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Those with Disabilities Take Heed: Eighth Circuit Suggests That ADA May Not Protect Those Who Fail to Control a Controllable Disability

Brian T. Rabineau

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Burroughs v. City of Springfield[1]

I. INTRODUCTION

Finding that millions of Americans suffer discrimination as a result of a disability, the federal government enacted the Americans with Disabilities Act ("ADA") in an attempt to rectify and prevent such injustice.[2] For the most part, many will find themselves within the ADA's protection. At times, however, an individual may be unable to establish a prima facie case of discrimination, thereby finding himself excluded.[3]

In *Burroughs v. City of Springfield*, a case of first impression, the Eighth Circuit considered whether the ADA's protection extends to one who fails to control his diabetes.[4] The court determined that failure to control a controllable disability, to the extent that it negatively impacts one's ability to "meet the employer's legitimate job expectations," does not warrant protection by the ADA.[5]

II. FACTS AND HOLDING

In 1990, Ray Burroughs ("Burroughs") was diagnosed with diabetes.[6] Five years later, he sought a position as a police recruit with the City of Springfield, Missouri ("the City").[7] After Burroughs informed the City of his condition and gave assurance that he was able to control it, he underwent a required physical

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1. 163 F.3d 505 (8th Cir. 1998).

2. 42 U.S.C. § 12101 (1994).

3. In order to establish a prima facie case of discrimination, a plaintiff must show that: (1) she has a disability, (2) she is an otherwise qualified individual, and (3) she was discriminated against "because of" her disability. *See infra* note 30 and accompanying text. *Burroughs* focuses on the *third* element of an ADA prima facie case—whether alleged discrimination is "because of" a disability. *Burroughs*, 163 F.3d at 507. This issue is distinct from the one the Supreme Court confronted during its recent decision in *Murphy v. UPS, Inc.*, 527 U.S. 516 (1999). In *Murphy*, the Court addressed the first element of an ADA prima facie case—establishing the existence of a disability.

4. *Burroughs*, 163 F.3d at 505-09.

5. *Id.* at 509.

6. *Id.* at 506.

7. Burroughs v. City of Springfield, 163 F.3d 505 (8th Cir. 1998).

examination.[8] The examining physician certified that Burroughs was able to work without limitation.[9] Subsequently, Burroughs was hired and commenced employment as a recruit with the City police department.[10]

Shortly after Burroughs began work, he suffered two hypoglycemic episodes that caused him to become disoriented and dysfunctional to the point of requiring immediate medical attention.[11] In response, the City placed him on "internal duty" and required him to undergo another medical exam.[12] On January 11, 1996, Burroughs saw Dr. Larry E. Koppers ("Dr. Koppers").[13] After examining Burroughs's records and condition, Dr. Koppers noted that Burroughs's condition could be controlled by careful oversight of diet and physical activity.[14] The doctor also suggested, however, that it was "inappropriate" for Burroughs to remain in his present position as he "could conceivably be dangerous to the public" were he to have another episode.[15] The City removed Burroughs from active duty and, on February 2, 1996, sent him a letter requesting that he either agree to a demotion in accordance with a proposed plan or resign.[16] Burroughs resigned.[17]

After resigning, Burroughs brought suit and alleged that the City violated the ADA by discriminating against him because of his diabetic condition.[18] The City moved for summary judgment.[19] The United States District Court for the Western District of Missouri granted the motion on the grounds that Burroughs failed to state a cause of action under the ADA.[20] The court reasoned that Burroughs "was not terminated 'because of' his disability, but rather because he

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8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* In addition, it appears that Burroughs was on an insulin regimen. *Id.* at 507-08.

15. *Id.* at 506.

16. *Id.* The letter sent to Burroughs read:

> Because of the situations that happened on October 18, 1995, and December 4, 1995, the City has a responsibility to assess your physical condition for the position of Police Officer. To assist the City in making a determination, with your consent, we enlisted the aid of Dr. Larry E. Koppers, MD. . . . Dr. Koppers' medical evaluation determined that it would be inappropriate to have you maintain a position of carrying a weapon and that you could conceivably be dangerous to the Public, until such time that you are able to function without significant hypoglycemic episodes.

Id.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

failed to control his controllable disease."[21] Burroughs appealed, arguing that summary judgment was improper in that there were material questions of fact as to whether he was discriminated against "because of" his disability.[22] The United States Court of Appeals for the Eighth Circuit affirmed the trial court's decision and held that "where an employee knows that he is afflicted with a disability, needs no accommodation from his employer, and fails to meet the employer's legitimate job expectations, due to his failure to control a controllable disability, he cannot state a cause of action under the ADA."[23]

III. LEGAL BACKGROUND

While the federal government had previously enacted anti-discriminatory legislation, the year 1973 ushered in an era of legislation targeted at eliminating discrimination against the disabled in matters relating to employment.[24] The first of such legislation was the Rehabilitation Act of 1973.[25] This Act eventually came under criticism, however, because its prohibitions extended only to those entities receiving federal financial assistance.[26] This led some to suggest that "[d]iscrimination against handicapped persons . . . be prohibited in all the contexts where Congress has seen fit to outlaw other forms of discrimination" by extending coverage "to all entities that affect interstate commerce."[27] In 1990, Congress responded to this call with the passage of the ADA.[28]

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21. *Id.*

22. *Id.*

23. *Id.* at 508-09 (quoting Siefken v. Village of Arlington Heights, 65 F.3d 664, 667 (7th Cir. 1995)).

24. Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implication of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 428 (1991) (citing to various pieces of legislation aimed at discrimination).

25. The Rehabilitation Act provides, in part, that:

> No otherwise qualified individual with a disability . . . shall, by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination *under any program or activity receiving Federal financial assistance . . .* "

29 U.S.C. § 794(a) (1994) (emphasis added).

26. *See supra* note 25.

27. Burgdorf, *supra* note 24, at 432 (citing Robert Burdgorf & Christopher Bell, *Eliminating Discrimination Against Physically and Mentally Handicapped Persons: A Statutory Blueprint*, 8 MENTAL & PHYSICAL DISABILITY L. REP. 64, 71 (1984)).

28. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended in scattered sections of 42 U.S.C.). In many respects, the provisions of the ADA are significantly similar to those of the Rehabilitation Act. Courts note that they may rely on cases and regulations implementing the Rehabilitation Act in construing the ADA. *See, e.g.*, McKay v. Toyota Motor Mfg., Inc., 110 F.3d 369, 374 n.1 (6th Cir. 1997); Allison v. Dep't of Corrections, 94 F.3d 494, 497 (8th Cir. 1996); Wooten v. Farmland Foods, 58 F.3d 382, 385 n.2 (8th Cir. 1995); Vande Zande v.

