IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Appeal No. 04-11473

RUDY RODRIGUEZ,
***Plaintiff-Appellant*,**

v.

CONAGRA GROCERY PRODUCTS CO.,
***Defendant-Appellee*.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION

BRIEF OF *AMICI CURIAE* AARP, ADVOCACY INC., AMERICAN DIABETES ASSOCIATION AND COALITION OF TEXANS WITH DISABILITIES URGING REVERSAL AND SUPPORTING PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

AARP is a nonprofit, nonpartisan membership organization, which is tax-exempt under section 501(c)(4) of the Internal Revenue Code, and is dedicated to addressing the needs and interest of older Americans. AARP neither has a parent corporation, nor has it issued shares or securities.

Advocacy Inc. (AI) is a nonprofit organization authorized by federal law, and is designated as the protection and advocacy system for the State of Texas. AI is the state affiliate organization for Texas of the National Association of Protection and Advocacy Systems (NAPAS), which is described below. AI neither has a parent corporation, nor has it issued shares or securities.

The American Diabetes Association ("Association") is a nationwide, nonprofit, voluntary health organization, which is tax-exempt under section 501(c)(3) of the Internal Revenue Code, and whose mission is to prevent and cure diabetes and top improve the lives of all people affected by diabetes. The Association neither has a parent corporation, nor has it issued shares or securities.

Coalition of Texans with Disabilities (COTWD) is a nonprofit membership organization that is tax-exempt under section 501(c)(3) of the Internal Revenue Code.

COTWD is dedicated to addressing the needs and interest of Texans with disabilities. COTWD neither has a parent corporation, nor has it issued shares or securities.

Respectfully submitted,

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INTERESTS OF THE *AMICI*

This case involves the scope and meaning of the Texas Commission on Human Rights Act (TCHRA), which, *inter alia*, protects people with disabilities against discrimination in employment. *Amici* are national and Texas-based organizations that advocate on behalf of people with disabilities. Because many of their members and clients have encountered discrimination in a variety of employment settings, *amici* are concerned about the implications of this case for Texans with disabilities. In addition, because of parallels between the TCHRA and federal laws after which it is modeled – in particular, the Americans with Disabilities Act (ADA) – this Court's ruling also will affect employment discrimination law regarding persons with disabilities throughout the Fifth Circuit, and potentially throughout the nation. A description of each of the *amici* appears in Appendix A hereto.

INTRODUCTION AND SUMMARY OF ARGUMENT

The District Court took a highly unusual and errant path in resolving ConAgra's motion for summary judgment. Due to this detour, the trial court's decision conflicts with fundamental principles governing claims of employment

discrimination because of disability established by this Court and the U.S. Supreme Court.[1/] The decision also relies on serious misconceptions about diabetes.

This Court has set forth clear standards for evaluating an employer's Rule 56 motion seeking dismissal of disability bias claims under the ADA or TCHRA. A plaintiff's first step is to advance proof sufficient to make out a *prima facie* case:

> In order to prove a prima facie case of discrimination under the ADA, a plaintiff must show that: (1) [he or] she is disabled; (2) [he or] she was qualified for the job in question; and (3) an adverse employment action was taken because of [his or] her disability. *Talk v. Delta Airlines, Inc.*, 165 F.3d 1021, 1024 (5th Cir. 1999).

Anderson v. City of Dallas, No. 03-11229, 2004 U.S. App. LEXIS 22523, at *21 (5th Cir. Oct. 28, 2004). *Accord Giles v. General Electric Co.*, 245 F.3d 474, 483 (5th Cir. 2003) (citing *Sherrod v. Am. Airlines, Inc.*, 132 F.3d 1112, 1119 (5th Cir. 1998)). Assuming this test is satisfied, in a case where, as here, direct evidence of intentional employment discrimination is disputed, this Court has followed further proof procedures first stated in *McDonnell Douglas Co. v. Green*, 411 U.S. 792 (1973). *See Rizzo v. Children's World Learning Ctr.*, 84 F.3d 758, 761 & n.2 (5th

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[1/] As this case arises under the TCHRA, which "is modeled after federal civil-rights laws," the District Court properly acknowledged that "courts [should] look to the [Americans with Disabilities Act] and cases and regulations interpreting that statute" to resolve issues under the TCHRA presented in this litigation. *Rodriguez v. ConAgra*, 4:03-CV-055-4, 2004 U.S. Dist. LEXIS 18812, at *6 n.2 (N.D. Tex. Sept. 16, 2004).

Cir. 1996) (ADA); *Machinick v. PB Power, Inc.*, No. 04-20418, 2005 U.S. App. LEXIS 1165, at *25 & n.37 (5th Cir. Jan 25, 2005) (TCHRA).[2/]

The District Court initiated a sound summary judgment analysis, properly indicating that plaintiff-appellant satisfied each component of his *prima facie* case. Thereafter, the District Court lost track of well-established legal rules.. Rather than faithfully applying the *McDonnell Douglas* proof model, and clear authority on questions presented when an applicant like Rodriguez is rejected due to a post-offer medical exam, the trial court embraced the novel contention that Rodriguez violated a duty to mitigate a disability that ConAgra merely perceived him to have.

The District Court should have recognized that ConAgra neglected to carry its burden, at the summary judgment stage, to show that Rodriguez' post-offer medical exam was a legitimate basis for revoking his job offer – *i.e.*, the company failed to demonstrate either that he could not perform "essential job functions," with or without "reasonable accommodation," or that he posed a "direct threat" to himself or co-workers that could not be reduced or eliminated by a "reasonable accommodation." ConAgra did not raise these claims; thus, the trial should have denied summary judgment.

