UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

Civ. No. 01-705 MJD/JGL

v.

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

NORTHWEST AIRLINES, INC.,

Defendant.

Northwest Airlines, Inc., ("NWA") contends that it is entitled to judgment as a matter of law on the Equal Employment Opportunity Commission's ("EEOC") claims for class-wide relief under the Americans With Disabilities Act ("ADA"), even though the Supreme Court and other courts have already rejected its argument. NWA asserts that the EEOC did not plead its complaint with sufficient particularity, even though the Supreme Court recently held that employment discrimination complaints are not held to a heightened standard. NWA argues that it is entitled as a matter of law to reject applicants with insulin-dependent diabetes and epilepsy requiring anti-seizure medication from certain positions, even though its

position is not supported by legal or medical authority, and even though the parties have yet to engage in discovery. NWA's motion to dismiss or for summary judgment should be denied.

BACKGROUND

In this suit, the EEOC contends that NWA applies a blanket exclusionary policy whereby it refuses to hire persons with certain medical conditions, such as epilepsy requiring anti-seizure medication and insulin-dependent diabetes, for jobs as Equipment Service Employee ("ESE"), who are NWA's baggage handlers, or Aircraft Cleaners, who clean out NWA's aircraft between flights. *(Amended Complaint, ¶11)*. It contends that NWA discriminated against Larry Lewis because of his epilepsy and against Timothy Rued because of his diabetes when NWA withdrew offers for the ESE position from the two men. *(Id., ¶¶8-9)*. It also asserts that NWA discriminatorily revoked an offer of employment for a Cleaner position to Serita Nellum when NWA learned that she had epilepsy and used anti-seizure medication.[1] *(Id., ¶10)*. The EEOC seeks relief for these

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[1]Nellum has since stopped using anti-seizure medication. Because NWA refuses to hire anyone who has been on anti-seizure medication during the past two years, she is still excluded by NWA's blanket exclusionary policy. *(Vasichek Decl., Ex. 9)*.

three individuals and for a class of similarly situated applicants. *(Id., ¶12).*

NWA is a major international commercial airline with its headquarters and principal place of business in Minnesota. *(Vasichek Decl., Ex. 1 at 2; Ex. 12 at 11-12).*[2] In 1989-90, NWA retained the Airport Medical Clinic in Minneapolis, MN, to review its job positions at its Minneapolis-St. Paul Terminal.[3] *(Vasichek Decl., Ex. 2 at p. 14.)* Dr. David Zanick and Dr. Michael Goertz of the Airport Medical Clinic performed the evaluation of these positions, and made recommendations regarding the optimal physical characteristics of persons filling the positions. *(See id., Ex. 2 at pp. 14-15; Ex. 3 at ¶9.)*

Among other positions, Drs. Zanick and Goertz reviewed the performance of the Aircraft Cleaner and ESE positions at NWA's Minneapolis-St. Paul facility. *(See id.)* The doctors and

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[2]Because some of the documents on which the EEOC relies are voluminous, the EEOC attaches only excerpts of relevant portions of those documents as exhibits. The EEOC will submit complete copies of the documents to the Court and NWA upon request.

Unreported cases are attached as exhibits to the Vasichek Declaration.

[3]The Airport Medical Clinic is now called "Park Nicollet Clinic-Airport Occupational Medicine." *(Vasichek Decl., Ex. 4).* For clarity's sake, the EEOC will continue to refer to it as the Airport Medical Clinic in these papers.

others purportedly "spent a considerable amount of time on-site [at the Minneapolis-St. Paul facility] observing employees doing their jobs and observing the conditions under which these employees work." *(Id., Ex. 2 at p. 15.)* The Airport Medical Clinic doctors recommended that NWA adopt a policy whereby "any condition which might cause momentary or intermittent loss of consciousness or attention . . . would be expected to be a basis for exclusion from [the ESE and Cleaner] positions]." *(Id., Ex. 5 at p.17; Ex. 6 at p. 22)*

NWA adopted the Airport Medical Clinic's recommendations. Pursuant to these recommendations, NWA does not hire applicants who it alleges might pose a risk - no matter how slight - of loss of consciousness or disorientation for the ESE or Cleaner job. *(Complaint at ¶11; see NWA Mem. In Support of Motion at 23)*. Under this policy of "zero tolerance" or "zero acceptability," NWA does not hire applicants who have insulin-dependent diabetes or epilepsy requiring anti-seizure medication, regardless of how well-controlled the condition is, for the Cleaner or ESE jobs. *(Amended Complaint, ¶11)*.

NWA implements the "zero acceptability" policy through the pre-placement physicals that NWA requires after making conditional offers of employment to new applicants. After a conditional offer of employment, NWA sends its applicants to

the Airport Medical Clinic in Minneapolis for a pre-placement medical examination.[4] (*Vasichek Decl., Ex. 7 at ¶¶3, 5*). During the examination, the Airport Medical Clinic physicians will ascertain whether the applicant has any of 21 specific conditions, including seizure disorder and insulin-dependent diabetes. The medical conditions are number-coded and carry standard restrictions. For example, seizure disorders are coded as "17" and insulin-dependent diabetes is coded as an "18," and both carry standard restrictions:

17.	Seizure disorder	No working at unprotected heights above 5 feet No driving/operating vehicles and/or heavy equipment No working rotating shifts No working alone
18.	Insulin dependent diabetes	No working at unprotected heights above 5 feet No driving/operating vehicles and/or heavy equipment. No working rotating shifts. No working alone.