The ADA is divided into five titles, each of which addresses discrimination within a particular context. Title I of the Act, aimed specifically at private sector employment, provides that "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual."[29] In implementing this general provision, courts have routinely applied a three part test that must be satisfied in order to establish a prima facie case of discrimination. The plaintiff must show: (1) she has a disability, (2) she is an otherwise qualified individual, and (3) she was discriminated against "because of" her disability.[30] While appearing relatively straightforward, each of these elements has produced voluminous litigation and, at times, disagreement among the federal circuits.[31] Given this fact, each element is deserving of individualized attention.

A. Assessing Existence of a Disability Under the ADA

Under the ADA, the existence of a disability can be established in one of several ways. The principal method is by showing that an individual has a "physical or mental impairment that substantially limits one or more of the major life activities."[32] Not surprisingly, given the complexity of the ADA, these fifteen words implicate a three pronged analysis. In *Bragdon v. Abbott*, the Supreme Court noted that a plaintiff claiming a "disability" under this provision must show that: (1) a physical or mental impairment exists, (2) a major life

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Wisconsin Dep't of Admin., 44 F.3d 538, 542 (7th Cir. 1995). Congress also contemplated that the ADA was to be construed in a manner consistent with the Rehabilitation Act. 42 U.S.C. § 12117(b) (1994). As such, this Note will at times include discussion of Rehabilitation Act cases where relevant to discussion of a similar ADA provision.

29. 42 U.S.C. § 12112(a) (1994). Among other things, a "covered entity" includes any employer who has 15 or more employees working for him or her. *See* 42 U.S.C. § 12111(2), (5)(A) (1994).

30. *See, e.g.*, Moritz v. Frontier Airlines, Inc., 147 F.3d 784, 786 (8th Cir. 1998); *Wooten*, 58 F.3d at 385. Under this test, courts have applied the *McDonnell Douglas* burden-shifting analysis under which a plaintiff must establish her prima facie case. Upon such showing, the burden shifts to the employer, who must show a nondiscriminatory reason for taking the adverse action. The burden will then shift back to the plaintiff, who must show that the employer's reason is a pretext for purposeful discrimination. *See, e.g.*, Young v. Warner-Jenkinson Co., 152 F.3d 1018, 1021 (8th Cir. 1998); Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 938 (3d Cir. 1997); Crawford v. Runyon, 37 F.3d 1338, 1341 (8th Cir. 1994); Wilking v. County of Ramsey, 983 F. Supp. 848, 852 (D. Minn. 1997).

31. *See infra* notes 38-63 and accompanying text (discussing circuit split in regards to assessing existence of a disability).

32. 42 U.S.C. § 12102 (2)(A) (1994). "Disability" can also be established by showing that the person is "regarded as having such an impairment" or has a "record of having such an impairment." 42 U.S.C. § 12102 (2)(B)-(C) (1994).

activity is affected, and (3) the impairment substantially limits the major life activity.[33] The first two prongs, aside from occasional disagreement, are analyzed relatively consistently;[34] the third, in contrast, resulted in a firestorm of controversy and a split among the federal circuits that was only recently resolved by the Supreme Court.

The Equal Employment Opportunity Commission ("EEOC"), in issuing regulations to implement the ADA, has resolved that in assessing whether an impairment is "substantially limiting" and therefore a disability, one must determine whether the person alleging disability is unable to perform a major life activity or is significantly restricted in its performance.[35] In so doing, the courts are to look at the nature, severity, duration, and long-term impact of the impairment.[36] Additionally, EEOC interpretive guidelines contemplate that this assessment is to be made "*without* regard to mitigating measures such as medicine, or assistive or prosthetic devices."[37]

Despite these guidelines, federal courts have differed as to whether mitigating measures employed by a plaintiff should be considered. A majority of circuits, including the Eighth, have held that such measures are *not* to be considered.[38] For example, in *Arnold v. UPS, Inc.*,[39] Arnold, a diabetic, was

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33. 524 U.S. 624, 631 (1998).

34. The "physical or mental impairment" and "major life activity" inquiries are not the focus of this Note and will only be mentioned briefly. The term "physical or mental impairment" is defined as a "physiological disorder, or condition, cosmetic disfigurement, or anatomical loss" affecting one of the "body systems," or "any mental or physiological disorder." 29 C.F.R. § 1630.2(h) (1998). Under EEOC regulations, assessment of such an impairment is "to be determined without regard to mitigating measures." 29 C.F.R. Pt. 160, App. § 1630.2(h) (1998). The courts are generally in agreement with this non-mitigating measure analysis. *See, e.g.*, Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 629 (7th Cir. 1998); Sutton v. United Air Lines, Inc., 130 F.3d 893, 898-900 (10th Cir. 1997). "Major life activity" is defined as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working," although this list is not exhaustive. 29 C.F.R. § 1630.2(i) (1998); 29 C.F.R. pt. 1630, app. § 1630.2(i) (1998).

35. 29 C.F.R. § 1630.2(j)(1) (1998).

36. 29 C.F.R. § 1630.2(j)(2)(i)-(iii) (1998). Assessment of disability is to be conducted on a case-by-case basis. 29 C.F.R. pt. 1630, app. § 1630.2(j) (1998). Some impairments, such as deafness and blindness, are disabilities per se. *See, e.g.*, Runnebaum v. Nationsbank, 123 F.3d 156, 166 n.5 (4th Cir. 1997). Diabetes, however, is considered case-by-case even though the courts point out that a finding of "disability" is the usual result. *Baert*, 149 F.3d at 631.

37. 29 C.F.R. pt. 1630, app. § 1630.2(j) (1998) (emphasis added). *See infra* note 62-63 and accompanying text (indicating that the U.S. Supreme Court has rejected the position taken by the above EEOC interpretive guidelines).

38. *See* Bartlett v. N.Y. State Bd. of Law Exam'rs, 156 F.3d 321, 329 (2d. Cir. 1998), *vacated by* 119 S. Ct. 2388 (1999); Washington v. HCA Health Servs., 152 F.3d 464, 470 (5th Cir. 1998), *vacated by* 119 S. Ct. 2388 (1999); Arnold v. UPS, Inc., 136 F.3d 854, 863 (1st Cir. 1998); Matczak v. Frankford Candy & Chocolate Co., 136 F.3d

denied a job as a mechanic after his potential employer discovered that the diabetes would keep Arnold from obtaining a certification that he allegedly needed.[40] Arnold brought suit under the ADA, but the district court granted summary judgment for UPS after it assessed Arnold's condition as mitigated and concluded that he was not disabled.[41] On appeal, the First Circuit reversed and held that Arnold's impairment was to be assessed in its unmitigated state.[42] In so doing, his impairment would "substantially limit" a major life activity and would constitute a disability.[43]

Turning first to the language of the ADA, the court stated that if the language were clear on its face, the court would be bound to effectuate it.[44] It noted, however, that the statute "just says 'impairment.'"[45] This led the court to turn to the legislative history of the ADA.[46] Citing various provisions of the Senate and House Reports suggesting that mitigating measures should not be considered, the court found that it is "more consistent with Congress's broad remedial goals . . . to interpret the words 'individual with a disability' broadly."[47]