[2/] That is, the defendant must offer proof of a legitimate non-discriminatory motive for a challenged adverse employment action (here revoking Rodriguez' job offer), and if that effort is successful, plaintiff must present colorable proof that defendant's rationale was a mere pretext for unlawful discrimination. *Id.*

Instead, the District Court issued far-reaching and unfounded fact findings about features that supposedly "generally" characterize diabetes. Contrary to authoritative, readily available medical data, the District Court accepted a superficial view of a disease that takes multiple forms, exhibits varing symptoms, and is treated with diverse means differing for each person affected. That is, the trial court erred in acting on a conclusion that diabetes "generally" is a "controllable illness." *Rodriguez*, 2004 U.S. Dist. LEXIS 18812, at *8.

Based on its misunderstanding of Rodriguez' condition, the trial court endorsed precedents purportedly establishing "that an employer's adverse action in response to *a plaintiff's failure to control* an otherwise *controllable illness* does not give rise to a disability [employment] discrimination claim." *Id.* at 8 (emphasis supplied). This violated fundamental tenets of ADA law.

The District Court's decision clashes with key principles stated in *Sutton v. United Airlines*, 527 U.S. 471 (1999): that disabilities must be evaluated "with respect to an individual": *i.e.*, via "an individualized inquiry," *Id*. at 483; and that a disability bias claimant must be evaluated in terms of his or her actual, current condition, not some hypothetical condition. *Id.* at 483-84.

Sutton stated these principles in a context similar to this case, involving assessment of "mitigating measures" used by a plaintiff to reduce the impact of

their asserted disability. Just as the *Sutton* Court refused to assess plaintiffs' claims of "disability" in light of their hypothetical unmitigated state (*i.e.*, not using their eyeglasses), the District Court should have assessed Rodriguez' claim in light of his actual disease, not some hypothetical, "generally controllable" condition. Remarkably, however, the District Court did not mention, much less apply *Sutton*.

Nor did the trial court discuss this Court's most recent decision involving employment discrimination claims by a person with diabetes. *See Kapche v. City of San Antonio*, 304 F.3d 493 (5th Cir. 2002). In *Kapche*, this Court condemned across-the-board exclusionary policies by employers with the effect of screening out job applicants with diabetes regardless of their ability to do the job. The District Court's decision would have the effect of upholding such a practice.

By contrast, authorities cited by the District Court cannot be squared with well-settled legal authority.

ARGUMENT

I. THE TRIAL COURT IGNORED THE KEY ISSUES RAISED BY CONAGRA'S PRECIPITOUS DECISION THAT PLAINTIFF WAS MEDICALLY DISQUALIFIED.

The District Court properly sustained each element of plaintiff-appellant's *prima facie* case. At that point, however, the trial court veered off course.

A. Rodriguez Proved His *Prima Facie* Case.

The District Court correctly identified the issue of plaintiff-appellant's "disability" as inappropriate for summary judgment. Rodriquez presented proof sufficient to satisfy an alternative definition of an "individual with a disability": *i.e*., whether he was "*regarded* [by ConAgra] *as* having … an impairment" (emphasis supplied) substantially limiting him in the major life activity of working. *See* 42 U.S.C. §12102(2)(C) (2004) (ADA text creating "regarded as" claim).[3/]

The District Court similarly indicated that whether Rodriguez "was *qualified* for the job in question" (emphasis supplied) is no basis for summary judgment.[4/] As *amici* discuss below, the trial court improperly conflated the issue whether Rodriguez was "qualified" with the issue whether his diabetes was "controlled." But even accepting the flawed premise that "control" is a proxy for being

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[3/] Specifically, the trial court concluded "that Rodriguez has … at least demonstrated a question of fact regarding th[e disability] issue," in light of testimony from ConAgra's human resources director "tending to indicate that she considered Rodriguez disqualified from any position at the plant as a result of his uncontrolled diabetes." *Rodriguez v. ConAgra*, 2004 U.S. Dist. LEXIS 18812, at *7 & n.3. *Id*. (indicating plaintiff satisfied his burden to "rais[e] an inference that ConAgra perceived his condition as one that disqualified him from a broad class of jobs"). And later in its opinion, the trial court "assume[ed] that Rodriguez has adequately demonstrated ConAgra regarded him as disabled." *Id.* at *8.

[4/] As to Rodriguez' qualifications, the District Court observed that Rodriguez "worked as a temporary employee" – apparently successfully – at ConAgra's Fort Worth plant, and then later applied for and received a "contingent" offer of an "entry-level position in the production area at the plant" – apparently because he satisfied all non-medical job requirements. *Rodriguez*, 2004 U.S. Dist. LEXIS 18812, at *2.

"qualified," the court found this to be a disputed fact question, rendering summary judgment inappropriate. In particular, the court noted conflicting evidence whether plaintiff-appellant's diabetes "was under control at the time of his pre-employment physical exam," *Rodriguez*, 2004 U.S. Dist. LEXIS 18812, at *11-12,[5/] and was willing to "assume[e] [ConAgra] was incorrect that Rodriguez' diabetes was not under control." *Id.* at *11.

Finally, the District Court concluded Rodriguez suffered an "adverse employment action" by ConAgra solely "because of" the "disability" that ConAgra perceived him to have.[6/]

[5/] The record shows Rodriguez believed his diabetes was under control, as did his primary-care physician, Dr. Garcia, and a diabetes expert, Dr. DeFronzo; but the trial court concluded this proof was insufficient to "demonstrate" such control. *Rodriguez*, 2004 U.S. Dist. LEXIS 18812, at *9-11. ConAgra's contrary conclusion was made by a non-physician, Ms. Zamora, relying on a brief exam of Rodriguez by Dr. Morris, an occupational physician who declined to obtain Rodriguez' medical records or consult with his primary-care doctor. *Id.* at *2-3.

