dep., pp. 82-84).

Mr. Spindler began working for Overnite as a part-time dockworker at the Columbus, Ohio service center in July,1991 and assumed a regular full time dockworker position approximately one year later. (Spindler Dep., p. 14:5-8; Reed Dep., p. 42-43).

Due to his epilepsy, Mr. Spindler "[has] to watch out" because "whenever [he] get[s] excited or really get[s] the adrenalin flowing . . . [he] will have a seizure." (*Id*. p. 26:19-25;27:1-9). Mr. Spindler "get[s] a warning" prior to the time he has a seizure so that he "knows when it is going to happen." At that point Mr. Spindler "pretty much just [tries] to chill out" and if he "can get a hold of [his] medicine then [he] can keep [himself] from having a seizure." (Id.). The only accommodation or precautionary measure Mr. Spindler needed while working as a dockworker at Overnite was to have extra medication available which he kept in his lunch bucket. (*Id*., p. 26:19-25;27:1-9;102:1-4).

Mr. Spindler had two documented seizures during the period he was employed as a dockworker at Overnite which resulted in his having to take sick leave from work. On June 2, 1997,

Mr. Spindler had a seizure while on the job. (Spindler Dep. Exhibits 3 and 4). During that seizure he fell and broke his left clavicle. Mr. Spindler was able to return to work after a sick leave period of approximately eight weeks. (Spindler Dep., p. 57:12-23; Spindler Exhibit 7).

Mr. Spindler also had a seizure over the weekend of December 16, 2000 at which time he was also diagnosed with pneumonia. (Reed Dep., pp.31:17-25; 32-33). (See Personen Dec., March 27, 2003 Letter from Robert L. Stewart, counsel for Overnite to Solvita McMillan, counsel for EEOC, enclosing employment records for three applicants and one incumbent employee, John Spindler; October 8, 2003 Defendant Overnite Transportation Company's Response; see also October 8, 2003 Defendant Overnite's Overnite Plaintiff EEOC's Interrogatories and Request for Production of Documents, at Response to Interrogatory No. 20).

Mr. Reed was the Columbus service center manager at the time Mr. Spindler had his June 2, 1997 seizure at work. (Reed Dep., p. 18:1-25; 22:8-25; 23:1-4; 31:17-25, 32-33). Mr. Reed first learned of Mr. Spindler's seizure disorder when Mr. Spindler had the June, 1997 seizure at work. (*Id.*). After Mr. Reed learned of Mr. Spindler's seizure disorder, Mr. Reed did not have any concerns about Mr. Spindler's ability to safely operate a forklift. Mr. Reed's personal opinion was that Mr. Spindler could and would control his disorder by taking medication. (*Id.*). Mr. Reed could not recall how he formed his conclusion regarding Mr. Spindler's ability to control his seizures. (*Id.*, p. 33:22).

On June 22, 1997, Mr. Reed sent a computerized message form to Overnite's headquarters office indicating that Mr. Spindler "suffered [an] epileptic seizure" and that Mr. Spindler's injury from work will be covered under Overnite's sick pay policy rather than as an industrial claim. (Reed Deposition Exhibit 2; Reed Dep., p. 31:17-23). The standardized message form completed by Mr.

Reed, asks whether Mr. Spindler's accident should be classified as an "unsafe act," an "unsafe condition," a "work rule violation" or "other." Mr. Reed did not check any of the aforementioned blocks and instead checked the "other" block. In the comments section Mr. Reed wrote "[e]mployee suffered epileptic seizure, was not on medication, use of which has since been reinstated by doctor."

Consistent with Mr. Reed's deposition testimony, there is nothing on the forms that Mr. Reed completed regarding the seizure Mr. Spindler had at work to indicate that Mr. Reed believed Mr. Spindler to be a threat to the health or safety of himself. Mr. Reed also testified that he could not recall ever having discussed the question of whether Mr. Spindler posed a threat to his own safety or the safety of others in the workplace as a result of his having a seizure disorder. (Reed Dep., p. 18:1-25; 22:8-25; 23:1-4; 31:17-25, 32-33).