Other cases adopting this view have also given attention to the statutory language and the legislative history. The guiding factor, however, has been the EEOC interpretive guidelines which, as previously noted, provide that mitigating measures are not to be considered.[48] While recognizing that these guidelines do not carry the same weight as agency rules, courts have, nevertheless, found them to be a permissible construction of the ADA and have deferred to the EEOC's interpretation.[49]

933, 937 (3d Cir. 1997); Doane v. City of Omaha, 115 F.3d 624, 627 (8th Cir. 1997), *cert. denied*, 522 U.S. 1048 (1998); Harris v. H & W Contracting Co., 102 F.3d 516, 521 (11th Cir. 1996); Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996); Roth v. Lutheran Gen. Hosp., 57 F.3d 1446, 1454 (7th Cir. 1995). Professor Harris notes that under this non-mitigation standard "the pertinent question is a 'what if' question." Erica Worth Harris, *Controlled Impairments Under the Americans with Disabilities Act: A Search for the Meaning of "Disability,"* 73 WASH. L. REV. 575, 581 (1998).

39. 136 F.3d 854 (1st Cir. 1998).

40. *Id.* at 857.

41. *Id.*

42. *Id.* at 866.

43. *Id.*

44. *Id.* at 857-58.

45. *Id.* at 859 (citing Sicard v. City of Sioux City, 950 F. Supp. 1420, 1436 (N.D. Iowa 1996)).

46. *Id.* at 859-60.

47. *Id.* at 861.

48. *See supra* note 34 and accompanying text.

49. *See, e.g.*, Washington v. HCA Health Servs., 152 F.3d 464, 469-70 (5th Cir. 1998), *vacated by* 119 S. Ct. 2388 (1999); Arnold v. UPS, Inc., 136 F.3d 854, 864 (1st Cir. 1998); Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 937 (3d Cir. 1997); Harris v. H & W Contracting Co., 102 F.3d 516, 521 (11th Cir. 1997).

While this non-mitigatory analysis is the majority view, it has not always been conclusively embraced. Even among those circuits adopting it, some have done so with limitations[50] or with less than complete adherence from the district courts.[51] Furthermore, in *Sutton v. United Air Lines, Inc.*,[52] the Tenth Circuit rejected this view altogether and made its assessment of disability by looking at the impairment as mitigated.[53]

In *Sutton*, two individuals were denied positions as commercial airline pilots because their uncorrected eyesight did not meet the required standard.[54] They brought suit under the ADA, alleging that they were discriminated against based on their disability.[55] Specifically, they alleged that their impairment in its unmitigated state substantially limited a major life activity—seeing.[56] The court, however, held that disability was to be assessed by "[taking] into consideration mitigating or corrective measures utilized by the individual."[57] As such, the court summarily rejected the EEOC interpretive guidelines and supporting case law as being contrary to the express language of the ADA.[58] The court said: "[W]e are concerned with whether the impairment affects the individual in fact, not whether it would hypothetically affect the individual without the use of corrective measures."[59]

Even prior to *Sutton*, courts within the Tenth Circuit had assessed impairments in their mitigated states.[60] Various scholars have also suggested that this is the more reasoned approach.[61] Whether or not this is the case, however,

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50. *See Arnold*, 136 F.3d at 866 (limiting holding to diabetes and suggesting that minor impairments, such as myopia, may have to be considered in their mitigated state); *Washington*, 152 F.3d at 470-71 (holding that only "serious" impairments requiring repeated attention will be considered in their unmitigated states).

51. *See, e.g.*, Wilking v. County of Ramsey, 983 F. Supp. 848, 854 (D. Minn. 1997) (holding that beneficial effects of depression medication will be considered); Schluter v. Indus. Coils, Inc., 928 F. Supp. 1437, 1445 (W.D. Wis. 1996) (citing various district court cases holding that impairment to be assessed as mitigated).

52. 130 F.3d 893 (10th Cir. 1997), *aff'd*, 119 S. Ct. 2139 (1999).

53. *Id.* at 902.

54. *Id.* at 895.

55. *Id.*

56. *Id.* at 900.

57. *Id.* at 902.

58. *Id.*

59. *Id.*

60. *See, e.g.*, Murphy v. UPS, Inc., 946 F. Supp. 872, 879-81 (D. Kan. 1996), *aff'd*, 527 U.S. 516 (1999); Moore v. City of Overland Park, 950 F. Supp. 1081, 1088 (D. Kan. 1996).

61. David A. Skidmore, Jr., *Mitigating Measures and the ADA: UPS Caught in a Split Between the Circuits*, FED. LAW., Nov./Dec. 1998, at 39 (arguing that commonsense would recognize a difference between a blind man and one who simply wears glasses); Harris, *supra* note 38, at 603 (arguing that " 'substantially limits' clearly indicates that the determination is to be made with regard to the present reality").

the Tenth Circuit's decision to break with the other circuits created a split, which prompted the Supreme Court to consider the issue.[62] In so doing, the Court recently affirmed *Sutton* and held that disability is to be assessed with regard to mitigating measures, notwithstanding contrary language in the EEOC interpretive guidelines.[63]

B. Assessing Whether One Is a "Qualified Individual"

Under the ADA, a "qualified individual" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[64] Assuming that a plaintiff has been able to establish the existence of a disability, she must next prove that she is otherwise qualified. Under EEOC regulations, however, this is a two-step process.[65] As applied, the plaintiff will first have to show that she has the "requisite skill, experience, education, and other job-related requirements."[66] Once this criteria has been satisfied, the plaintiff will then have to establish that she is able to perform the essential functions of the job. While establishing that one has these requisite criteria is easily accomplished, determining what "essential functions" and "reasonable accommodations" entail can be more difficult.[67]

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62. The Supreme Court granted certiorari on this issue. *See* Sutton v. United Air Lines, Inc., 130 F.3d 893 (10th Cir. 1997), *cert. granted*, Sutton v. United Air Lines, Inc., 119 S. Ct. 790 (1999).

63. Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2146 (1999). This information is provided so as to clearly reflect the current state of the law. It must be noted, however, that the Supreme Court ruled on this issue approximately six months after the instant case was decided. As such, this Note will not discuss the Supreme Court's opinion at greater length as it postdates the relevant legal background. Furthermore, the opinion did not resolve the principal issue presented in the instant decision—whether termination for failure to control a disability is termination "because of" such disability.

64. 42 U.S.C. § 12111(8) (1994).

65. 29 C.F.R. § 1630.2(m) (1998).

66. *Id.*; *see also* Benson v. Northwest Airlines, 62 F.3d 1108, 1111-12 (8th Cir. 1995) (noting 2-step analysis).

