No. 04-11473

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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 THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF RUDY RODRIGUEZ AND IN FAVOR OF REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules and Regulations

Miscellaneous

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STATEMENT OF INTEREST

The Equal Employment Opportunity Commission ("EEOC") is charged by Congress with interpreting, administering, and enforcing Title I of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq. The district court relied on its interpretation of Title I in this case to hold that an applicant does not state a claim under the Texas Commission on Human Rights Act ("TCHRA"), Tex. Lab.

Code § 21.051, when a prospective employer refuses to hire him based on his perceived failure to control an ordinarily controllable illness (in this case, diabetes). The district court observed that the TCHRA is modeled on the ADA and noted that courts look to cases and regulations interpreting the ADA when interpreting the TCHRA. 2004 WL 2085491, at *2 n.2. However, EEOC policy guidance interpreting the ADA contradicts the district court's position that an individual who fails to control an ordinarily controllable illness may not state a disability discrimination claim. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA, 2002 WL 31994335, at question 38 (Oct. 17, 2002) (employer is not relieved of reasonable accommodation obligation for disabled employee who fails to take medication, to obtain medical treatment, or to use an assistive device).

The unsuccessful applicant now seeks to overturn the district court's award of summary judgment to the employer. The EEOC believes that the district court misinterpreted the ADA. Because proper interpretation of the statute is critical to enforcement of the federal disability discrimination law, the EEOC offers its views to this Court. The EEOC has authority to file this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUE

May an individual who has not controlled an ordinarily controllable impairment state a disability discrimination claim under the ADA?

STATEMENT OF THE CASE

This is an appeal from a final judgment of the district court in favor of ConAgra.

A. Statement of Facts

After one month of observing Rudy Rodriguez's work as a temporary employee at its Ranch Style Beans plant, ConAgra offered Rodriguez an entry level job in the production area of its plant contingent on his passing a background check, a drug screen, and a physical exam. At the physical exam, Rodriguez reported that he took medicine for high blood pressure and diabetes. He told the doctor that his diabetes was under control and that it had never caused him problems. 2004 WL 2085491, at *1.

The doctor gave Rodriguez a form concluding that Rodriguez was "not medically qualified" due to "uncontrolled diabetes." Based solely upon this form, ConAgra's human resources officer considered Rodriguez to be disqualified for any position at the plant and she withdrew the job offer. Rodriguez sued under the TCHRA, arguing that ConAgra discriminated against him based on a non-

substantially limiting impairment which it wrongly regarded as substantially limiting him in the major life activity of working. Id.

B. District Court's Opinion

The district court granted summary judgment to ConAgra. The court initially held that Rodriguez had "at least demonstrated a question of fact" on the issue of whether ConAgra "perceived his condition as one that disqualified him from a broad class of jobs." Id. at *2 n.3. The court found, however, that "Rodriguez has failed to present any evidence tending to demonstrate that his employment offer was withdrawn because of the fact that he had diabetes, as opposed to the fact that his diabetes was not controlled." Id. at *2. Relying on cases construing the ADA, the court said, "This is a distinction with a difference. As ConAgra points out, numerous courts have concluded, albeit on different grounds, 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 discrimination claim." Id. The court noted that "diabetes is generally controllable with proper diet, medication, and regular monitoring." Id. It therefore concluded that ConAgra did not violate the TCHRA by withdrawing its job offer based on a belief that Rodriguez's diabetes was uncontrolled. Id.

The district court also said that even if ConAgra had been mistaken in

assuming that Rodriguez's diabetes was uncontrolled, Rodriguez would still not have a claim. Id. at *3. The court reasoned that because an actual failure to control a controllable illness would not support a disability discrimination claim, neither would a mistaken belief that an individual was failing to control a controllable illness. Id.

SUMMARY OF ARGUMENT

In holding that a plaintiff may not state a claim under the ADA unless he has successfully controlled a controllable illness, the district court impermissibly separated the symptoms of a disability from the disability itself. The ADA does not require plaintiffs to mitigate their symptoms. For plaintiffs who do not mitigate, their unmitigated symptoms are an integral part of their disability. An employment decision based on those unmitigated symptoms is disability-based discrimination.

ARGUMENT

> When an individual with a disability has not mitigated the symptoms of his impairment, discrimination based on the uncontrolled symptoms is the same as discrimination based on the disability itself.