[6/] *Id.* at *2-3, 7 (finding ConAgra's human resources director, Zamora, withdrew Rodriguez' job offer "solely" due to Dr. Morris' report, based on which she "considered Rodriguez to be disqualified … as a result of his uncontrolled diabetes"). Similarly, the District Court said withdrawing Rodriguez' job offer was "an *employer's adverse action* in response to a plaintiff's" perceived mismanagement of his medical condition. *Id.* at *8 (emphasis supplied).

B. Appellee ConAgra Failed to Carry Its Burden to Show Appellant Could Not Perform Essential Job Functions or that He Posed A "Direct Threat."

Where as here, an applicant receives a job offer contingent on results of a medical exam, due to an employer's preliminary conclusion that the offeree is qualified to perform the job, and the exam then raises a red flag, it is crystal clear how an employer should respond. ConAgra failed to comply with applicable legal authority and the District Court ignored this.

In the situation presented in this case, the employer should have examined the adverse medical exam result in the context of two specific questions. First, in spite of the exam result, could the offeree "perform the essential functions of the job with or without reasonable accommodation." If the answer to this query was "yes," did the offeree, in light of the exam result, nevertheless pose a "direct threat" to his own safety on the job or that of co-workers. *See, e.g., EEOC v. Northwest Airlines*, 246 F. Supp. 2d 916, 921-26 (W.D. Tenn. 2002) (insulin-treated applicant with diabetes had offer of baggage handler job revoked; plaintiff demonstrated he was qualified and did not pose "direct threat"); *Garrison v. Baker Hughes Oilfield Operations, Inc.*, 287 F.3d 955, 960-61 (10th Cir. 2002) (affirming jury verdict for plaintiff; rejecting employer's claim that withdrawing job offer following post-offer medical exam was job-related and consistent with

business necessity, as plaintiff could perform essential job functions and employer's fear of plaintiff's "possible future injuries" amounted to "unsubstantiated speculation about future risks from a perceived disability").

The EEOC has issued guidance that specifically affirms this interpretation.[7/] Given these authorities, the District Court should have faulted ConAgra for ignoring such claims, and denied its summary judgment motion.

Moreover, nothing in the record, much less in the facts relied on by the District Court, justifies a conclusion that plaintiff-appellant was unqualified for the job ConAgra offered him or that he posed a "direct threat" to himself or co-workers. It follows that ConAgra had no legitimate, non-discriminatory basis for revoking Rodriguez' offer, and thus, is not entitled to summary judgment. *See McDonnell Douglas, supra*.

The trial court's opinion makes plain that Ms. Zamora decided to revoke Rodriguez' offer based "solely" on Dr. Morris' conclusion that plaintiff-appellant was "medically disqualified" due to "uncontrolled diabetes." There is no record

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[7/] *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N (EEOC), QUESTIONS AND ANSWERS ABOUT DIABETES IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT (ADA) 2 ("3. What should an employer do when it learns that an applicant has diabetes after he has been offered a job? The fact that an applicant has diabetes may not be used to withdraw a job offer if the applicant is able to perform the fundamental duties ("essential functions") of a job, with or without reasonable accommodation, without posing a direct threat to safety."), *available at* http://www.eeoc.gov/facts/diabetes.html (last modified October 29, 2003).

evidence that Ms. Zamora or Dr. Morris made any attempt to assess Rodriguez' actual limitations in light of the essential functions of the job which he had been offered. Indeed, the District Court does not discuss the job, or ConAgra's decision process, in any detail. ConAgra simply applied - and thus, affirming the trial court would sustain - a kind of "blanket ban" on persons whose diabetes might appear to be "uncontrolled" based on the minimal evidence obtained in a post-offer medical exam. Yet this Court has ruled out such practices even by public employers in law enforcement. *See Kapche v. City of San Antonio*, 304 F.3d 493, 499-500 (5th Cir. 2002) (striking down "per se" ban on police officer candidates who use insulin for diabetes, mandating "individualized assessment of [plaintiff's] ability to perform the essential functions of an officer," and noting "we are unaware of any decision from our sister Circuits abrogating the requirement of an individualized assessment in favor of a *per se* exclusion under the ADA").

To be sure, Dr. Morris judged Rodriguez "medically disqualified" based on some specifics; *i.e.*, Dr. Morris knew that Rodriguez took oral medication, not insulin, for his diabetes; that the sugar level in his urine was above normal on the day of his medical exam; and that he was uncertain of the identity of his treating physician and his medications, and also "what his diabetic treatment plan was." *Rodriguez*, 2004 U. S. Dist. LEXIS 18812 at *3. Yet Rodriguez also told Morris

"his diabetes was well controlled and . . . had never caused problems for him." *Id*. And there is no sign Dr. Morris assessed Rodriguez' condition or qualifications in light of the "essential functions of the job in question," or that he gave Ms. Zamora information allowing her to do so. This was not the "individualized assessment" the ADA requires.[8/]

Nor did Dr. Morris, much less Ms. Zamora, evaluate Rodriguez' condition in a manner consistent with standards required to be satisfied to reach a valid conclusion that an employee is a "direct threat." In *Chevron U.S.A. v. Echazabal*, the Supreme Court upheld EEOC rules that a "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."