(*Id., Ex. 8*). The AMC doctors report their version of these standard restrictions by computer to personnel in NWA's

[4] If the applicants are examined at clinics elsewhere in the country, the medical records are sent to the Airport Medical Clinic for review. (*Vasichek Decl., Ex. 9 at p. 4*)("According to standard protocol, [the NWA manager in Detroit] proceeded to send the preplacement report that was generated from the [Detroit] physical examination to the Airport Medical Clinic ("AMC"), located in Minneapolis, for independent review."). The AMC doctors perform nearly a thousand such routine pre-placement medical examinations each year for NWA. (*Id., Ex. 10 at pp. 4-5*).

headquarters using codes and numbers. (*Id.*, *Ex. 11*). Based on these restrictions, NWA personnel revoke the job offers to the applicants with epilepsy requiring anti-seizure medication or with insulin-dependent diabetes.[5] (*Id.*, *Ex. 7 at ¶3*) ("If the applicant fails [NWA's] pre-placement medical examination, the conditional offer of employment is withdrawn and the applicant is not permitted to work for NWA absent circumstances not relevant to this case.").

The EEOC alleges in its complaint that NWA's "zero acceptability" policy is unlawful. It brings suit on behalf of three identified claimants and others similarly situated from whom NWA revoked the job offers for Cleaner and ESE positions based upon their disabilities.[6] The EEOC filed its Complaint

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[5]When the doctors at the Airport Medical Clinic vary the standard restrictions, they occasionally code the disability as "99" or "other," which allows them to enter a narrative description of the restrictions into the computer linkup with NWA. Even in those cases where the Airport Medical Clinic vary the restrictions for applicants with epilepsy requiring anti-seizure medication or insulin-dependent diabetes, they still invoke the standard restriction of "no driving," which NWA then uses to exclude the applicants from the ESE and Cleaner jobs.

[6]NWA contends that the EEOC used the charges of Rued, Lewis and Nellum as the jurisdictional basis for this class action, rather than the charge of Kevin Armstrong, who the EEOC contends was discriminatorily denied an ESE job because of his diabetes in separate litigation in Tennessee, because the EEOC recognized that Armstrong would make a poor class representative. It further asserts that the EEOC is trying to "distance" itself from Armstrong.

on April 25, 2001, and its Amended Complaint on June 1, 2001. NWA answered on June 21, 2001, and moved to transfer venue on that same day. This Court denied the motion on October 30, 2001. On February 27, 2002, the parties had a pretrial conference before the Magistrate Judge, where the parties agreed that discovery in this case would be stayed pending NWA's current motion to dismiss or for summary judgment. To date, there has been no discovery in this matter. The EEOC files a concurrent declaration under Fed. R. Civ. P. 56(f) setting forth the facts that the EEOC expects to establish in discovery to withstand this premature motion.

ARGUMENT

The standard for evaluating a Rule 12(c) motion for judgment on the pleadings is essentially the same as the standard for evaluating a Rule 12(b)(6) motion.[7] Westcott v.

NWA's assertion is false. The EEOC is firmly convinced that NWA discriminated against Armstrong based upon his disability, and has said so forcefully in its response to NWA's motion for summary judgment in that case. Armstrong is not a claimant in this suit because an individual suit on his behalf was already initiated in Tennessee when this case seeking class-wide relief was filed.

[7]Although NWA styles its motion to dismiss as one brought under Fed. R. Civ. P. 12(b)(6), NWA has answered the EEOC's complaint. Rule 12(b)(6) motions are to be brought prior to

City of Omaha, 901 F.2d 1486, 1488 (8th Cir. 1990). The court must accept all of the plaintiff's well-pleaded factual allegations as true, and draw all reasonable inferences in the plaintiff's favor. Id. A motion for judgment on the pleadings under Fed. R. Civ. P. 12(c) should be granted only if it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him to relief. Id.

Summary judgment is only appropriate where, viewing the record in the light most favorable to the nonmoving party and giving that party the benefit of all reasonable inferences, there exists no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The Eighth Circuit "has repeatedly cautioned that summary judgment should seldom be granted in the context of employment actions, as such actions are inherently fact based." Keathley v. Armeritech Corp., 187 F.3d 915, 919 (8th Cir. 1999). Summary judgment should be granted only when all the evidence points one way and is susceptible of no reasonable inferences sustaining the position of the non-moving party. Hietala v. Real Estate

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responsive pleadings. Westcott v. City of Omaha, 901 F.2d 1486, 1487 (8th Cir. 1990). The EEOC will treat NWA's motion as having been brought under Rule 12(c) for judgment on the pleadings. The distinction between a Rule 12(b)(6) and a Rule 12(c) appears largely technical because both motions use the same standard of review. Id.

Equities/Village Green, LLC, 998 F. Supp. 1065, 1067 (D. Minn. 1998).