67. In assessing "essential functions," the EEOC regulations provide that one is to consider: (1) the employer's judgment as to which functions are essential; (2) written job descriptions; (3) amount of time spent performing the function; (4) consequences of not requiring its performance; (5) terms of any collective bargaining agreement; (6) work experience of past employees; and (7) the work experience of current employees. *See* 29 C.F.R. § 1630.2(n)(3) (1998). For a definition of "reasonable accommodation," see 29 C.F.R. § 1630.2(o)(1) (1998). Although by no means exclusive, this may include such measures as job restructuring, modified work schedules, reassignment, acquisition of work aids, and the like. *See* 42 U.S.C. § 12111(9) (1994); 29 C.F.R. § 1630.2(o)(2) (1998). It is usually up to the plaintiff to propose an accommodation. *See* Mole v.

These issues often present themselves in the context of law enforcement discrimination claims. In *Scheer v. City of Cedar Rapids*,[68] for example, an Iowa federal district court addressed them in a case involving an airport safety officer ("ASO") who was terminated shortly after informing his employer that he was epileptic.[69] One of the functions of the ASO position included regularly driving various vehicles.[70] As such, driving was determined to be an "essential function."[71] This ASO, however, was unable to perform the function in that applicable law prevented him from having a driver's license until such time as he was seizure-free for six months.[72] Ultimately, he requested a period of leave.[73] The court, however, rejected this proposal and granted summary judgment in favor of his employer.[74] Noting that there was no guarantee that he would be able to return to work in six months time, the court held that his leave request was for an indefinite period and that it was an accommodation which was not "reasonable."[75]

In *Holbrook v. City of Alpharetta*,[76] the Eleventh Circuit also addressed these issues after the plaintiff brought suit under the ADA and the Rehabilitation Act for alleged discrimination in being denied a promotion. Noting that his job description required that he be able to both collect evidence and drive, the court found these to be "essential functions."[77] The plaintiff, however, could not perform these functions because of his condition. He instead argued that he could be accommodated by "shuffling" his cases onto the other detectives.[78] Rejecting this argument, the court held that "reasonable accommodation" by way of job restructure does not entail reallocating essential functions.[79] A Missouri

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Buckhorn Rubber Products, Inc., 165 F.3d 1212, 1217 (8th Cir.), *cert. denied*, 120 S. Ct. 65 (1999); Wallin v. Minnesota Dep't of Corrections, 153 F.3d 681, 689 (8th Cir. 1998); Scheer v. City of Cedar Rapids, 956 F. Supp. 1496 (N.D. Iowa 1997); 29 C.F.R. pt. 1630, app. § 1630.9 (1998). An employer is only required to provide a "reasonable" accommodation, which may or may not be the one desired by the plaintiff. Gile v. United Air Lines, Inc., 95 F.3d 492, 499 (7th Cir. 1996).

68. 956 F. Supp. 1496 (N.D. Iowa 1997).

69. *Id.* at 1497.

70. *Id.* at 1498.

71. *Id.* at 1501

72. *Id.*

73. *Id.* at 1499.

74. *Id.* at 1503.

75. *Id.* at 1501-02; *see also* Nowak v. St. Rita High School, 142 F.3d 999, 1004 (7th Cir. 1998) (citing various cases in which indefinite leave held to be an unreasonable accommodation).

76. 112 F.3d 1522 (11th Cir. 1997).

77. *Id.* at 1527.

78. *Id.* at 1528.

79. *Id. See, e.g.*, Mole v. Buckhorn Rubber Products, Inc., 165 F.3d 1212, 1218 (8th Cir. 1999), *cert. denied*, 120 S. Ct. 65 (1999); Moritz v. Frontier Airlines, Inc., 147 F.3d 784, 788 (8th Cir. 1998); Hall v. United States Postal Serv., 857 F.2d 1073, 1080

federal district court reached a similar result in *Simon v. St. Louis County*,[80] a Rehabilitation Act case. The court held that a paraplegic individual was not "otherwise qualified" to serve as a commissioned police officer because he could not perform the "essential functions" of the job—effecting a forceful arrest and transferring between the various departments as needed—and could not reasonably expect the department to modify them.[81]

While not addressing the "qualified individual" issue directly, the Seventh Circuit also touched on it in *Siefken v. Village of Arlington Heights*.[82] This case involved a police officer who failed to control his diabetes and suffered a hypoglycemic episode that apparently rendered him unable to perform his duties and caused him to drive in an oblivious state for forty miles.[83] The court noted that he failed to meet his employer's legitimate job expectations, thereby suggesting that he was not performing the "essential functions."[84] When questioned, however, the plaintiff suggested that he would be able to perform them were he given a "second chance."[85] The court held that this was not a "reasonable accommodation" that the department was obligated to provide.[86]

One accommodation that has been deemed reasonable in the law enforcement context, however, is reassignment of the plaintiff. On occasion, the plaintiff may propose this reassignment.[87] Sometimes though, the plaintiff is put in a position where he or she may not have a choice. In *Karbusicky v. City of Park Ridge*,[88] for example, a hearing impaired officer was transferred to a community service position after not being able to perform the "essential

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(6th Cir. 1988) (interpreting the Rehabilitation Act). It should be noted, however, that job restructuring *is* reasonable where it entails reallocation of only "marginal" functions. *See, e.g.*, Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112 (8th Cir. 1995); Rhoades v. Atchison-Holt Elec. Co-op., No. 96-6057-CV-W-6, 1997 WL 839482, at *5 (W.D. Mo. Nov. 20, 1997).

80. 563 F. Supp. 76 (E.D. Mo. 1983), *aff'd*, 735 F.2d 1082 (8th Cir. 1984).

81. *Id.* at 81. This case raised an interesting corollary issue concerning whether functions can really be deemed "essential" to all police officers when it is unlikely that all will be called upon to perform them. This issue was apparently resolved in the affirmative. *See* Simon v. St. Louis County, 735 F.2d 1082, 1084-85 (8th Cir. 1984). For a related inquiry, see also Allison v. Dep't of Corrections, 94 F.3d 494, 497-98 (8th Cir. 1996) (noting existence of question of fact as to whether restraining inmates is an "essential function" for those guards not routinely called upon to do such).

82. 65 F.3d 664 (7th Cir. 1995).

83. *Id.* at 665. In addition, the officer remembered nothing of the event. *Id.*

84. *Id.* at 667.

85. *Id.* at 666.

86. *Id.* at 666-67; *see also* Rogers v. CH2M Hill, Inc., 18 F. Supp. 2d 1328, 1341 (M.D. Ala. 1998) (noting that a "second chance" is not a reasonable accommodation).

87. *See, e.g.*, Vazquez v. Bedsole, 888 F. Supp. 727, 731 (E.D.N.C. 1995) (plaintiff requested transfer to position where she would not have to carry weapon, apprehend fugitives, or drive an automobile).