Phil Bowen, who was the assistant manager at Overnite's Columbus service center at the time Mr. Spindler had his June 2, 1997 seizure, also completed various forms associated with Mr. Spindler's absence from work at that time. (Spindler Dep. Exhibits 4-7). Mr. Bowen actually accompanied Mr. Spindler when he was taken by ambulance to the hospital emergency room[24]. That same day, Mr. Bowen completed an Overnite "Supervisor's Report of Work Injury Form" regarding Mr. Spindler's seizure. (Spindler Dep. Exhibit 4).

The form asks the supervisor to "Describe Any Unsafe Acts, Conditions, Deficiencies or Other Contributing Factors" and provides a space for a description of "Unsafe Acts." In the space for unsafe acts, Mr. Bowen wrote "NO." Similarly in a space provided for the supervisor to describe "Unsafe Conditions," Mr. Bowen wrote "NO." In the space provided for "Other Factors," Mr. Bowen wrote "NONE." In the space provided for "Describe Corrective Action(s) to Taken to

[24]At the hospital, Mr. Spindler was given additional Dilantin and discharged. (Spindler Dep., p. 33:3-21).

Prevent Reoccurrence," Mr. Bowen wrote "employee was not on medication for condition per doctor's instructions, he is being returned to doctors care and to medication." (*Id*.).

At his deposition, Mr. Spindler testified that Mr. Bowen and Mr. Reed discussed the above-described comments with him regarding the need for Mr. Spindler to continue taking his anti-seizure medication. However, neither Mr. Bowen nor Mr. Reed, nor anyone else from Overnite's management, ever told Mr. Spindler that Overnite had a concern regarding his seizure disorder presenting a health or safety issue in the workplace. Nor was Mr. Spindler ever asked by anyone at the Columbus service center to provide information regarding his seizure disorder to anyone at Overnite's headquarters. (Spindler Dep., p.56:6-25, 57:1-3).

IV. LEGAL ARGUMENT

A. Summary Judgment Standard

Summary judgment is proper when the moving papers and affidavits show there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Rule 56 provides that summary judgment "may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." Fed.R.Civ.P. 56 (c).

B. Mr. Bowman and M. Spindler Each Have a Disability Within the Meaning of the ADA

Epilepsy is defined as "a group of neurologic disorders characterized by recurrent episodes of convulsive seizures, sensory disturbances, abnormal behavior, loss of consciousness or all of these." Mosby's Medical Dictionary, Second Edition (The C.V. Mosby Company 1986). Common to all types of epilepsy is an uncontrolled electric discharge from the nerve cells of the cerebral cortex. (*Id.*).

Under the ADA disability is defined as (1) a physical or mental impairment that substantially limits one or more of the major life activities; (2) having a record of such an impairment; or (3) being regarded as having such an impairment." 42 U.S.C. Section 12102(2). In the present case, Mr. Bowman and Mr. Smith each meet the definition of disability under the first prong of the definition in that they each have an "actual" disability. Mr. Bowman and Mr. Smith also meet the "regarded as" prong of the definition in that Dr. Cametas, Overnite's MRO clearly regarded both Mr. Bowman and Mr. Smith as disabled.

Under the ADA, an impairment is "substantially limiting" if it "prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." Also, the impairment's impact must be permanent or long-term." Toyota Motor Mfg. v. Williams, 534 U.S. 184, 185 (2002). The Court in Williams did not set down the rule that all people claiming a disability must show an inability to perform the variety of tasks required to be performed in most people's daily lives." Albert v. Smith's Food & Drug Centers, Inc., 356 F. 3d 1242, 1250, fn. 5 (10th Cir. 2004). The court in Toyota was concerned only with what "substantially limited" meant in terms of the performance of "manual tasks" which was the major life activity affected by the plaintiff's impairment in that case.

In the instant case, Mr. Bowman's and Mr. Smith's epilepsy causes each of them to be substantially limited in the major life activities of caring for themselves, interacting with others and thinking. As was set forth in the preceding sections, the grand mal seizures which Mr. Bowman and Mr. Smith experience render them completely unaware of, and unresponsive to, their surroundings and produce significant residual effects on each of their respective daily lives. There is uncontradicted testimony from both Mr. Bowman and Mr. Smith that, among other things, grand mal seizures affect each of them in terms of their ability to think, concentrate, and remember. Also, particularly in Mr. Bowman's case, the medication he takes to control his seizures affects his ability to interact with others. In Mr. Smith's case, the medication he takes causes him to experience migraine headaches and moodiness.