536 U.S. 73, 86 (2002). In performing such an "individualized assessment" of a possible "direct threat," an employer (and any reviewing court) must consider "(1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The

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[8/] Compliance with ADA standards should not have been difficult for ConAgra. Surely a human resources officer at such a firm had ready access to – or should have had little difficulty generating – a list of essential job functions. And surely Ms. Zamora could have discussed with (or demanded specifics from) Dr. Morris *why* he found Rodriguez "medically disqualified," and whether, given specifics of his diabetes, Rodriguez could have performed essential job functions, with or without accommodation. Yet apparently, no such steps were taken in this case.

likelihood of the potential harm; and (4) The imminence of the potential harm." *Id.* (citing EEOC regulation, 29 C.F.R. § 1630.2(r)). Furthermore, "[t]o constitute a direct threat, an individual must pose a risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *Kapche v City of San Antonio*, 176 F.3d 840, 844 (5th Cir. 1999). And in a case like this, where it is plain that ConAgra's "safety requirements" in regard to persons with diabetes "tend to screen out the disabled, then the burden of proof shifts to the employer, to prove that the employee is, in fact, a direct threat." *Rizzo v. Children's Learning Ctrs., Inc.*, 173 F.3d 254, 259-60 (5th Cir. 1999), *aff'd en banc*, 213 F.3d 209 (5th Cir. 2000), *cert. denied*, 531 U.S. 958 (2000).[9/]

Even had ConAgra acted in accordance with applicable legal standards, sound "available objective evidence" would not have supported a decision to revoke Rodriguez' job offer. ConAgra simply did not have the data it needed to make a meaningful assessment of plaintiff-appellant's condition. *Cf. Branham v. Snow*, 392 F.3d 896, 900, 904-09 (7th Cir. 2004) (rejecting "direct threat" defense by U.S. Treasury Department, based on much more substantial medical evidence,

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[9/] *Accord Branham v. Snow*, 392 F.3d 896, 906-07 (7th Cir. 2004); *Hutton v. Elf Atochem N. America, Inc.*, 273 F.3d 884, 893 (9th Cir. 2001). Regardless which party is assigned the burden of proof on this issue, however, Rodriguez would prevail, as the record contains nothing to indicate he poses any appreciable risk of harm to himself or co-workers.

in case of IRS agent with diabetes, as "a reasonable trier of fact could [have] f[ou]nd that Mr. Branham [wa]s qualified").

In a recent *amicus* brief filed in an ADA employment case in another federal circuit court, on behalf of a plaintiff-appellant with insulin-treated diabetes, *amicus* American Diabetes Association identified, based on its official "Standards of Care," minimal steps required to be performed in an adequate occupational medical examination of a person with diabetes. These are: a test of the person's current blood (not urine) sugar level; an "A1C test," which affords a three-month retrospective summary of a person's blood sugar level; a review of the person's medical history; a review of the person's current treatment regimen, including diet, physical activity and medication(s); a review of the person's past history, if any, in regard to dangerously low (or high) blood sugar levels (including, especially, instances of incapacitating hypoglycemia); a review of the person's past experience in the same or similar jobs, and/or place of employment; and an analysis of the essential functions of the job in question. *See* Brief of the American Diabetes Association as *Amicus Curiae* in Support of Appellant, *Darnell v. Thermafiber, Inc.*, No. 04-2170 (7th Cir. Sept. 24, 2004), at 16-17. In this case, the only such step taken by Dr. Morris was a cursory review of current treatment steps being

taken by the plaintiff-appellant that did not even include a review of his recent medical records. This was plainly insufficient.

C. Current Medical Knowledge Confirms that Rodriguez Could Perform Essential Job Functions and Posed No "Direct Threat."

"Current medical knowledge," much of it readily available over the internet on websites maintained by reputable medical authorities such as the American Diabetes Association, creates at least an issue of fact whether – and indeed, strongly suggests that – Rodriguez was well-qualified for manual labor at ConAgra's Ft. Worth bean plant, and posed no threat to himself or co-workers.

"Diabetes" refers to a category of diseases distinguished by persistent elevated blood sugar levels (or "hyperglycemia"), due to interference with the body's ability to break down sugar in the bloodstream. To widely varying degrees, in one way or another, the body's normal functioning is compromised: insulin, "a hormone that serves to 'drive' sugar from the bloodstream to the cells of the body where it is metabolized," ceases to be produced or fails to perform that function. *Bombrys v. City of Toledo*, 849 F. Supp. 1210, 1214 (N.D. Ohio 1993).[10/] And "[w]ithout insulin to cause sugar to cross the cell membrane, the sugar stays in the

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[10/] "Diabetes Mellitus is a group of metabolic diseases characterized by hyperglycemia resulting from defects in insulin secretion, insulin action or both." American Diabetes Ass'n (ADA), *Position Statement on Diagnosis and Classification of Diabetes Mellitus*, 28 DIABETES CARE S37 (2005), *available at* http://care.diabetesjournals.org/cgi/content/full/28/suppl_1/s37.

bloodstream where the kidneys attempt to eliminate it through increased production of urine." *Id.* The "most prevalent form of diabetes," commonly called "type 2," results from "insulin resistance" – *i.e.*, the body becomes less capable of using insulin it produces – and inadequate insulin production.[11/] By contrast, most persons with "type 1" diabetes are incapable of producing insulin because the cells of the pancreas that ordinarily do so have been destroyed.[12/]

All persons treated for type 1 diabetes take insulin, via some form of injection, to make up for their body's inability to produce it, and to address various *long-term* risks posed by hyperglycemia.[13/] By contrast, though some

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[11/] *Id.* at 4, 7.