88. 950 F. Supp. 878 (N.D. Ill. 1997).

functions" of his position.[89] While the city had previously tried to accommodate him through provision of hearing aids, they were ineffective. As such, transfer to a position not requiring that he carry a weapon and make arrests was the only remaining alternative.[90] While sometimes the only option, reassignment is nevertheless disfavored and should only be turned to after other attempts to accommodate have failed.[91]

It must also be briefly noted that an individual who appears "qualified" may not always be protected if he or she poses a "direct threat."[92] As defined by the ADA, this includes one who poses "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[93] In *School Board v. Arline*,[94] a Rehabilitation Act case, the Supreme Court said that this risk is to be assessed by taking into account the duration of risk, nature and severity of harm, likelihood that harm will occur, and imminence of potential harm.[95] Furthermore, the assessment must be based on medical or objective evidence rather than just the employer's belief.[96]

At times, courts have upheld blanket prohibitions against allowing certain individuals to hold a given job.[97] These cases, however, appear to be the exception rather than the rule. EEOC guidelines require that this determination be based on an "individualized assessment,"[98] and the courts have, for the most part, followed this guidance. In *Bombrys v. City of Toledo*,[99] for example, the court struck down a prohibition against allowing diabetics to become police officers.[100] In part, this decision was based on the EEOC guidelines requiring an individualized assessment.[101] More importantly, however, the court held that "presumptions [which] irrebuttably determine that an individual is unqualified

89. *Id.* at 882.

90. *Id.* at 884-85.

91. *Id.* at 884 (citing 29 C.F.R. pt. 1630, app. § 1630.2(o) (1998)).

92. In such situations, the ADA provides an employer with a defense if the alleged discriminatory action was taken due to the existence of such a threat. *See* 42 U.S.C. § 12113(a)-(b) (1994). For a definition of "direct threat," see *infra* note 93 and accompanying text.

93. 42 U.S.C. § 12111(3) (1994).

94. 480 U.S. 273 (1987).

95. *Id.* at 288; *see also* 29 C.F.R. § 1630.2(r)(1)-(4) (1998).

96. Bragdon v. Abbott, 524 U.S. 624, 649 (1998).

97. *See, e.g.*, Davis v. Meese, 865 F.2d 592 (3d Cir. 1989); Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993), *cert. denied*, 511 U.S. 1011 (1994).

98. 29 C.F.R. § 1630.2(r) (1998).

99. 849 F. Supp. 1210 (N.D. Ohio 1993).

100. *Id.* at 1221.

101. *Id.* at 1216; *see also* Stillwell v. Kansas City Bd. of Police Comm'rs, 872 F. Supp. 682, 687 (W.D. Mo. 1995) (striking down blanket exclusion as violating the individualized assessment requirement).

for a particular job are violative of the Due Process Clause of the Fourteenth Amendment."[102]

C. Determining Whether Discrimination Is "Because of" the Disability

One can imagine various situations in which an employee could be terminated for a reason that is not "because of" a disability. For example, there may be legitimate economic reasons, such as a downturn in the economy, wherein both disabled and non-disabled employees alike are terminated.[103] Likewise, if an employer knows nothing of the employee's disability, courts have held that termination can certainly not be "because of" it.[104] The more difficult issues arise, however, in situations where there is a closer causal connection between the reason for termination and the disability. In such cases, the federal circuits have utilized conflicting methods of analysis.[105]

One approach has been to hold that termination for conduct that has a sufficiently strong causal connection to the underlying disability will be analyzed the same as would termination for the disability itself.[106] In *Teahan v. Metro-North Commuter Railroad Co.*,[107] a prominent Rehabilitation Act case, the Second Circuit adopted such an approach. In *Teahan*, an individual suffering from alcoholism and drug abuse brought suit after being fired for excessive absenteeism.[108] Appealing a summary judgment below, the plaintiff argued that the trial court "improperly shifted the burden to him to present evidence of pretext" as his "absenteeism was 'caused by' his substance abuse problem."[109] Agreeing with the plaintiff, the court noted that the "relevant inquiry is into the causal connection" and held that "termination by an employer subject to the Act which is justified as being due to absenteeism shown to be caused by substance abuse is termination 'solely by reason of' that substance abuse."[110]

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102. *Bombrys*, 849 F. Supp. at 1217; *see also Stillwell*, 872 F. Supp. at 688 (noting that blanket exclusions also violate notions of due process).

103. *See, e.g.*, Borkowski v. Valley Central Sch. Dist., 63 F.3d 131, 143 (2d Cir. 1995); Smith v. Barton, 914 F.2d 1330, 1340 (9th Cir. 1990), *cert. denied*, 501 U.S. 1217 (1991) (budget constraints).

104. *See* Morisky v. Broward Co., 80 F.3d 445, 447-48 (11th Cir. 1996); Miller v. National Gas Co., 61 F.3d 627, 629-30 (8th Cir. 1995); Hedberg v. Indiana Bell Tel. Co., 47 F.3d 928, 934 (7th Cir. 1995); Landefeld v. Marion Gen. Hosp., 994 F.2d 1178, 1181 (6th Cir. 1993).

105. John P. Gause, *The ADA in Practice: Navigating the Minefield*, 13 ME. B.J. 30, 33-34 (1998) (summarizing the conflicting approaches).

106. *See infra* notes 107-10 and accompanying text.

107. 951 F.2d 55 (2d Cir. 1991).

108. *Id.* at 513.

109. *Id.* at 514.

110. *Id.* at 517. This "solely by reason of" phrase is the counterpart of "because

In contrast, a majority of courts, including the Eighth Circuit,[111] have effectively rejected *Teahan*'s causal analysis. In its place, they attempt to draw a distinct line between the plaintiff's conduct and disability. In so doing, the question becomes whether the adverse employment action was taken "because of" the disability, thereby violating the ADA, or whether it was taken "because of" the conduct, thereby allowing courts to disregard any causal connection between the two.[112]

The conduct/disability distinction appears to have predominantly arisen in the context of alcohol-related cases. In *Maddox v. University of Tennessee*,[113] for example, Maddox, a football coach, was terminated after having been arrested for driving under the influence of alcohol.[114] Maddox asserted that he was terminated "because of" his disability in that impaired driving is a "causally connected manifestation of the disability of alcoholism."[115] The court dismissed this argument, however, and pointed out that "a number of cases have considered the issue of misconduct as distinct from the status of the disability."[116] Joining those jurisdictions that have so held, and rejecting the approach taken by *Teahan*, the court concluded that employees, disabled or not, must be treated alike when it comes to "egregious or criminal conduct."[117] Cases both prior and subsequent to *Maddox* have repeatedly drawn this distinction in alcohol-related cases.[118]

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of" under the ADA. It is important to note that even under the analysis adopted in *Teahan*, the courts will not take the causal connection as established merely because it is alleged to exist. It is a question of fact, and the court pointed out that had a significant portion of the absences been due to something other than alcoholism, the termination might *not* have been "solely by reason of" the disability. *Id.*

111. *See infra* notes 134-39 and accompanying text.