There are strong indications that Congress viewed individuals who have epilepsy, such as that in Mr. Bowman's and Mr. Smith's respective cases, as being among the 43 million Americans who have an "actual" disability as defined by the statute. Congress derived the figure of 43 million, in large part, from contemporaneous reports on disability status. Sutton v. United Airlines., 527 U.S. 471 (1999).

The ADA's legislative history is replete with references to epilepsy, reflecting an assumption on Congress' part that epilepsy would typically meet the standard for a substantially limiting impairment. S. Rep. No. 101-116, 101st Cong., 1st Sess. 22, 31, 39, 62 (1998) (referencing epilepsy in discussing the protections of the ADA, including the requirement of reasonable accommodation); H.R. Rep. No. 101-485(II), 101st Cong., 2d Sess. 51, 62, 72, 79-80, reprinted in 1990 U.S.C.C. A.N. 445, 451, 456, 465, 473. It is apparent from the legislative history that Congress viewed epilepsy as a substantially limiting impairment, at least in those cases where an individual experiences

recurrent grand mal seizures.

This is not to say, of course, that epilepsy is a per se disability. There are no per se disabilities under the ADA. Congress, instead, adopted a functional test for disability, geared to determining the impact of an impairment on one or more major life activities. Nonetheless, while the ADA does not contain an itemized list of covered disabilities, Congress understood that some impairments would be sufficiently severe to produce a substantially limiting effect on a major life activity in most (if not all) cases. Individuals, who like Mr. Bowman and Mr. Smith, have epilepsy with recurring grand mal seizures have the type of impairment that yields a finding of a covered disability under the ADA's functional standard.

Also, individuals who have epilepsy with recurrent grand mal seizures, even those whose seizures are controlled by medication, are at risk for a breakthrough seizure. A "breakthrough seizure" is a seizure that occurs randomly after a long period of no seizure activity and may be triggered by precipitating factors such as a concurrent (e.g. influenza), sleep depravation and stress. Report of Dr. Grisolia, pp. 2-4 See also Nancy Santilli, Selection and Discontinuation of Antiepileptic Drugs in Managing Seizure Disorders: A Handbook for Health Care Professionals (N. Santilli ed. 1996).

Courts have recognized that an individual with epilepsy who is prone to seizures that are temporarily debilitating has "a condition [that] obviously limits [him] in significant ways." EEOC v. Kinney Shoe Corp., 917 F. Supp. 419 (W.D. Va. 1996), *aff'd on other grounds*, 104 F.3d 683 (4th Cir. 1997). Reynolds v. Brock, 815 F.2d 571, 573-74 (9th Cir. 1987) (citing the "inescapable conclusion" that an individual with epilepsy has a substantially limiting impairment if the individual is not seizure-free). Rowles v. Automated Prod. Sys., Inc., 92 F. Supp. 2d 424, 429 (M.D. Pa. 2000)

(reasonable juror could conclude that plaintiff was disabled where, despite the use of medication, plaintiff was still at risk of occasional, substantially limiting seizures).

C. Overnite Failed to Engage in Efforts to Find A Reasonable Accommodation For Mr. Bowman and Mr. Smith

Under the ADA, once an employer knows of an qualified[25] applicant's disability, it has an obligation to engage in a good faith interactive discussion with the individual to explore reasonable accommodations. There can be no question that under the rule enunciated by the Ninth Circuit in Barnett v. U.S. Air. Inc., 228 F.3d 1105 (9th Cir. 2000)(en banc), *vacated on other grounds*, U.S. Airways, Inc. v. Barnett, 122 S.Ct. 1516 (2002), Overnite failed to meed its obligation to Mr. Bowman and Mr. Smith in this regard. There, faced with failure of accommodation efforts similar to the evidence here, the Court held that:

> [E]mployers, who fail to engage in the interactive process in good faith,[26] face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible. We further hold that an employer cannot prevail at the summary judgment stage[27] if there is a genuine dispute as to whether the employer

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[25]There is no question that Mr. Bowman and Mr. Smith were each qualified for the dockworker positions they sought. Indeed, both Mr. Bowman and Mr. Smith were told during their respective interviews that they "had the job" pending approval from Overnite's MRO.