In prohibiting discrimination against a qualified individual with a disability "because of the disability of such individual," 42 U.S.C. § 12112(a), the ADA

makes no distinction between the symptoms of a disability and the underlying disability in general. Section 12102(2)(A) defines a disability as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual." An impairment, in turn, is defined as "[a]ny physiological disorder, or condition" that affects a major body function. 29 C.F.R. § 1630.2(h)(1). Under this definition, either a condition, such as diabetes, or the symptoms of that condition, such as hypoglycemic episodes, can be viewed as an impairment. If the impairment otherwise meets the statutory standard because it causes substantial limitations on a major life activity, discrimination based on such an impairment is illegal. See EEOC v. Kinney Shoe Corp., 104 F.3d 683, 686 (4th Cir. 1997) ("Whether Kinney fired Martinson because he suffered from epilepsy or because of the 'specific attributes' of his disease, i.e., his seizures, is immaterial – both are disabilities and an employer may not use either to justify discharging an employee so long as that employee is qualified for the job.").

For a variety of reasons, individuals with disabilities may not use or have access to ordinarily available methods to control their symptoms. Some people may be reluctant to undergo surgery. Others may dislike the side effects of medication, may be unable to afford mitigating measures, or may have religious objections. For some, the disability itself can interfere with efforts to mitigate –

for example, the disorganized thinking associated with schizophrenia may make it difficult for an individual to remember to take his medication. See generally Kevin L. Cope, Comment, "Sutton Misconstrued: Why the ADA Should Now Permit Employers to Make Their Employees Disabled," 98 Nw. U. L. Rev. 1753, 1773-74 (Summer 2004) ("[W]hat is so unfair about allowing persons with disabilities to choose, in consultation with their doctors, their own best treatment option?"); Sarah Shaw, Comment, "Why Courts Cannot Deny ADA Protection to Plaintiffs Who Do Not Use Available Mitigating Measures for Their Impairments," 90 Cal. L. Rev. 1981, 1985-86 (Dec. 2002) (citing various reasons why ADA plaintiff might not mitigate); Deborah Burke & Malcom Abel, "Ameliorating Medication and ADA Protection: Use It and Lose It or Refuse It and Lose It?," 38 Am. Bus. L.J. 785, 814 (Summer 2001) (same).

Because of the highly personal and individualized nature of mitigation decisions, the Supreme Court has said that failure to mitigate is not fatal to an ADA claim. Sutton v. United Air Lines, Inc., 527 U.S. 471, 488 (1999). Under Sutton, symptoms which are in fact unmitigated must be considered in analyzing whether an individual has a disability for purposes of the ADA. Id. at 482-83, 488. Those symptoms must be considered whether they are theoretically controllable or not. Id. at 488 (disability analysis under the ADA does not turn on

an individual's "use or nonuse of a corrective device," but turns instead "on whether the limitations an individual with an impairment actually faces are in fact substantially limiting") (emphasis in original). If an individual with an impairment uses a mitigating measure, both the positive and negative effects of that mitigating measure must be taken into account when determining whether the individual has a disability within the meaning of the statute. Id. at 482. Conversely, if an individual with an impairment declines to use a mitigating measure, the hypothetical benefits that he might have achieved if he had chosen to mitigate cannot factor into the disability analysis. Nawrot v. CPC Int'l, 277 F.3d 896, 904 (7th Cir. 2002) ("We consider only the measures actually taken and consequences that actually follow.").

In this case, the district court's error was not in analyzing whether the plaintiff had a covered disability, but rather in concluding that ConAgra refused to hire him because of his unmitigated condition rather than because of his disability. This makes no sense, precisely because the very existence of a disability must be analyzed based on an individual's actual condition. See Sutton, 527 U.S. at 488. If the individual does not use mitigating measures and is found to have a disability, his unmitigated symptoms are an integral part of his disability. An employment action taken because of those unmitigated symptoms must, therefore,

be taken because of the disability. Cf. Sch. Bd. v. Arline, 480 U.S. 273, 282 (1987) ("[w]e do not agree that . . . the contagious effects of a disease can be meaningfully distinguished from the disease's physical effects on a claimant").

The district court's contrary approach violates the ADA by eliminating any individualized inquiry for a plaintiff who does not mitigate and by requiring speculation about the efficacy of potential mitigating measures. The court did not know whether medication and proper attention to diet would have controlled Rodriguez's diabetes. Nor could the court predict the type and degree of side effects that he might have experienced from various mitigating measures. In excluding Rodriguez from the ADA's protections based solely on his alleged failure to mitigate, the court necessarily assumed that mitigation would have been successful for him. This assumption was both unsupported by any evidence in the record and violated the ADA's requirement "that disabilities be evaluated 'with respect to an individual' and not 'based on general information.'" Sutton, 527 U.S. at 483.