A. THE EEOC IS AUTHORIZED TO SEEK CLASS-WIDE RELIEF UNDER THE ADA

The EEOC brings this action under the enforcement powers conferred upon it by Congress in Sections 706 and 707 of Title VII, which are incorporated into the ADA. 42 U.S.C. § 12117(a) (incorporating by reference 42 U.S.C. § 2000e-5(f)(1), 2000e-6). Contrary to NWA's arguments, the EEOC is not required to satisfy the standards of Rule 23, directly or indirectly, to bring a claim of class-wide relief under these enforcement provisions. In General Telephone Co. v. EEOC, 446 U.S. 318 (1980), the Supreme Court recognized the special role that Congress conferred upon the EEOC in the enforcement of the civil rights laws, and rejected the assertion that the EEOC must satisfy the requirements of Fed. R. Civ. P. 23(c) to maintain a suit seeking class relief. The Court specifically discussed the difficulty of applying Rule 23's requirements of numerosity, commonality, typicality, and adequacy of representation to the Commission as a basis for not requiring the Commission to comply with these requirements. General Telephone, 446 U.S. at 330-31. The Court, without relying on the type of claim brought, discussed the incompatibility of Rule 23 and the Commission's enforcement authority:

> It is also apparent that forcing EEOC civil actions into the Rule 23 model would in many cases distort the Rule as it is commonly interpreted and in others foreclose enforcement actions not satisfying prevailing Rule 23 standards but seemingly authorized by § 706(f)(1). The undesirability of doing either supports our conclusion that the procedural requirements of the Rule do not apply.

Id. at 329-330.[8] The Supreme Court recently re-confirmed the special status held by the EEOC as the enforcement agency for the civil rights laws against employment discrimination. EEOC v. Waffle House, 122 S.Ct. 754, 763 (2002) ("The statute clearly makes the EEOC the master of its own case and confers on the agency the authority to evaluate the strength of the public interest at stake. Absent textual support for a contrary view, it is the public agency's province--not that of the court--to determine whether public resources should be committed to the recovery of victim-specific relief.").

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[8]NWA refuses to concede that General Telephone governs this case because the Supreme Court decision was decided before the ADA was adopted. *(NWA Mem. In Supp. at 4, n.4)*. General Telephone interpreted the EEOC's authority under Section 706 of Title VII, which is one of the enforcement provisions incorporated by reference into the ADA. The fact that General Telephone was decided before the ADA was adopted actually increases the persuasive authority of the EEOC's argument, because it shows that Congress knew and intended the EEOC to seek class relief without satisfying the requirements of Rule 23.

There is nothing in General Telephone or any of the cases decided under it that imposes any typicality or similarity or commonality standard upon the EEOC.[9] Courts uniformly have rejected employers' efforts to impose requirements upon the EEOC beyond those set forth in Sections 706 and 707 of Title VII, and have dismissed efforts of employers to distinguish or augment General Telephone on the grounds that the EEOC's claims require individualized determinations regarding liability or relief. Courts have rejected these arguments where the EEOC has sought compensatory and punitive damages for aggrieved claimants that required individualized assessments of damages, concluding that "[h]aving to persuade the district court that the class was numerous and homogeneous and that the EEOC's interest was aligned with that of the class members, the sort

[9]NWA tries to apply Rule 23 standards to the EEOC through a backdoor approach, contending that General Telephone held that the EEOC's actions were subject to requirements analogous to those in Rule 23, even though General Telephone held that the EEOC was not subject to the Rule itself. NWA's argument relies on one simple passage from General Telephone, where the Supreme Court stated: "The courts, however, are not powerless to prevent undue hardship to the defendant and should perform accordingly. The employer may, by discovery and other pretrial proceedings, determine the nature and extent of the claims that the EEOC intends to pursue against it." 446 U.S. at 333. There is nothing in this passage that supports NWA's argument that General Telephone intended that courts hold EEOC actions to the very standards of typicality and commonality that the Court concluded did not apply and would do damage to the EEOC's enforcement processes.

of things that compliance with Rule 23 would entail, would interfere with the Commission's exercise of its prosecutorial discretion." In re Bemis Company, Inc., 279 F.3d 419, 421(7th Cir. 2002); see also EEOC v. Dinuba Medical Clinic, 222 F.3d 580, 588 (9th Cir. 2000) ("Because the Court reached this conclusion without any qualifications based on the type of relief sought, there is no principled reason to depart from General Telephone Company and require class certification under Rule 23 simply because the EEOC is now authorized to sue for damages in addition to equitable relief."). Courts further have rejected arguments that the EEOC could not seek class relief in harassment cases, where the individual claimants must show that they were subjectively harmed to establish a hostile work environment claim. EEOC v. Mitsubishi Motor Mfg. of America, Inc., 990 F. Supp. 1059, 1076-79 (C.D.Ill. 1998) (rejecting argument that because of the individualized and subjective nature of sexual harassment claims, the EEOC's pattern or practice sexual harassment claim was inappropriate); EEOC v. Dial Corp., 156 F. Supp. 2d 926, 945 (N.D. Ill. 2001)(rejecting defendant's argument that the EEOC could not proceed with action because of the "highly individualized nature" of the harassment claims). The Sixth Circuit rejected arguments advanced by NWA itself, where NWA contended in a

racial harassment case that the EEOC could not show "numerosity" or some equivalent to seek class-wide relief for employees subjected to nooses and Klu Klux Klan symbols in its workplace. EEOC v. Northwest Airlines, 188 F.3d 695, 702 (6th Cir. 1999).