[26][footnote not in the original] To demonstrate good faith, the employer can illustrate helpful behavior which encourages the identification of a reasonable accommodation. For instance, he can meet with the disabled employee, request information about the disability, ask the employee his objectives from the interactive process, seriously consider proposed accommodations and offer alternative accommodations when the proposed accommodations are too burdensome. Barnett, 228 F.3d at 1115 (citing Taylor v. Pheonixville School District, 184 F. 3d 296, 317 (3rd Cir. 1999).

[27][footnote not in the original] While the Supreme Court had no occasion to address the interactive process as a "mandatory obligation" as the Ninth Circuit had declared in Barnett, Justice Stevens' concurrence in U.S. Airways Inc. v. Barnett, 122 S.Ct.1516, 1526, sided with the Ninth Circuit" "[T]he Court of Appeals also *correctly held* that there was a triable issue of fact precluding the entry of summary judgment with respect to whether the petitioner violated the statute by failing to engage in an interactive process concerning the respondent's three proposed

engaged in good faith in the interactive process. 228 F.3d at 1116.

The rule applies to employees *and applicants*. Zivkovic v. Southern California Edison Co., 302 F.3d 1080, 1089 (9th Cir. 2002)("This same requirement applies to applicants for employment"), citing to Barnett at 1114, n. 5. As the Barnett court noted, *Id.*,:

> [E]mployers must notify applicants and employees of the reasonable accommodation provisions, who is entitled to an accommodation and what is necessary to trigger the interactive process.

The Ninth Circuit is not alone in its conclusion that "the interactive process is a mandatory[28] rather than a permissive obligation on the part of employers under the ADA." (Emphasis added). Indeed, "almost all of the circuits have held an employer has a mandatory obligation to engage in the interactive process." See "Living in Harmony? Reasonable Accommodations, Employee Expectations and US Airways, Inc. v. Barnett," Hofstra Lab. & Emp. L.J. 345, 375 (Spring, 2003).[29]

Further, an employer's failure to engage in the interactive process is not defensible merely because it is ultimately determined that no reasonable accommodation exists. As noted by the court

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accommodations. [citation omitted]. *This latter holding is untouched by the Court's opinion today*." (Emphasis added). Thus, Justice Stevens indicates the process is important enoough in determining the reasonable accommodation issue that an employer should be denied summary judgment if a reasonable jury could find the employer failed to participate. See "Determining 'Reasonable Accommodation' Under the ADA: Understanding Employer and Employee Rights and Obligations During the Interactive Process," 33 SW. U. L. Rev. 51, 58-59 (2003).

[28]The reason that the obligation is " mandatory" is that "[w]ithout the possibility of liability for failure to engage in the interactive process, employers would have less incentive to engage in a cooperative dialogue and to explore fully the existence and feasibility of reasonable accommodations." Barnett at 1116.

[29]Citing, Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944, 952 (8th Cir. 1999); Smith v. Midland Brake, Inc., 180 F.3d 1154, 1172: (10th Cir. 1999) (en banc); Taylor v. Phoenixville Sch. Dist., 184 F. 3d 296, 15 (3d Cir. 1999); Bultemeyer v. Fort Wayne Cnty. Schs., 100 F.3d 1281, 1285 (7th Cir. 1996); Taylor v. Principal Fin. Group Inc., 93 F.3d 155, 165 (5th Cir. 1996). But see Wilis v. Conopco, Inc., 108 F.3d 282, 285 (11th Cir. 1997).)

in Taylor v. Phoenixville School Dist., 184 F.3d 296, 315-16 (3rd Cir. 1999):

> The interactive process would have little meaning if it was interpreted to allow employers, in the face of a request for accommodation, simply to sit back passively, offer nothing, and then, in post-termination litigation, try to knock down every specific accommodation as too burdensome. That's not the proactive process intended: it does not help avoid litigation by bringing the parties to a negotiated settlement, and it unfairly exploits the employee's comparative lack of information about what accommodations the employer might allow. (Footnote omitted).