112. *See* Fritz v. Mascotech Automotive Sys. Group, Inc., 914 F. Supp. 1481, 1493 (E.D. Mich. 1996). If the employer can point to any conduct of the plaintiff as justifying his employment decision, the plaintiff will likely not prevail. The employer will, however, have to show that the employment decision is attributable to the plaintiff's conduct instead of an "improper consideration of Plaintiff's disability." *Id.* If, in fact, the disability *itself* is considered and makes a difference in the employment decision, the employer will not be able to avoid liability. *See* McNely v. Ocala Star-Banner Corp., 99 F.3d 1068, 1076-77 (11th Cir. 1996).

113. 62 F.3d 843 (6th Cir. 1995).

114. *Id.* at 845.

115. *Id.* at 846.

116. *Id.* at 847.

117. *Id.* at 848.

118. *See, e.g.*, Newland v. Dalton, 81 F.3d 904, 906 (9th Cir. 1995) (termination was for "egregious and criminal conduct" in firing weapon in bar, not alcoholism); Williams v. Widnall, 79 F.3d 1003, 1006-07 (10th Cir. 1996) (fired for misconduct in making threats against co-workers despite fact that actions were the direct result of alcoholism); DeSpears v. Milwaukee County, 63 F.3d 635, 637 (7th Cir. 1995) (noting that the disability was not the sole cause of firing in that the plaintiff acted in deciding to drive while drunk); Leary v. Dalton, 58 F.3d 748, 754 (1st Cir. 1995) (Rehabilitation

In the meantime, the conduct/disability distinction has been increasingly applied in different contexts as well. In *Houck v. City of Prairie Village*,[119] for example, a Kansas federal court drew the distinction where a police officer suffering from a "variety of mental conditions"[120] was ultimately terminated after engaging in conduct that included domestic battery, battery on a fellow officer, and violations of the police code of conduct.[121] Although the officer argued that the firing was discriminatory in that "his alleged misconduct was caused by his disability," the court rejected this claim.[122] In so doing, the court stated that "[a] person who commits a criminal act as a result of a disabling condition is not excused from the employment consequences of the criminal act because of the disability."[123] Similarly, in *EEOC v. Amego, Inc.*,[124] the First Circuit rejected the proposition that the ADA should protect disability-related conduct to the same extent as the underlying disability and held that an individual suffering from clinical depression was terminated "because of" her conduct in attempting suicide rather than "because of" the disability.[125]

Leading up to the instant case, the approach taken by courts within the Eighth Circuit had not been entirely clear. On at least one occasion, for example, it appeared that the court was leaning towards adoption of causal analysis similar to that of *Teahan*.[126] In *Perkins v. St. Louis County Water Co.*,[127] the plaintiff brought suit under the ADA and the Rehabilitation Act after being

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Act case noting that termination was for excessive absences caused by incarceration for drunk driving rather than disability); Little v. FBI, 1 F.3d 255, 259 (4th Cir. 1993) (Rehabilitation Act case noting that alcoholic was not terminated "solely by reason of his handicap").

119. 978 F. Supp. 1397 (D. Kan. 1997).

120. *Id.* at 1399. These conditions included "post-traumatic stress syndrome, borderline personality disorder, psychosis from mania, unipolar depression, bipolar depression, clinical depression, chronic depression and chemical imbalance of the brain." *Id.*

121. *Id.* at 1401. These were the charges listed in the officer's pre-termination notice. *Id.*

122. *Id.* at 1403.

123. *Id.* Although not phrasing its holding in precisely the same manner, the Seventh Circuit's decision in *Siefken v. Village of Arlington Heights*, 65 F.3d 664 (7th Cir. 1995), also implicitly applied the distinction to a case involving diabetes-related conduct. As previously discussed, this case involved a diabetic police officer who was terminated after failing to control a controllable disease, which thereby resulted in erratic driving. *See supra* note 83 and accompanying text.

124. 110 F.3d 135 (1st Cir. 1997).

125. *Id.* at 149. Significantly, however, the court left the door open to situations where the disability is such that it "compels" the undesirable conduct. *Id.*; *see also* DeSpears v. Milwaukee County, 63 F.3d 635, 637 (7th Cir. 1995) (noting the compulsion argument).

126. *See infra* notes 127-32 and accompanying text.

127. 160 F.3d 446 (8th Cir. 1998).

terminated for a pattern of unexcused absences.[128] Specifically, the plaintiff alleged that he had been discriminated against "because of" his Meniere's disease and permanent hearing loss.[129] Rather than simply holding that the plaintiff was terminated "because of" his absences, however, the court undertook further analysis.[130] Ultimately addressing the hearing loss, the court upheld summary judgment for the employer and stated that the plaintiff "ha[d] not produced sufficient evidence that his hearing impairment was linked to his absences from work and to his subsequent termination for excessive absenteeism."[131] The implication of this was to suggest that the plaintiff may have prevailed had he been able to establish a stronger causal link.[132]

Ultimately, the *Perkins* decision stands in relative isolation, as several courts within the circuit have indicated that conduct is to be analyzed separately from the underlying disability.[133] For example, in *Grimes v. United States Postal Service*,[134] a Rehabilitation Act case, a Missouri federal court held that an individual who possessed and distributed drugs at work was not terminated "solely because of" his marijuana addiction.[135] Despite the plaintiff's argument that the disability caused him to engage in such activity, the court noted that the termination was because of his conduct rather than the disability itself.[136] Similarly, in *Larson v. Koch Refining Co.*,[137] a Minnesota federal court drew a conduct/disability distinction where an employee was fired for his short notice absences and criminal conduct in driving drunk and committing an assault rather than for his alcoholism.[138] Addressing claims under the ADA and the State's

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128. *Id.* at 447.

129. *Id.* at 448-49. Meniere's disease was defined by the court as "a condition that causes occasional episodes of vertigo and vomiting." *Id.* at 448.

130. *Id.* at 448-49.

131. *Id.* at 449.

132. Apparently not satisfied with the court's analysis and the implications thereof, a concurring judge felt that the plaintiff's abuse of the absenteeism policy had "established a separate cause for discharge," and that this was the ground upon which the judgment should have been affirmed. *Id.* at 450.

133. *See infra* notes 134-39 and accompanying text.

134. 872 F. Supp. 668 (W.D. Mo. 1994), *aff'd*, 74 F.3d 1243 (8th Cir. 1996).

135. *Id.* at 675-76.

136. *Id.* at 676. ("The Act does not prohibit an employer from discharging an employee who commits a crime or otherwise engages in improper conduct when the improper conduct, rather than the alleged addiction, is the reason for discharge."). *Id.*

137. 920 F. Supp. 1000 (D. Minn. 1996).