[12/] *Id.* at 4 ("type 1 encompasses the vast majority of cases that are primarily due to pancreatic islet B-cell destruction").

[13/] *Id.* at 1 ("chronic hyperglycemia of diabetes is associated with long-term damage, dysfunction, and failure of various organs, especially the eyes, kidneys, nerves, heart and blood vessels"). Such complications develop slowly, over time, if they develop at all. They do not pose an immediate safety risk for an employee who does not suffer from them. Short-term symptoms of hyperglycemia may include frequent urination, excessive thirst, extreme hunger, unusual weight loss, increased fatigue, irritability and/or blurry vision. American Diabetes Ass'n, *Diabetes Symptoms*, *available at* http://www.diabetes.org/diabetes-symptoms.jsp. (last visited Feb. 16, 2005). Such symptoms generally develop gradually, and can be managed by diet, medication and/or increased physical activity. Thus, they present little risk of injury to self or others. Still, if left untreated, usually for no less than several days (during which typically there is opportunity for intervention), in rare instances hyperglycemia can lead to a life threatening known as ketoacidosis. American Diabetes Ass'n, *Hyperglycemia*, *available at* http://www.diabetes.org/type-2diabetes/hyperglycemia.jsp (last visited Feb. 16,

persons with type 2 diabetes inject insulin, many, including plaintiff-appellant Rodriguez, do not. Rather, they rely on oral medication, in addition to diet and exercise, to regulate their blood sugar levels.[14/] This key difference in treatment translates into critical differences in the nature of the health and safety risks persons with diabetes face.

By far the most acute danger to persons with diabetes, whether in the workplace or elsewhere, comes from low blood sugar, or "hypoglycemia," due to insulin treatment.[15/] "Hypoglycemia usually occurs gradually," "is generally associated with typical warning signs," and also can be detected by "proper use of systems that allow rapid and accurate self-monitoring of blood glucose levels"; moreover, "preventative action [to forestall hypoglycemia] can be taken by eating carbohydrates."[16/] Hence, the dangers associated with insulin-treated diabetes in

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2005).

[14/] Plaintiff-appellant apparently "was placed on the medication Glucovance approximately a year prior to [Dr/] Morris' exam." *Rodriguez v. ConAgra*, 2004 U.S. Dist. LEXIS 18812, at *10.

[15/] "Hypoglycemia occurs from a relative excess of insulin in the blood and results in excessively low blood glucose levels." American Diabetes Ass'n, *Position Statement, Hypoglycemia& Employment Licensure*, 28 DIABETES CARE S61 (2005), at 1, *available at* http://care.diabetesjournals.org/cgi/content/full/28/suppl_1/s61.

[16/] *Id.* at 1-2. Thus, "[m]ost individuals with diabetes never suffer … severe hypoglycemia," and "[a] hypoglycemic reaction is not ordinarily associated with a

the workplace are greatly exaggerated.[17/] More important, in this case, however, is the fact that hypoglycemia "does not occur" in persons with diabetes relying only on diet and exercise to manage elevated blood sugar, and "is rare" in those who also take oral medications, not insulin.[18/]

Plaintiff-appellant's medical exam results – an elevated urine glucose level on the day in question, and uncertainty about his current treatment plan – principally raised issues regarding plaintiff-appellant's long-term health, not his qualifications to work safely and successfully at ConAgra's plant. Rodriguez currently has none of these ailments. This fact, together with the long-term nature

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loss of consciousness or a seizure." But "if warning signs are absent or ignored and the blood glucose level continues to fall, more severe hypoglycemia may lead to an alteration of mental function that proceeds to confusion, stupor and finally to unconsciousness." *Id.*

[17/] *Id.* ("discrimination in employment and licensure against people with diabetes still occurs … often based on apprehension that the person with diabetes may present a safety risk to the employer or the public – a fear sometimes based on misinformation or lack of up-to-date knowledge … Perhaps the greatest concern is that hypoglycemia will cause sudden, unexpected incapacitation"; however, "most people with diabetes can manage their condition in such a manner that there is a minimal risk of incapacitation from hypoglycemia").

[18/] *Id.* ("Hypoglycemia does not occur in people with diabetes who require only medical nutrition therapy (MNT) and exercise and is rare in people treated with [alpa]-glucosidase inhibitors, biguanides, or thiazolidinediones [i.e., oral glucose-lowering agents]. Except in elderly or chronically ill individuals or in association with prolonged fasting, severe hypoglycemia is unlikely to occur when appropriate doses of any oral glucose-lowering agents are used to manage blood glucose").

of most risks of type 2 diabetes, demonstrate that Rodriguez' elevated urine sugar result evidences no significant risk of acute injury to himself, or to co-workers.

ConAgra's decision to revoke plaintiff-appellant's job offer was fundamentally flawed for two other specific reasons. First, Dr. Morris (and Ms. Zamora and her ConAgra colleagues) failed to gather (prior to this litigation) any data on Rodriguez' blood sugar levels, at the time of plaintiff-appellant's post-offer medical exam or prior to it, even though this data was vital to assessing Rodriguez' diabetes management.[19/] A single urine test result did not suffice to establish the nature of Rodriguez' diabetes or the state of his diabetes management.[20/]

[19/] *See Rodriguez v. ConAgra*, 2004 U.S. Dist. LEXIS 18812, at *10 ("DeFronzo repeatedly testified … that a hemoglobin A1c [three month retrospective blood glucose] test was necessary to determine whether an individual's diabetes was under control, and that there were no [such] tests or other tests reflecting Rodriguez' condition at the time of [Dr.] Morris' exam").