The record in this case shows that Overnite's MRO summarily rejected both Mr. Bowman and Mr. Smith without ever making any attempt to engage in the interactive process.

D. Overnite Cannot Rely Upon The ADA's Direct Threat Defense to Protect Itself From Liability in This Case

The ADA "creates an affirmative defense" for an employer that can show that an individual violates a qualification standard that s/he "not pose a direct threat to the health or safety of other individuals in the workplace" and "if the individual cannot perform the job safely with reasonable accommodation." Chevron U.S.A., Inc. v. Echazabal, 122 S.Ct. 2045, 2053 (2002), citing to 42 U.S.C. § 12113(a) and (b). As further described by the Court:

> The direct threat defense must be "based on a reasonable medical judgment that relies on the *most current* medical knowledge and/or the *best available* objective evidence," and upon an expressly "*individualized assessment* of the individual's present ability to safely perform the essential functions of the job," reached after considering, among other things, the imminence of the risk and the severity of the harm portended. (emphasis added)

Id, at 2053. The Echazabal court affirmed the Commission's "direct threat" regulations which appear at 29 CFR § 1630.2(r):

> (r) Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a ``direct threat'' shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;
(2) The nature and severity of the potential harm;
(3) The likelihood that the potential harm will occur; and
(4) The imminence of the potential harm.

The Commission's "Appendix to Part 1630 - Interpretive Guidance on Title I of the Americans With Disabilities Act"at 29 CFR § 1630.2(r) elaborates on the direct threat factors, as well as the need for an individualized assessment. With regard to the consideration of direct threat, the Appendix provides that

> [s]uch consideration must rely on objective, factual evidence--not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes--about the nature or effect of a particular disability, or of disability generally [citations omitted].

Regarding the need for an individualized assessment, the Appendix provides that

> The assessment that there exists a high probability of substantial harm to the individual, like the assessment that there exists a high probability of substantial harm to others, must be strictly based on valid medical analyses and/or on other objective evidence. This determination must be based on individualized factual data, using the factors discussed above, rather than on stereotypic or patronizing assumptions and must consider potential reasonable accommodations. Generalized fears about risks from the employment environment, such as exacerbation of the disability caused by stress, cannot be used by an employer to disqualify an individual with a disability. For example, a law firm could not reject an applicant with a history of disabling mental illness based on a generalized fear that the stress of trying to make partner might trigger a relapse of the individual's mental illness. Nor can generalized fears about risks to individuals with disabilities in the event of an evacuation or other emergency be used by an employer to disqualify an individual with a disability [citations omitted].

Thus, a direct threat exists only if (1) an individualized assessment, (2) based on the most current and best medical knowledge, (3) discloses a significant risk of substantial harm to self or others that (4) cannot be eliminated or reduced by a reasonable accommodation.

In Holiday v. City of Chattanooga, 206 F.3d 637 (6th Cir. 2000) the court, relying on the

Supreme Court's 1999 trilogy of ADA decisions[30], rejected a direct threat defense and noted at 643 that "an individualized determination - one which focuses on the medical conditions *actual* effect on the *specific* plaintiff - lies at the heart of the ADA. (emphasis added). Emphasizing that "it is the employer's burden to educate itself about the varying nature of impairment [sic] and to make individualized determinations about affected employees", 206 F.3rd at 644 [citation omitted], the court refused to permit the employer to hide behind the opinion of a private doctor who had recommended against the hiring. Noting that the doctor's opinion was "unsubstantiated and cursory", and that the doctor had not "conducted the individualized inquiry mandated by the ADA", the court held that "[c]ourts need not defer to an individual doctor's opinion that is neither based on the individualized inquiry mandated by the ADA nor supported by objective scientific and medical evidence." 206 F.3rd at 645.