NWA's argument is particularly inapposite here, where the EEOC claims that NWA maintains a blanket exclusionary policy. The Supreme Court held in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), that the Government does not need to establish that the individual claimants are entitled to relief to establish liability for a discriminatory policy. Thus, the EEOC can establish that NWA violated the ADA through its per se unlawful blanket exclusionary policy even if the EEOC does not show that a single one of NWA's applicants was disabled within the meaning of the ADA.[10] It would only be in the subsequent damages stage

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[10]The EEOC is confident that it will show that the claimants were disabled within the meaning of the ADA during the liability stage. Persons with insulin-treated diabetes and epilepsy requiring anti-seizure medication have been found to have actual disabilities or records of a disability under the ADA. See, e.g., Lawson v. CSX Transportation, Inc., 245 F.3d 916 (7th Cir. 2001) (diabetes); Otting v. J.C. Penney, 223 F.3d 704 (8th Cir. 2000) (seizure disorder). Moreover, as is evident from NWA's arguments, NWA believes that no person with medication-treated epilepsy or diabetes can hold a single job at NWA that requires driving or working at heights. NWA regards these individuals as disabled within the meaning of the ADA. Taylor v. Pathmark, 177 F.3d 180, 187-92 (3rd Cir. 1999)

that the EEOC would be required to show that applicants with disabilities, real or perceived, were excluded from NWA's jobs. United States v. City and County of Denver, 943 F. Supp. 1304, 1308-10 (D. Colo. 1996), aff'd sub nom., Davoll v. Webb, 194 F.3d 1116 (10th Cir. 1999); EEOC v. United Parcel Service, 860 F.2d 372, 374 (10th Cir. 1988) (EEOC "need not produce an injured party when seeking to challenge an allegedly discriminatory policy that may affect unidentifiable members of a known class"); EEOC v. Murray, Inc., 175 F. Supp. 2d 1053, 1060 (M.D. Tenn. 2001) (holding that the EEOC did not have to prove that any individual job applicants or employees, including individual charging parties, were qualified individuals during the liability phase of the litigation); United States v. Morvant, 843 F. Supp. 1092, 1096 (E.D. La.

(employer's belief that plaintiff could not hold any job at employer sufficient to establish that employer regarded plaintiff as substantially limited in the major life activity of working); EEOC v. Blue Cross Blue Shield of Connecticut, 30 F. Supp.2d 296, 305 (D. Conn. 1998) (employer's belief that plaintiff could not hold a job with it requiring physical exertion established that employer regarded plaintiff as ineligible for employment generally); Dipol v. New York City Transit Authority, 999 F. Supp. 309, 314 (E.D. N.Y. 1998) (employer regarded plaintiff as substantially limited in working where, upon receiving information from plaintiff's doctor, it excluded plaintiff from all jobs with it); Coleman v. Keebler Co., 997 F. Supp. 1102, 1114 (N.D. Ind. 1998) (genuine issue of material fact existed as to whether employer regarded plaintiff as substantially limited in major life activity of working where employer concluded that plaintiff could not perform any available jobs in production plant).

1994) ("The government may properly seek monetary damages for initially unidentified persons aggrieved by acts pursuant to a discriminatory pattern or practice, in violation of the ADA.").

None of the cases cited by NWA support its contrary argument. All of the cases cited by NWA but one were brought solely by private parties, who must satisfy Rule 23. The one case cited by NWA that included a claim by the Government under Section 707, Davoll v. Webb, 194 F.3d 1116 (10th Cir. 1999), supports the EEOC's ability to bring this claim and not NWA's argument as it contends. In Davoll, the private plaintiffs brought a class ADA action against the City of Denver. The Department of Justice[11] brought a separate suit that was ultimately consolidated with the private action, asserting that the City of Denver violated the ADA by maintaining a policy of refusing to reassign police officers injured in the line of duty to other positions in violation of the ADA. The district court denied class certification on the private plaintiffs' claims, but granted the Department of Justice's motion for summary judgment for liability on the claim that the City of Denver maintained a blanket exclusionary policy.

[11]Under the ADA, the EEOC has the authority to enforce the ADA by bringing Sections 706 and 707 suits against private employers, and the Department of Justice has the authority to bring such suits against public employers.

The Tenth Circuit affirmed, holding that the district court did not abuse its discretion by denying class certification, but that the Government could proceed with its pattern-and-practice claims.[12] It further rejected the City of Denver's argument that the Government could not establish that the City had violated the ADA unless the Government could identify individuals with disabilities who were refused reasonable accommodation based upon the district court's reasoning. 194 F.3d at 1147-48. The district court held that the Government could establish the employer's liability without showing the individualized impact of the policy on persons with disabilities, and did not have to establish that the policy

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[12]The Court of Appeals observed:

> We understand plaintiffs' concern that by denying their class certification motion and upholding the United Staes pattern and practice action, this decision may be interpreted as holding that only the government can bring a class-wide ADA employment suit. Such an interpretation would be unfounded. Given the deferential standard by which we review class certification, it is possible that the district court could have certified the class in its discretion, or could have modified the proposed definition so that it was sufficiently definite. Of course, we do not decide those questions as our holding here is limited to the issue directly before us.
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> At the same time, we do note that a pattern and practice action brought by the United States pursuant to section 707 of Title VII, 42 U.S.C. § 2000e-6 is not subject to the requirements of Fed. R. Civ. P. 23.