138. *Id.* at 1005; *see also* Harris v. Polk County, 103 F.3d 696, 697 (8th Cir. 1996) (permissible to base decision not to hire on criminal shoplifting record despite fact that shoplifting was a causally-related symptom of mental illness); Mole v. Buckhorn Rubber Products, Inc., 165 F.3d 1212, 1219 n.3 (8th Cir. 1999) (noting that "[f]iring an employee *because of* the job performance consequences of a disability . . . rather than the disability itself, is not actionable under the ADA.") (emphasis added), *cert. denied*, 120 S. Ct. 65 (1999).

Human Rights Act, the court noted that misconduct is not protected and need not be tolerated.[139]

IV. INSTANT DECISION

After reciting the facts of the case as presented at the district court, Circuit Judge Hansen, writing for the United States Court of Appeals for the Eighth Circuit, noted that the ADA prohibits a "covered entity" from discriminating "against a qualified individual with a disability because of the disability of such an individual."[140] The court went on to observe that in order to state a claim, the plaintiff must show that he has a disability, is qualified, and was discriminated against "because of" his disability.[141] Noting that the parties did not dispute that the City of Springfield was a "covered entity" or that Burroughs was both "disabled" and a "qualified individual," the court declined to discuss these issues further.[142] Instead, it turned its attention to the question of whether the adverse action was taken "because of" the disability.[143]

The court pointed out that while it had not yet considered this issue, it was guided and persuaded by a factually similar case from the Seventh Circuit.[144] The court then turned to a brief discussion of *Siefken v. Village of Arlington Heights*, where a police officer failed to control his diabetic condition and was terminated "not 'because of' his disability, but because he failed to control a controllable disease."[145] Noting that Burroughs did not dispute that his disability was also controllable, the court observed that the prior episodes were Burroughs's own fault because of "poor timing of his meals and activities."[146]

The court next turned to Burroughs's argument that reliance on *Siefken* was misplaced in that there existed a material question of fact regarding whether Burroughs was responsible for the hypoglycemic episodes.[147] Although Burroughs cited reports by his physician indicating that he was compliant and able to perform his duties, the court found the reports to be "out of context" because they were written "before [the doctor] had reviewed the medical records of Burroughs's latest on-duty episodes."[148] Furthermore, the court pointed out that Burroughs had to be at fault because he "admit[ted] that the episodes

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139. *Id.* at 1004-05.

140. Burroughs v. City of Springfield, 163 F.3d 505, 507 (8th Cir. 1998) (citing 42 U.S.C. § 12112(a) (1994)).

141. *Id.* at 507.

142. *Id.*

143. *Id.*

144. *Id.* (citing Siefken v. Village of Arlington Heights, 65 F.3d 664, 665-66 (7th Cir. 1995)).

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 508.

resulted from changes in his eating schedule," which was a "matter within his control."[149] Therefore, the court found no merit in the claim that there was a material question of fact precluding summary judgment.[150]

The court then turned to Burroughs's second argument that he was wrongfully terminated in that the City had not shown that he was a "direct threat."[151] After observing that one may not be a "qualified individual" if he poses a "direct threat," the court found this inquiry to be "not exactly on point" because the parties had already conceded this issue.[152] Nevertheless, the court discussed the risk posed by Burroughs. Referring again to the two prior hypoglycemic episodes and the doctor's testimony regarding the dangers posed, the court found that "[t]he inherent and substantial risk of serious harm arising from such episodes, given the nature of police work, is self-evident."[153]

Finally, the court addressed Burroughs's third argument that he was entitled to an accommodation, but found it unnecessary to consider this issue because Burroughs was unable to establish a claim under the ADA.[154] The court, therefore, affirmed the summary judgment and stated that "when an employee knows that he is afflicted with a disability, needs no accommodation from his employer, and fails to meet the employer's legitimate job expectations, due to his failure to control a controllable disability, he cannot state a cause of action under the ADA."[155]

V. COMMENT

The instant case is important in that it has the potential to significantly impact a future plaintiff's ability to recover on an ADA claim. The Eighth Circuit has clearly stated that when a person fails to control a controllable disability that such person is capable of controlling without any accommodation, and thereby fails to meet his employer's expectations, that person will not be able to establish a prima facie case of discrimination.[156] Thus, future plaintiffs may not be able to recover if they have been lax in their own care. Of equal significance to this holding, however, is the process by which it was reached. In this respect, the instant opinion is not only significant for what it says, but also for what it failed to address.[157]

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149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 508-09.

155. *Id.* at 509 (citing Siefken v. Village of Arlington Heights, 65 F.3d 664, 667 (7th Cir. 1995)).

156. *Id.*

157. Because the court did not have the benefit of the Supreme Court's holding in *Sutton* prior to deciding this case, it should probably first have clarified why it believed

Because the parties conceded the "disability" and "qualified individual" issues,[158] the court was faced with a situation where it could either challenge the parties' concessions or base its decision on the third element by finding that Burroughs was not discriminated against "because of" his disability. This latter approach is the one that the court chose.[159] In so doing, the court, although never explicitly saying so, rejected *Teahan*'s causal analysis and extended application of the conduct/disability distinction to failure to control diabetes. In fact, had the court not done so, Burroughs clearly would have been terminated "because of" his disability in that he would not have had a hypoglycemic episode or failed to meet his employer's expectations but for his diabetes.

In implementing the distinction between conduct and disability, the court followed somewhat circular reasoning. As previously discussed, it began by noting that Burroughs was a "qualified individual."[160] A great deal of the remainder of the opinion, however, was spent discussing how Burroughs's failure to control his disability rendered him unable to meet his employer's legitimate expectations in a safe manner.[161] In light of this discussion, the court seemed to suggest that Burroughs was *not* a "qualified individual." Yet, this is a contention that the court rejected twice in its opinion.[162]

The instant opinion, therefore, raises the question of why the court would discuss factors traditionally associated with a "qualified individual" analysis, while purporting to resolve this case on other grounds. The court apparently did

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the parties' "disability" concession to be correct. The Eighth Circuit had expressed its opinion that the existence of a "disability" was to determined without regard to mitigating factors. *See supra* note 38 and accompanying text. At least one district court within the circuit, however, had reached a contrary result. *See supra* note 51 and accompanying text. Interestingly, those courts taking the minority position (and that which we now know to be the correct one) had looked to the impairment as mitigated by the plaintiff, *not* as it may "potentially" have been mitigated. *See, e.g.*, Sutton v. United Air Lines, Inc., 130 F.3d 893, 902 (10th Cir. 1997) ("The determination of whether an individual's impairment substantially limits a major life activity should take into consideration mitigating or corrective measures utilized by the individual."). Thus Burroughs, although voluntarily disabled, would admittedly have been disabled nonetheless. This factor has the corollary effect of dramatically increasing the importance of the instant case. Assuming that there really is no present duty to mitigate (at least in the context of establishing the existence of a disability) and that a person can essentially choose to elevate his or her impairment to the level of a disability, future courts will be increasingly inclined to turn towards the "because of" element that *Burroughs* focuses on in rejecting an ADA claim. As discussed later in this Note, courts may wish to consider rejecting this inevitable trend and instead resolve cases similar to *Burroughs* on "qualified individual" grounds.