In Hamlin v. Charter Tp. of Flint, 165 F.3rd 426, 432 (6th Cir. 1999), the court, again, rejected a direct threat defense, relying on the Commission's direct threat regulations at 29 CFR § 1630.2(r) and held that "[a]n employer. . . is not permitted to deny an employment opportunity to an individual with a disability *merely because of a slightly increased risk*." (Emphasis added). "The risk can only be considered when it poses a significant risk, i.e., high probability of substantial harm; a speculative or remote risk is insufficient."

There is no evidence in the record which could support a finding of a direct threat defense in this case. Indeed, the fact that Overnite successfully accommodated, John Spindler, an individual with epilepsy, in the position of dockworker should preclude Defendant from relying upon the direct threat defense. In any event it is clear from Dr. Cametas' testimony that he did not make the required

[30]Sutton v. United Air Lines, Inc., 119 S.Ct. 2139 (1999); Murphy v. United Parcel Serv., Inc., 119 S.Ct. 2133 (1999); and Albertsons, Inc. v, Kirkingburg, 119 S.Ct. 2162 (1999).

individualized assessment required to determine Mr. Bowman's and Mr. Smith's respective abilities to safely perform the essential functions of the job at the time they sought employment with Overnite. Instead, Dr. Cametas made his decision to reject Mr. Bowman and Mr. Smith upon myths, fears and sterotypes. Dr. Cametas biased attitude toward individuals with epilepsy was based in large part upon one unfortunate experience Dr. Cametas had over thirty-one years ago with one of his patients. Also, the experience described by Dr. Cametas during his deposition appears to have occurred prior to the FDA's approval of Depakote, which has been one of the leading medications for treating epilepsy for many years now. (Dr. Privitera Dep., p. 85:18-25, 86-87). Overnite's decision to reject Mr. Bowman and Mr. Smith for employment was clearly not based on reasonable medical judgment that relies on the *most current* medical knowledge and/or the *best available* objective evidence.

E. Overnite Regarded Mr. Bowman and Mr. Smith as Having a Disability Within the Meaning of the ADA

As set forth in the preceding sections, under the ADA an individual has a "disability" within the meaning of the Act regardless of whether or not he has an actual physical impairment that substantially limits one or more major life activities, if he has been "regarded as" having such an impairment. In the event the this Court finds that Mr. Bowman and/or Mr. Smith do not have an "actual" disability within the meaning of the ADA, there is overwhelming evidence in the record that Dr. Cametas, Overnite's MRO, regarded both Mr. Bowman and Mr. Smith as being disabled in at least the major life activities of thinking, interacting with others and working.

Throughout his deposition Dr. Cametas repeatedly expressed his fear that individuals with epilepsy can kill themselves in a wide range of activities and environments ranging from drowning in a bath tup to washing windows. Dr. Cametas also testified that he does not believe an individual

with epilepsy can ever have the capacity to reliably recognize auras or prodromes in advance of a seizure. Even though Dr. Cametas admitted that he has not reviewed any scientific studies nor consulted with any outside sources such as the Epilepsy Foundation, Dr. Cametas "just do[es'nt] think it happens that way." (Cametas Dep. pp. 50:15-25, 38:17-25). Dr. Cametas also expressed his belief that individuals with epilepsy should not engage in various types of work activities including the following: washing windows in situations where a rope and lift is necessary (Id.pp. 62-66); working with a saw or cutting equipment; any workplace with "environmental" problems with "anything that he can do to hurt himself" Id.); any environment with forklifts, concrete floors and heavy machinery (Id. p. 428-12).

The restrictions which Dr. Cametas believes should have been placed on individuals with epilepsy would exclude both Mr. Bowman and Mr. Smith from a broad range of jobs in many classes. (Report of Plaintiff's Vocational Rehabilitation Expert, Dr. Lewis, p. 2). Based upon the manner in which Overnite summarily rejected Mr. Bowman and Mr. Smith upon learning the nature of their respective medical conditions and based upon Dr. Cametas' testimony regarding the type of restrictions which should be placed upon the employment opportunities of individuals with epilepsy, there is overwhelming evidence to indicate that Mr. Bowman and Smith were regarded by Overnite as being disabled. See EEOC v. Northwest Airlines, 246 F. Supp. 2d 916, 925 (W.D. Tenn. 2002) (Defendant's proposed restrictions that prohibited individual with insulin-dependent diabetes from driving and operating heavy equipment and working at unprotected heights above five feet could indeed severely limit him from performing a wide range of jobs).