Davoll, 194 F.3d at 1146-47 n.20 (citations omitted).

excluded qualified persons with disabilities until the damages stage of the litigation. United States v. City and County of Denver, 943 F. Supp. 1304, 1308-10 (D. Colo. 1996), aff'd sub nom., Davoll v. Webb, supra.

NWA's argument that the EEOC must meet the standards of Rule 23, whether directly or through analogy, has no merit. In 1990, when Congress adopted the ADA and incorporated the EEOC's enforcement powers from Sections 706 and 707 of Title VII, Congress knew that it was authorizing the EEOC to bring class-wide actions without satisfying Rule 23 or any analogous requirements. NWA asks this Court to ignore Congress's intent and the established Supreme Court precedent by imposing a burden upon the EEOC that has never been recognized and which has been repudiated by every court considering the issue. NWA's motion to dismiss or for summary judgment should be denied.

B. THE EEOC PLED ITS COMPLAINT WITH SUFFICIENT SPECIFICITY

NWA argues that the EEOC is required to identify, at the pleading stage, the specific major life activities on which its disability claims are based, the degree to which the claimants' conditions are controlled by medication, and to the extent that the EEOC contends that the claimants are substantially limited in the major life activity of working, the broad class of jobs

from which the claimants were excluded. In fact, as confirmed in a recent Supreme Court decision, the EEOC is not required to plead its theory of disability with the level of specificity demanded by NWA.

Federal practice is governed by the principle of notice pleading. Notice pleading requires only that the complaint include "'a short and plain statement of the claim showing that the pleader is entitled to relief.'" Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) (quoting Fed.R.Civ.P. 8(a)(2)). "[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim." Conley v. Gibson, 355 U.S. 41, 47 (1957). A complaint is sufficient, "[u]nder the liberal federal system of notice pleading," if it gives the defendant "'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" Vector Research, Inc. v. Howard & Howard Attorneys P.C., 76 F.3d 692, 697 (6th Cir. 1996).

Plaintiffs in employment discrimination cases are not held to a higher standard. In the recent case of Swierkiewicz v. Sorema, 122 S.Ct. 992, 997-98 (2002), the Supreme Court rejected the notion that plaintiffs in employment discrimination cases could be required to plead sufficient

facts to establish their prima facie case. The Court noted that the prima facie case does not always apply, such as when there is direct evidence of discrimination (like a discriminatory policy), and that the precise requirements of a prima facie case can vary and are developed during discovery. The Court further held that imposing a heightened pleading standard in employment discrimination cases violates the "short and plain" statement requirement of Fed. R. Civ. P. 8.

Consistent with these principles, five circuit courts have ruled that an ADA plaintiff is not required, at the pleading stage, to plead with the specificity demanded by NWA. In EEOC v. J.R. Routh Packing Co., 246 F.3d 850, 852-55 (6th Cir. 2000), the Sixth Circuit held that, as long as the complaint notifies the defendant of the impairment, the substantially limited major life activity need not be identified in the pleading. The Court of Appeals also held that the EEOC did not defeat its disability claim by pleading that the charging party had a history of epilepsy controlled by medication. In EEOC v. Browning Ferris, 225 F.3d 653, 2000 WL 1039469 (4th Cir. 2000) (unpublished) (attached), the Fourth Circuit held that the EEOC stated a claim by pleading that the defendant terminated the charging party based upon its perception that she was disabled. It held further that, even if the complaint was read narrowly,

the EEOC had stated a claim that charging party was substantially limited in the major life activity of working when it pled that the defendant perceived that charging party could not work around waste. In Poindexter v. Atchison, Topeka and Santa Fe Ry. Co., 168 F.3d 1228, 1232 (10th Cir. 1999), the Tenth Circuit ruled that, consistent with "federal notice pleading requirements," a "plaintiff has the option of clarifying his or her position at the pleading stage or waiting until trial to prove with particularity the impairment and major life activity he or she asserts are at issue." Id. Similarly, in Menkowitz v. Pottstown Mem'l Med. Ctr., 154 F.3d 113, 117 n.2 (3d Cir. 1998), the court ruled that the plaintiff stated a valid claim of disability under the ADA by alleging in his complaint that he had "'a disorder recognized as a disability under the [ADA].'" The court found this allegation, "which we must accept as true, sufficient to meet the notice pleading requirements of Fed.R.Civ.P. 8 with respect to his disability." Id. Finally, in Duda v. Board of Educ. of Franklin Park Pub. Sch. Dist. No. 84, 133 F.3d 1054, 1059 (7th Cir. 1998), the court ruled that the plaintiff sufficiently pled the existence of an actual disability, based on the assertion that he "suffers from a psychiatric illness and has been diagnosed as a manic depressive." The court stressed that this allegation was sufficient, at the pleading stage, because

"medically diagnosed mental conditions" can give rise to "recognized disabilities under the ADA." Id.[13]

Here, the EEOC has pled with specificity that Timothy Rued has insulin-dependent diabetes, and Larry Lewis and Serita Nellum have epilepsy requiring anti-seizure medication. *(Amended Complaint, ¶¶8, 9, 10)*. It has pled that these charging parties were disabled within the meaning of the ADA, and has alleged that NWA rejected these three applicants for positions of Cleaner and ESE because of their disabilities. *(Id.)* The EEOC has also alleged that NWA maintained a blanket exclusionary policy whereby it excludes persons with insulin-dependent diabetes or epilepsy requiring anti-seizure