The EEOC does not suggest that failure to mitigate has no bearing on an ADA claim. A plaintiff whose uncontrolled symptoms prevent him from carrying out the essential functions of a job, with or without reasonable accommodation, would not be qualified for the position. 42 U.S.C. § 12111(8). An employer

would also have a statutory defense against hiring a plaintiff whose uncontrolled symptoms would render him "a direct threat to the health or safety of other individuals [or himself] in the workplace." Id. § 12113(b); 29 C.F.R. § 1630.15(b)(2); Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 76 (2002). Both of these scenarios, however, would require specific evidence relating to the individual plaintiff, and – unlike the district court's rule – not just generalizations about people who experience a similar disability. See Sutton, 527 U.S. at 483 (ADA does not permit courts and employers to speculate about an individual's condition or to make disability determinations based on general, rather than individualized, information).

Although they are not expressly decided on qualifications or direct threat grounds, all of the appellate cases involving failure to mitigate are consistent with this approach. In each one, the employer took action against an employee only after that particular employee demonstrated the existence of negative symptoms that were adversely affecting his work. See Hill v. Kansas City Area Transp. Auth., 181 F.3d 891, 893 (8th Cir. 1999) (bus driver on medication fell asleep twice while assigned to bus route); Burroughs v. City of Springfield, 163 F.3d 505, 506 (9th Cir. 1998) (police recruit suffered two diabetic hypoglycemic episodes while on duty, causing him to become disoriented and dysfunctional);

Nielsen v. Moroni Feed Co., 162 F.3d 604, 605 (10th Cir. 1998) (company president with perceived chemical dependency repeatedly made unauthorized entries into private homes); Van Stan v. Fancy Colours & Co., 125 F.3d 563, 566 (7th Cir. 1997) (manager with bipolar disorder developed problems with management style and left office in the middle of the day); Siefken v. Village of Arlington Heights, 65 F.3d 664, 665 (7th Cir. 1995) (probationary police officer experienced a diabetic reaction while on duty in his squad car, causing him to become disoriented and drive his squad car at high speed through residential areas).

Unlike the plaintiffs in these cases, Rodriguez engaged in no behavior that would suggest to ConAgra that his diabetes might pose a problem in the workplace. To the contrary, ConAgra was so impressed with Rodriguez's performance as a temporary employee that it offered him a full-time job contingent on his passing a background check, a drug screen, and a physical exam. 2004 WL 2085491, at *1.

By rescinding its job offer based on assumptions rather than facts about Rodriguez's diabetes, ConAgra violated its statutory obligation to assess Rodriguez's qualifications individually. See Sutton, 527 U.S. at 483. ConAgra chose not to hire Rodriguez based solely on a doctor's claim that Rodriguez had

uncontrolled diabetes. ConAgra took no steps to confirm that the doctor's diagnosis was correct, did not investigate how diabetes affected Rodriguez's life, and did not consider whether reasonable accommodations would have enabled Rodriguez to perform the essential functions of the job for which he was applying. ConAgra's knee-jerk response to the words "uncontrolled diabetes" reflects precisely the type of "stereotypic assumptions" which prompted Congress to enact the ADA. See Sutton, 527 U.S. at 48 (condemning misperceptions "'resul[ting] from stereotypic assumptions not truly indicative of . . . individual ability'") (quoting 42 U.S.C. § 12101(a)(7)); Echazabal v. Chevron U.S.A., Inc., 336 F.3d 1023, 1028 (9th Cir. 2003) (employer invoking direct threat defense may not rely solely on the advice of its own doctors; rather, it must perform an "individualized assessment of the individual's present ability to safely perform the essential functions of the job," relying on "the most current medical knowledge and/or on the best available objective evidence").

CONCLUSION

Because the ADA does not require plaintiffs to mitigate the effects of their impairments, a plaintiff's uncontrolled symptoms cannot be separated from his disability. Discrimination based on failure to control ordinarily controllable symptoms is the same as discrimination based on disability.

For these reasons, the EEOC urges this Court to reverse.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gail S. Coleman, hereby certify that I filed this brief with the Court by sending, via Federal Express, seven copies together with a computer disk containing a PDF version of the brief.

I also certify that I served two copies of the brief, as well as a computer disk containing a PDF version of the brief, this 16th day of February, 2005, by first-class mail, postage pre-paid, to the following counsel of record:

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