F. Overnite Also Violated the ADA By Relying Upon An Unlawful Blanket Exclusion

Blanket rules that exclude persons with disabilities from employment without regard to their

individualized condition are per se unlawful because the policies abrogate the employer's responsibility to individually evaluate whether the applicant has a disability that could and should be accommodated under the ADA. Stillwell v. Kansas City, 872 F. Supp. 682, 686-87 (W. D. Mo. 1995) (blanket rule prohibiting hiring of security guards with one hand violates the ADA because it runs afoul of the individual assessment required by ADA); Bombrys v. City of Toledo, 849 F. Supp. 1210, 1219-20 (N.D. Ohio 1993) (blanket rule prohibiting hiring of police officers with insulin-controlled diabetes violates ADA); Millage v. City of Sioux City, 258 F.Supp.2d 976, 992 (N.D. Iowa 2003)(Determination of whether or not a insulin-dependent diabetic bus driver can perform the essential functions of the job must be based upon an individualized assessment and cannot be based simply on a blanket exclusion. See also Kapche v. City of San Antonio, 304 F.3d 493, 499 (5th Cir. 2002)(Individualized inquiry was required to determine whether person with insulin-treated diabetes was qualified to perform police officer job relying on "the requirement of an individualized assessment in favor of a *per se* exclusion under the ADA."). These exclusionary rules impermissibly allow the employer to substitute a determination of whether a qualified individual meets the exclusionary standard for the individual assessment of whether the qualified individual is able to perform the essential functions of his or her job either with or without accommodation. McGregor v. National Railroad Passenger Corp., 187 F.3d 1113, 1116 (9th Cir. 1999) (100% healed policy is per se unlawful); Hendricks-Robinson v. Excel Corp. 154 F.3d 685, 698-99 (7th Cir. 1998) (hinging employment decisions on whether employee is "physically fit" violates ADA); Heise v. Genuine Parts, Co., 900 F. Supp. 1137, 1154 & n. 10 (D. Minn. 1995) (holding that a "must be cured" or "100% healed" policy is a per se violation of the ADA); see also Norris v. Sysco, 191 F.3d 1043, 1045 (9th Cir. 1999) (policy indicating that employee could not

return to work unless he or she had an unrestricted work release would likely be an ADA violation), cert. denied, 120 S. Ct. 1221 (2000). See Toyota Motor Mfg. v. Williams, 122 S.Ct. 681, 692 (2002) (Congress intended the existence of a disability to be determined on a case-by-case basis).

The Supreme Court's decision in Sutton v. United Air Lines, Inc., 119 S.Ct. 2139 (1999) supports the rejection of blanket exclusions. Sutton holds that an impairment does not give rise to an actual disability under the ADA when the impairment is fully correctable. The Sutton Court explicitly disclaimed any blanket rule precluding coverage of individuals who "take medicine for epilepsy," suggesting various theories in which such individuals can meet the definition of disability. 119 S.Ct. at 2149.

Here, the Defendant's MRO, Dr. Cametas followed a blanket exclusion policy to exclude qualified individuals with epilepsy from being employed as dockworkers based upon a standard which he derived from the FMCSR. As set forth in section D. above, during the EEOC's investigation Dr. Cametas explained that when considering Mr. Bowman for employment, he relied upon guidelines derived from the DOT's FMCSR which explicitly prohibit individuals with epilepsy from operating commercial motor vehicles. Although during his deposition Dr. Cametas' denied relying upon the aforementioned regulations, his summary rejection of Mr. Bowman and Mr. Smith indicates otherwise. Indeed, as noted above, even Overnite's expert, Dr. Privitera testified that he would have asked for additional medical records in order to evaluate Mr. Smith for employment as a dockworker.

CONCLUSION

For the foregoing reasons, the Commission's Motion for Partial Summary Judgment regarding the issue of liability in this case should be granted and this case should be scheduled for stage II

proceedings to determine appropriate relief.

Respectfully submitted,

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