[13]NWA cites cases from the district court level suggesting the need for more detailed factual allegations on the disability issue. See, e.g., Fedor v. Illinois Dep't of Employment Sec., 955 F. Supp. 891, 893 (N.D. Ill. 1996). All of these cases preceded or did not cite the Supreme Court's decision in Sorema, and no appellate court has agreed with the reasoning in these decisions. Additionally, district courts within the same jurisdiction as those relied upon by NWA have held to the contrary. See Smallberger v. Federal Realty Inv. Trust, 1999 WL 126919, *2 (E.D. Pa. March 8, 1999) (allegation that, "as a result of his illness and resulting colectomy, Plaintiff is disabled within the meaning of the ADA," sufficient "for the purposes of notice pleading"); Andriacchi v. City of Chicago, 1996 WL 685458, *2 (N.D. Ill. 1996) (allegation that the plaintiff "is a qualified individual with a disability as that term is defined [in the ADA]" sufficient to satisfy requirements of notice pleading); Muller v. Costello, 1996 WL 191977, *4 (N.D.N.Y. 1996) (allegation that plaintiff suffered from asthma sufficient to state a claim of disability under the ADA; no requirement that the complaint list the affected major life activities). (These unpublished cases are attached as exhibits to the Vasichek Declaration).

medication from holding positions as ESE or Cleaner. (*Id.*, ¶11). It has pled that NWA failed and refused to perform individualized assessments of these applicants' ability to perform the job or of their need for reasonable accommodation. (*Id.*) The EEOC's Complaint specifically seeks relief for Rued, Lewis, Nellum and all persons similarly situated. (*Id.*, ¶12). Under these circumstances, NWA cannot plausibly argue that it did not have "'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" Vector Research, Inc., 76 F.3d at 697. Indeed, NWA answered the EEOC's complaint, which indisputably rebuts any contention that the EEOC did not plead its case with sufficient particularity to allow NWA to respond. NWA's motion to dismiss or for summary judgment on this ground should be denied.[14]

C. NWA MAINTAINS AN UNLAWFUL BLANKET EXCLUSIONARY POLICY

The ADA prohibits an employer from "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in

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[14]The EEOC alternatively asks that it be granted leave to file an amended complaint to cure any deficits in its pleadings.

question and is consistent with business necessity." 42 U.S.C. 12112(b)(6). The statute provides that "[i]t may be a defense to a charge of discrimination" if a challenged qualification standard or criterion "has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation." 42 U.S.C. 12113(a). The ADA specifies that the "term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace," 42 U.S.C. 12113(b), and defines "direct threat" in parallel terms, see 42 U.S.C. 12111(3).

The EEOC contends, and evidence will show, that NWA maintained a blanket exclusionary policy, under which it excluded applicants with diabetes requiring insulin and epilepsy requiring anti-seizure medication from holding positions as ESEs and Cleaners.[15] Blanket rules that exclude persons with disabilities from employment without regard to their individualized condition are per se unlawful because the

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[15]Although NWA denies having a blanket exclusionary policy, it essentially admits that it disqualifies any person who poses a risk, no matter how slight, of unconsciousness or disorientation in the ESE and Cleaner positions. It also asserts that diabetes requiring insulin and epilepsy requiring anti-seizure medication carry risks of unconsciousness and disorientation. Thus, while NWA denies the conclusion - that it has a blanket exclusionary policy - it admits the facts that show that it does have such a policy. *(See NWA Mem. In Support at 17-26).*

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). 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).

NWA can show no facts that would excuse its use of a blanket exclusionary policy.[16] NWA vigorously argues that its exclusion of the claimants was based upon safety concerns, but advances no evidence to indicate that the *individual* claimants posed any risk at all. See 29 C.F.R. § 1630.2(r); Lovejoy-Wilson v. NOCO Motor Fuel, 262 F.3d 208, 220 (2d Cir. 2001) ("To protect disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear, . . . an individualized assessment of [plaintiff's] present ability to safely perform the essential functions of the job based on medical or other objective evidence is required."); see also Lowe v. Alabama Power Co., 244 F.3d 1305, 1308-09 (11th Cir.

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[16]NWA states its defense to the EEOC's claim that its exclusionary policy is unlawful in various ways. It argues that the claimants are not "qualified" because they are a safety risk. It also contends that its policy is lawful because it is justified by business necessity, and it asserts that the policy is lawful because the claimants pose a direct threat to the safety of others. The EEOC contends that NWA can defend its exclusion of the claimants, if at all, only under the "direct threat" standard in Section 103(b) of the ADA, 42 U.S.C. § 12113(b). It also believes, however, that the Court will never be called upon to decide which defense applies here, since NWA cannot establish the premise -- that NWA was entitled to categorically exclude the claimants based upon safety risks -- that underlies all of its arguments.

2001) ("particularized facts" of "specific person's condition" evidencing direct threat).