[20/] "Before 1975, routine … monitoring [of diabetes] consisted of urine sugar/glucose … determinations. Typically, physicians monitored occasional laboratory blood glucose determinations and reviewed patient home urine testing records. … Since 1975, dramatic changes have taken place in both the methods and goals of monitoring. … At present, it is recommended that all patients with diabetes … should monitor their blood, not urine, glucose levels. …Reasons why the use of urine glucose testing to estimate blood glucose concentrations in diabetes management is undesirable include": "Fluid intake and urine concentration affect urine test results"; "urine glucose value[s] reflect[] an average level of blood glucose during the interval since the last voiding and not the level at the time of the test"; "[u]rine glucose testing … is less accurate than … blood glucose [testing]"; and "[s]ome drugs interfere with urine glucose determinations." Thus, at best, "urine glucose testing provides only a rough estimate of prevailing blood glucose levels." American Diabetes Ass'n, *Tests of Glycemia in Diabetes*,

Second, ConAgra (and Dr. Morris) rushed to judgment without data critical to assessing any safety risk Rodriguez' diabetes might have posed: information (including from Rodriguez himself, and/or his medical records) that might have revealed any history of incapacitating hypoglycemia.[21/]

D. The District Court's Conclusion that Diabetes Is "Generally" A "Controllable" Condition Was Flawed.

In premising its decision on the notion that diabetes is "generally" a "controllable illness," *Rodriguez v.ConAgra*, 2004 U.S. Dist. LEXIS 18812, at *8, the District Court attached undue importance to the question whether diabetes is "controllable." In materials it issues to educate the public, *amicus* American Diabetes Association describes diabetes "control" as synonymous with "managing" the disease.[22/] Yet the trial court went beyond this neutral approach to describing

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27 DIABETES CARE S91-93 (2004), *available at* http://care.diabetesjournals.org/cgi/content/full/27/7/1761.

[21/] *See* ADA, *Hypoglycemia and Employment Licensure*, *supra* at 2: "People with diabetes should be individually considered for employment based on the requirements of the job. Factors to be weighed in this decision include the individual's medical condition, treatment regimen … and medical history, particularly in regard to the occurrence of incapacitating hypoglycemic episodes."

[22/] *See* ADA, *Managing Your Blood Glucose*, which states, "Tight diabetes control means getting as close to normal (nondiabetic) blood glucose levels as possible." *Available at* http://www.diabetes.org/type-2-diabetes/blood-glucose.jsp (last visited Feb. 16, 2005). Similarly, in DIABETES IN THE WORKPLACE, the EEOC declares: "Although diabetes cannot be cured, it can be *managed*. Some people *control* their diabetes by eating a balanced diet, maintaining a healthy body weight,

measures to manage diabetes, and assigned far more weight than is justified to the arguably innocuous observations of "medical experts (in this instance Rodriguez' own) that "diabetes is generally controllable with diet, medication and regular monitoring." *Id.* at 9. In doing so, the court not only failed to discern what is meant by "controlling" diabetes, but it also implied that it is meaningful to speak of a person's responsibility for not reaching certain goals of diabetes treatment, *i.e.*, a person's "failure to control a controllable illness."[23/]

As a matter of fact, *amici* submit, this view is false. Diabetes is not curable or correctable, and can have widely varying impacts on individuals who have it. Some persons may be able to avoid the disease's most severe complications through careful management, yet still face the lifelong "burden of [such] a perpetual treatment regime" that is "severely restrictive," "highly demanding," and

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and exercising regularly. Many individuals, however, must take oral medication and/or insulin to *manage* their diabetes." At 1 (emphasis supplied). *See supra* n. 7.

[23/] Experts discourage overbroad references to diabetes "control." *See* American Diabetes Ass'n, *Tests of Glycemia in Diabetes*, *supra*, at 3 (emphasis supplied): "Because hyperglycemia is the defining hallmark of the diabetic state and because glucose is relatively easy to quantify, most monitoring methods have focused on glucose determinations. … Further research is needed to determine whether metabolic perturbations other than hyperglycemia predict risk for chronic complications. *It also will be important* to develop more precise definitions of altered metabolic status in diabetes and, in particular, *to avoid using ambiguous terminology such as 'tight control,' 'good control,' 'poor control*,' and so forth.").

requires "a careful balance of blood sugar, food intake and activity levels." *Fraser v. Goodale*, 342 F.3d 1032, 1039, 1041 (9th Cir. 2003), *cert. denied sub nom U.S. Bancorp v. Fraser*, 124 S. Ct. 1663 (2004) (ADA employment claim, by former bank employee with "brittle" diabetes, sent back for trial); *accord Lawson v. CSX Transp., Inc.*, 245 F.3d 916, 924 (7th Cir. 2001) (describing "sever[e]" and "demanding regimen" that insulin-dependent plaintiff with diabetes must follow). Even persons such as Rodriguez, with type 2 diabetes, can encounter variations in symptoms (such as blood sugar levels) as they work to manage their diabetes with diet, exercise and oral medication.

A brief survey of "current medical knowledge" and sound "available objective evidence" demonstrates that ConAgra's decision to revoke Rodriguez' job offer was unfounded. Even if ConAgra *had* properly inquired, after plaintiff-appellant's medical exam, into his ability to perform essential job functions with or without reasonable accommodation, or into whether he posed a "direct threat" to himself or co-workers, the answers would have supported sending his case to a jury. Summary judgment for defendant-appellee should be reversed.