NWA apparently believes that it can legitimately exclude applicants who have medical conditions that might remotely pose a risk of injury, "no matter how slight the likelihood of occurrence." (*NWA's Mem. In Support at 23*). The Supreme Court rejected that argument in Bragdon v. Abbott, 524 U.S. 624 (1998), where the Court evaluated the safety-based decision of a dentist to refuse treatment to an HIV-positive applicant. As the Court stated, "Because few, if any, activities in life are risk free, Arline and the ADA do not ask whether a risk exists, but whether it is significant." Bragdon, 524 U.S. at 649. Here, NWA's own argument describes the individual variations of symptoms among persons with diabetes and epilepsy, and notes the importance of the individual's willingness to adhere to their prescribed medical regime in controlling the symptoms of the disease.[17] *(NWA Mem. In Supp. at 19-23)*.

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[17]Apparently in an effort to buttress its arguments, NWA distorts the testimony of the EEOC's expert from the Tennessee litigation against NWA throughout its argument. As one example, NWA contends that Dr. Levin testified that "[d]espite the patient's best efforts, strenuous exercise and erratic eating schedules can adversely affect blood sugar levels and lead to symptoms such as disorientation." In fact, Dr. Levin testified that "[e]rratic eating schedules, *if you don't adjust your insulin and don't take extra food*, it could have an adverse effect." *(Vasichek Decl., Ex. 13 at 101:7-9 (Levin Dep.)*. Dr. Levin went on to explain that a patient can simply adjust his food and insulin intake when faced with an erratic

NWA asserts that courts have endorsed blanket exclusions of persons with diabetes requiring insulin and epilepsy requiring anti-seizure medication. NWA relies most heavily on Chandler v. City of Dallas, 2 F.3d 1385, 1395 (5th Cir. 1993), where the Fifth Circuit held that drivers with insulin-dependent diabetes posed genuine substantial risk of injury. NWA does not disclose that six years later, in Kapche v. City of San Antonio, 176 F.3d 840, 846-47 (5th Cir. 1999), the Fifth Circuit retreated from the per se rule in Chandler in another case involving a police officer applicant, recognizing that, in light of changes to the federal regulations on which its per se rule was based, as well as possible advancements in medical technology, the blanket exclusion of insulin-dependent diabetics from positions that require driving might no longer be viable. The Court of Appeals also explicitly concluded that there was a genuine issue of material fact whether insulin-dependent diabetics who drove would pose a safety risk.[18] Id.

Similarly, in Davis v. Meese, 692 F. Supp. 505 (E.D. Pa. 1988), aff'd, 865 F.2d 592 (3d Cir. 1989), the district court

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eating schedule. *(Id. 101:12-24)*.

[18]On remand, the district court entered judgment for the defendant, concluding that it could not be held liable for following the per se rule set forth in Chandler. Kapsch is currently before the Fifth Circuit again on appeal from the district court's judgment.

upheld an FBI restriction against employing insulin-dependent diabetics as special agents, but only after full trial on its merits where the court considered the state of medical knowledge in 1988 and the dangerous circumstances in which FBI agents could find themselves. The district court specifically concluded that its holding should be considered in light of the medical progress as it existed at the time of the decision:

> At some future time, medical science may be able to predict accurately on a case-by-case basis those insulin-dependent diabetics who present only a very slight or de minimis risk of having a severe hypoglycemic occurrence while on an assignment as a special agent or investigative specialist. Great strides have been made in recent years in the control of diabetes. . . It may be that in the future, as testing and treating techniques improve, exclusions on a case-by-case basis will be the only permissible procedure; or, hopefully, methods of control may become so exact that insulin dependent diabetics will present no risk of ever having a severe hypoglycemic episode, in which case such persons would be clearly qualified to apply.

Id. at 520.[19]

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[19]The remaining cases cited by NWA do not, to any extent, support its contention that courts have endorsed employer's blanket policies barring the employment of persons with diabetes or epilepsy. For example, Smith v. City of Des Moines, 99 F.3d 1466 (8th Cir. 1996), did not concern epilepsy or diabetes, but was principally an age discrimination case concerning a firefighter who could not wear a breathing apparatus because of insufficient lung capacity. Wood v. Omaha, 25 F.3d 667 (8th Cir. 1994) was an appeal from a remand. In the first appeal, the Eighth Circuit reversed the district court's grant of summary judgment for the employer, concluding that there were sufficient facts regarding whether the bus drivers who had poorly controlled diabetes, could be reasonably accommodated. Wood v. Omaha, 985 F.2d 437 (8th Cir. 1993). On

As foreshadowed in Davis, medical science long ago progressed to the point where employers such as NWA could assess persons with insulin-treated diabetes and epilepsy requiring anti-seizure medication on an individualized basis as required by the ADA. Enormous strides have been made in the treatment and management of both diseases. Literature indicates, for example, the risk of seizures for persons with epilepsy decreases dramatically with the passage of time. The risk of having a second seizure after the initial seizure drops to 15 percent after three months, and to less than five percent after a year. See K. Ashkin, Epilepsy and Driving, http://www.supportworks.org/info/efncart2.htm. One study suggests that, after five years of being seizure free, the risk of a seizure is only one percent. See Allan Krumholz et al., Driving and epilepsy: a review and reappraisal, 265 JAMA 622 (1991).

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the second appeal, the Court merely affirmed the credibility findings of the trial court judge who sat as the finder of fact. Wood, 25 F.3d at 669. Levin v. Delta Airlines, Inc., 730 F.2d 994 997-98 (5th Cir. 1984), is a pregnancy discrimination case concerning the assignment of pregnant women as flight attendants. EEOC v. J.B. Hunt Transp., 128 F.Supp. 2d 117 (N.D. N.Y. 2001), which is currently on appeal to the Second Circuit, did not involve either diabetes or epilepsy, but considered whether the EEOC had shown that the claimants, who were excluded from positions because they took medication, were disabled for purposes of the ADA.