II. THE TRIAL COURT IGNORED GOVERNING LEGAL RULES SET FORTH BY THE U.S. SUPREME COURT IN *SUTTON V. UNITED AIRLINES*.

A. By Premising Its Judgment on A Conclusion that Diabetes Is A "Generally Controllable" Disease, the Trial Court Violated Its Duty to Give Plaintiff Individualized Consideration.

The District Court's holding that diabetes, in the abstract, is a "generally controllable" condition, and its use of this holding to support a conclusion that a "failure to control a controllable illness" bars liability, is completely at odds with ADA requirements identified in *Sutton v. United Airlines*, 527 U.S. 471 (1999), which apply to this litigation under the TCHRA. For instance, disabilities must be evaluated "with respect to an individual": *i.e.*, via "an individualized inquiry." 527 U.S at 483. *Accord Toyota Motor Mfg., Inc. v. Williams*, 534 U.S. 184, 198 (2002); *Bragdon v. Abbott*, 524 U.S. 624, 641-42 (declining to decide whether HIV is a *per se* "disability") (1997). The trial court violated this precept in founding its judgment on the supposed features of diabetes "generally."

A second, related proposition stated in *Sutton* and ignored by the District Court is that an asserted "disability" must be evaluated in terms of a claimant's condition "presently – not potentially or hypothetically." 527 U.S. at 482. The trial court took a wrong turn, focusing on possible steps Rodriguez supposedly

failed to take, and stressing that his diabetes was potentially "controllable." The trial court's decision confirms the *Sutton* Court's fears that the latter approach

> would often require courts and employers to speculate about a person's condition and would, in many cases, force them to make a disability determination about how an … impairment usually affects individuals, rather than on the individual's actual condition.

Id. at 483-84. By "speculat[ing]" how diabetes "usually" affects persons like Rodriguez, the District Court strayed from its duty to evaluate his disability discrimination claim in terms of his "actual condition."

B. The Trial Court Ignored *Sutton's* Command to Consider A Plaintiff's Actual Condition, Not A Plaintiff's Hypothetical Condition Had He Employed Mitigating Measures.

In *Sutton*, the Supreme Court ruled that plaintiffs' "disability" claims should be evaluated not in light of their underlying impairments, but rather, taking into account the benefits of actual measures they employed to "mitigate" these impairments. *Sutton v. United Airlines*, 527 U.S. 471, 488 (1999). Since then, several federal appeals courts have read *Sutton* also to preclude *defendants* like ConAgra from pointing to hypothetical mitigating measures not actually taken, or hypothetical treatment benefits that do not materialize. *See Fraser v. Goodale*, 342 F.3d 1032, 1042 (9th Cir. 2003), *cert. denied sub nom*. *United States Bancorp v. Fraser*, 124 S. Ct. 1663 (2004). ("*Sutton* does not require us to pretend that

treatment measures are completely effective when there is evidence that they are not;" rejecting defendant's claim that plaintiff with insulin-treated diabetes was not disabled because she followed her treatment regime); *Nawrot v. CPC Int'l*, 277 F.3d 896, 904 (7th Cir. 2004) (*Sutton* provides no "license for courts to meander in 'would, could, or should-have' land. We consider only the measures actually taken and consequences that actually follow"; finding a plaintiff "disabled," as he "[wa]s able to manage his diabetes with constant monitoring and insulin injections (itself a substantial burden), [because] this hardly remedie[d] all the other adverse effects of his diabetes").

Thus, it was error to grant ConAgra summary judgment and cut off Rodriguez' TCHRA claim because of hypothetical mitigating measures plaintiff-appellant might have taken.

Sutton also noted, in a passage anticipating the District Court's ruling, that

> The use or nonuse of a corrective device does not determine whether an individual is disabled; that determination depends on whether the limitations an individual with an impairment *actually* faces are in fact substantially limiting.

527 U.S. of 488 (emphasis in original). Hence, it was error for the trial court to cite Rodriguez' "nonuse" of mitigating measures as grounds for dismissing his claim. This is true all the more because hypothetical treatment measures *never*

preclude a finding of disability, as a plaintiff like Rodriguez may be "regarded as" disabled. *Id.* (noting that even "one whose high blood pressure is 'cured' by medication may be regarded as disabled by a covered entity").

III. PLAINTIFF'S SUPPOSED "FAILURE TO CONTROL A CONTROLLABLE DISEASE" PROVIDES NO LEGAL JUSTIFICATION FOR DISMISSING HIS TCHRA CLAIM.

A. The Trial Court Erred in Following Precedents that Pre-Date, Did Not Anticipate, and Contradict *Sutton.*

The District Court's sparse legal defense of its ruling that Rodriguez' claim cannot survive his supposed "failure to control a controllable illness," *Rodriguez v. ConAgra*, 2004 U.S. Dist. LEXIS 18812, *8, is wholly inadequate to overcome the clear commands of *Sutton*. Indeed, with respect, the District Court appears to have done little more than reproduce a string citation offered by ConAgra. *Rodriguez v. ConAgra*, 2004 U.S. Dist. LEXIS 18812, at *8. The trial court's analysis shows a striking lack of interest in probing beneath the surface of what the court itself acknowledged is a mélange of authority issued by "numerous courts [ruling] on differing grounds." *Id.*

Moreover, not one of the decisions relied on by the District Court in support of its novel summary judgment ruling fills this void. That is, not one pinpoints a source for what amounts to a new sort of "duty to mitigate" on the part of disability discrimination plaintiffs, in which their claims are assessed in light of mitigating

measures they might hypothetically have taken, regardless of their actual circumstances. This "duty" (wholly unrelated to the concept used in calculating backpay) is especially unpersuasive because it is utterly at odds with *Sutton*.[24/]

A duty to mitigate makes even less sense where, as here, the trial court has sustained plaintiff's claim that he is "perceived as" disabled. Such a claim presupposes that a substantially limiting disability does not actually exist. This leaves bias victims in a quandary: what are they supposed to mitigate? It is simply illogical for a court to penalize them, by striking their claims, for not mitigating a condition that does not rise to the level of a "disability."