Great strides have been made in the ability to screen and manage the risk imposed by someone with insulin-dependent diabetes. With the progress of blood-sugar self-monitoring, routine hemoglobin testing, new insulin delivery systems and new types of insulin, diabetes can be managed. In addition, the experience of agencies and employers that have successfully adopted individualized screening for positions involving more public safety concerns than the position of ESE or Cleaner shows us that NWA did not have a basis for categorically screening out such applicants. For example, the Federal Aviation Administration ("FAA") changed its policy in 1996 to permit the special issuance of medical certificates for third class airmen to individuals with insulin-treated diabetes. See 66 Fed. Reg. 39,548, 39,549-50 *(attached to Vasichek Decl. as Ex. 14)*. In 1998, the United States Department of Justice concluded ADA suits against two states for their categorical prohibition against persons with insulin-treated diabetes from employment as bus drivers. (*Vasichek Decl., Exs. 15, 16*). These states have developed protocols to allow certain persons with insulin-treated diabetes to drive school buses after an individualized assessment. The FBI no longer has a blanket policy of excluding from employment all special agent applicants with insulin-treated diabetes, but rather considers

such applicants individually based upon their medical history, treatment, and prognosis, as do the other law enforcement agencies within the Department of Justice (including the U.S. Marshall Service, the Bureau of Prisons, the Drug Enforcement Administration, and the Immigration and Naturalization Service). *(Vasichek Decl.,* Ex. 17 *at 25-26) (Brief of DOJ).*

Most recently, the Department of Transportation concluded in a report to Congress in 2000 that "a safe and practical protocol to allow some ITDM [insulin-treated diabetes mellitus] individuals to operate CMV's [commercial motor vehicles] is feasible." 66 Fed. Reg. at 39,550. The DOT has proposed an exemption that will allow qualified applicants with diabetes to drive commercial motor vehicles.[20] The DOT's description of its report to Congress succinctly sets forth the lack of evidence to support a blanket exclusionary policy such as maintained by NWA:

> The research on the treatment and management of ITDM, combined with the determinations of the medical panel, indicate that the disease and its adverse effects can be successfully controlled and monitored. Moreover, recent risk assessments provide evidence that diabetic CMV operators can perform in an acceptably safe manner. Finally, the

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[20]NWA contends that the DOT regulations provide no waiver for persons with epilepsy or insulin-treated diabetes from operating a commercial vehicle. (NWA Brief at n.15). Inexplicably, it does not mention the DOT's proposed exemptions.

program operated by the FAA and the reanalysis of the FHWA's diabetes waiver program demonstrate that it is possible to screen and monitor ITDM individuals so that safe performance is feasible.

Id.

NWA is not entitled to unique deference for its safety defense because it is an airline. Congress did not grant it any special exemptions from the ADA's coverage. Cf. Aloha Islandair Inc. v. Tseu, 128 F.3d 1301 (9th Cir. 1997) ("Our view [that the FAA does not preempt state disability discrimination statutes] is buttressed by the fact that when Congress passed the Americans with Disabilities Act of 1990, it provided civil remedies enforceable in both state and federal courts without exempting pilots or expressing any concern whatsoever that airlines safety would be compromised. . . .). As the Supreme Court has said, airlines are not entitled to complete deference for their employment decisions simply because they invoke public safety. Western Air Lines v. Criswell, 472 U.S. 400, 423 (1985).[21]

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[21]NWA contends in a footnote that the safety mandate of the Federal Aviation Act, which provides that airlines must conduct their business "with the highest possible degree of safety, affords a complete defense to its failure to comply with the ADA. However, no court has ever exempted an airline from the operation of the federal antidiscrimination laws because they adopted a policy purportedly justified by safety concerns. In Western Air Lines v. Criswell, 472 U.S. 400 (1985), for example, the airline argued that it should be free to bar pilots from serving as flight engineers after the age of 60,

NWA is not entitled to an order of dismissal or for summary judgment. Even without discovery, the evidence shows that NWA maintains a blanket exclusionary policy. It further shows that NWA can advance no legitimate reason why it cannot perform an individualized assessment where the FBI can. Without minimizing the responsibilities of the positions of ESE and Cleaner at NWA, it appears beyond cavil that special agents for the FBI encounter more dangerous and more stressful situations than do ESEs and Cleaners. NWA's motion should be denied.

CONCLUSION

For the reasons stated above, NWA's motion to dismiss or for summary judgment should be denied. Alternatively, pursuant to the facts as set forth in the EEOC's Fed. R. Civ. P. 56(f)

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because the FAA had prohibited them from serving as captains after that age. The Supreme Court held, however, that the FAA regulation for captains should not be accorded conclusive weight when considering whether the airlines' facially discriminatory policy was justified because age was a bona fide occupational qualification. 472 U.S. at 418. It concluded, "even in cases involving public safety, the ADEA plainly does not permit the trier of fact to give complete deference to the employer's decision." Id. at 423.

Declaration, the Court should refuse NWA's motion or continue decision on the motion for another time.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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