Remarkably, the District Court did not once address *Sutton* or its companion rulings.[25/] In light of this omission, it is unsurprising that most of the cases the trial court cited regarding supposedly "controllable" conditions pre-date *Sutton.*

[24/] *See* Kevin Cope, *Sutton Misconstrued: Why the ADA Should Now Permit Employers to Make Their Employees Disabled*, 98 NW. U. L. Rev 1753, 1770 (2004) ("the plain language of the Sutton holding supports the proposition that a plaintiff bears no duty to mitigate"). Indeed, a "duty to mitigate" would have the perverse result of requiring disability claims to be evaluated – likely adversely – in light of hypothetical treatment measures that a plaintiff routinely undertakes, but is then prevented from taking by an employer. *Id.* at 1777.

[25/] *See Murphy v. United Parcel Service*, 527 U.S. 516 (1999), and *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), both issued the same day as *Sutton*.

These are irrelevant because, like the trial court's opinion, they do not confront the issues resolved in *Sutton*.[26/]

B. The Trial Court Erred by Relying On Rulings in Cases Unlike This One, Involving Plaintiffs Who Were Either Unqualified, Not Disabled or Posed a "Direct Threat."

The rulings cited to support summary judgment all identify grounds for decision other than the novel legal theory they supposedly establish. This vitiates their weight as precedent.[27/]

For instance, in *Rose v. Home Depot, U.S.A., Inc.*, 186 F. Supp.595, 617-23 (D. Md. 2002), *Brookins v. Indianapolis Power & Light Co.*, 90 F. Supp. 2d 993, 1000-03 (S.D. Ind. 2000), and *Van Stan v. Fancy Colors & Co.*, 125 F.3d 563, 571 (7th Cir. 1997), the plaintiffs failed to present sufficient evidence of a disability, in that they could not show they were "substantially limited" in any "major life

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[26/] Similarly, *Brookins v. Indianapolics Power & Light Co.*, 90 F. Supp. 2d 993 (S.D. Ind. 2000), simply relies on *Siefken v. Village of Arlington Heights*, 65 F. 3d 664 (7th Cir. 1995), as if *Sutton* had never been decided. *See*, 90 F.Supp.2d at 1006-07 (reaffirming the outdated, so-called "*Siefken* rule.").

[27/] *Amici* agree that "[t]he existence of these alternate holdings demonstrates that these courts could have denied ADA protection to the plaintiffs in question without invoking a 'failure to control a controllable disability' doctrine that has no basis in the [ADA] and might be used to deny ADA protection to those nonmitigating plaintiffs whom Congress intended to include in the statute's protected class"). Sarah Shaw, *Why Courts Cannot Deny Protection to Plaintiffs who Do Not Use Available Mitigating Measures for Their Impairments*, 90 Calif. L. Rev. 1981, 2021 (2002).

activity." In *Hewitt v. Alcan Aluminum Corp.*, 185 F. Supp. 2d.183, 190 (N.D.N.Y. 2001), the "record amply demonstrate[d] that [plaintiff] was a threat to himself and his fellow employees." *Accord Burroughs v. City of Springfield*, 163 F.3d 505 (7th Cir. 1998); *Siefken v. Village of Arlington Heights*, 65 F.3d 664 (7th Cir. 1995) (police officers who had severe hypoglycemic reactions while on duty rendering them dysfunctional). In *Pangalos v. Prudential Ins. Co. of Am.*, 1996 U.S. Dist. LEXIS 15749, No. 96-0167 (E.D. Pa. Oct. 15, 1996), the plaintiff could not perform the essential functions of his job. *Accord Roberts v. County of Fairfax, Va.*, 937 F. Supp. 541, 548-49 (E.D. Va. 1996) (Roberts is not a "qualified individual" under the ADA"). And in *Tangires v. Johns Hopkins Hosp.*, 79 F. Supp. 587, 598 (D. Md. 2000), *aff'd without op.*, 230 F.3d 1354 (4th Cir. 2000), the trial court held "[e]vidence of discriminatory motive on the part of defendant does not exist in this record."

The District Court's cursory legal analysis does not hold up to careful scrutiny. It should be set aside.

CONCLUSION

For the reasons set forth above, the District Court's order granting ConAgra summary judgment should be reversed, and this cause should be remanded for trial, in light of the authorities discussed herein.

Date: February 16, 2005

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a) (7)(C) and 5th CIR. R. 32, I hereby certify that the brief of *Amici Curiae* AARP*, et al.*, in *Rudy Rodriguez v. ConAgra Grocery Products, Co.*, Case No. 04-11473, was prepared in a proportionally spaced, New Times Roman typeface using Corel WordPerfect 10 and a font size of 14 points and contains 6953 words.

The undersigned understands that a material misrepresentation in completing this Certificate of Compliance, or circumvention of the type-volume limits in 5th CIR. R. 32.2.7, may result in the Court's striking the brief and imposing sanctions against the undersigned.

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CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that two true and correct copies of the above and foregoing document in both paper and electronic form has been sent by overnight mail, on this 16th day of February 2005, to the following:

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