158. *See* Burroughs v. City of Springfield, 163 F.3d 505, 507 (8th Cir. 1998).

159. *Id.*

160. *Id.*

161. *Id.* at 507-09.

162. *Id.* at 507, 508.

so because it did not want an employer to be permitted to discriminate based on nothing more than an employee's conduct in failing to control a controllable disability, where that conduct does not somehow pose a risk or affect the employee's ability to meet his employer's expectations. Thus, by discussing job performance and the risk factor, the court ensured that termination "because of" failure to control will only withstand scrutiny where such failure results in secondary conduct[163] that would *appear* to render the person unqualified.[164]

Ultimately, however, one must ask whether a "because of" analysis based upon the conduct/disability distinction is the best approach in the context of the instant case. As earlier noted, the distinction has been made, for the most part, in cases involving "egregious or criminal" misconduct.[165] There is good reason, however, to argue that diabetes should be treated differently. For example, an individual makes a conscious choice to drink and get behind the wheel of a vehicle, commit an assault, or distribute drugs—these are all affirmative acts. It is more difficult, however, to classify failure to control diabetes as "egregious or criminal" in nature. Furthermore, even if one classifies the wrongful conduct as patrolling while suffering a hypoglycemic episode, such conduct still does not appear to be "egregious or criminal." The diabetic, after all, engages in such activity without conclusively knowing whether she will suffer such an impairment.[166] Perhaps recognizing this difficult issue, the Seventh Circuit in *Siefken* arguably appeared hesitant to rest its holding on "failure to control" alone. Although ultimately stating that it was expressing "no opinion on these issues," the court cited decisions which held that diabetics were not "qualified individual[s]" as a matter of law for positions in which they would be required to operate a motor vehicle.[167] While the court admittedly did not decide the case

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163. An illustration adapted from the court's opinion in *Teahan v. Metro-North Commuter Railroad Co.*, 951 F.2d 511, 516 (2d Cir. 1991), will help illustrate this point. If an individual has a disability that causes him to make a "thump" when walking, and he could control the same, but chooses not to do so, termination will not be justified unless the thump somehow renders him unable to perform adequately. In other words, a person cannot be terminated merely "because of" failure to control harmless manifestations of a disability.

164. In the instant case, such secondary conduct was apparently the disorientation and dysfunction while on patrol.

165. *See supra* notes 113-39 and accompanying text.

166. The same difficulties present themselves even if one tries to analogize the instant case to those where conduct less than "egregious or criminal" in nature, i.e. excessive absences, served as a basis for permissible termination. Even here, the employee's conduct is somewhat reprehensible to the extent that he is acting in knowing violation of company policy. This is different than the diabetic, who perhaps through sheer inadvertence or accident, may fail to take the steps necessary to control the disability effectively or appreciate the consequences of a failure to control until those consequences are actually realized.

167. Siefken v. Village of Arlington Heights, 65 F.3d 664, 665 (7th Cir. 1995).

on these grounds, it at least recognized the existence of an alternative basis for resolving the issue.

As a practical matter, the Eighth Circuit likely had little leeway as to the grounds upon which it resolved the instant case given the parties' concessions. On policy grounds, however, this case could have been more soundly decided had the court been given full opportunity to undertake a true "qualified individual" analysis. In *Burroughs*, it was not entirely clear what the essential functions of the job were. By looking to EEOC regulations and analogizing to other cases, however, one may safely assume that they included such things as driving an automobile, effecting an arrest, firing a weapon, and the like.[168] Burroughs was certainly not able to perform these functions in that he was disoriented to the point of requiring emergency medical treatment.[169] Furthermore, objective evidence established that he posed a very real risk to health and safety.[170] These facts would appear to support a contention that he was not qualified. Yet, the inquiry does not end here. Instead, the court would have had to ask whether Burroughs could have performed these duties with "reasonable accommodation."[171]

Apparently, the parties thought that a "reasonable accommodation" was possible because they did not contest that Burroughs was qualified.[172] However, it has been proposed that "reasonable accommodation" be interpreted such that an accommodation may not be "reasonable" if an individual with a mutable disability "refuses or fails to take reasonable steps to improve or eliminate the condition."[173] This approach is based upon the proposition that reasonableness cannot be assessed in isolation, but rather must be viewed with regard to all of the existing circumstances, including the actions of the disabled employee.[174] Thus, if an employee fails to first help himself in a situation where reasonable self-help would be availing, the conclusion should be that it would not be "reasonable" to burden the employer with the responsibility to provide accommodation.[175] Such an analysis would have been well suited to the instant case. Burroughs's disability was indeed mutable, at least to the extent that its effects and manifestations could be reduced, if not eliminated.[176] Furthermore,

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168. *See supra* notes 68-91 and accompanying text.

169. Burroughs v. City of Springfield, 163 F.3d 505, 505 (8th Cir. 1998).

170. *Id.* at 508 (noting two instances of hypoglycemic episodes while on duty).

171. *See* 42 U.S.C. § 12111(8) (1997) (qualified individual may also include one who *with* reasonable accommodation can perform the essential functions).

172. *See Burroughs*, 163 F.3d at 507.

173. Lisa E. Key, *Voluntary Disabilities and the ADA: A Reasonable Interpretation of "Reasonable Accommodation,"* 48 HASTINGS L.J. 75, 96-103 (1996).

174. *Id.* at 76.

175. *Id.* at 103.

176. The physician who examined Burroughs noted that it would be possible for Burroughs "to control the episodes by the careful timing of meals and activities."

the steps that would have been required of Burroughs were not unreasonable or unbearably imposing in that all that would have been required was oversight of diet and an insulin regimen.[177] Since it is clear that Burroughs was not taking these steps, at least on two occasions,[178] he would not have been entitled to an accommodation, thus remaining unqualified and justifying termination on this ground.

Although the above analysis was not argued before the Eighth Circuit in *Burroughs*, future litigants and courts may want to consider relying on it. As has been noted, it would not only produce sound results, but would also keep those who are disabled from exploiting the protections offered by the ADA.[179] Furthermore, it would only marginally increase the scope of factual inquiry required of a court.[180] As has been discussed, courts already consider the employee's conduct in assessing whether an alleged discriminatory employment action was taken "because of" the disability.[181] Of course, this factor raises an interesting issue about whether this approach is distinguishable from the "because of" analysis. After all, some may ask, does it too not also base the ultimate determination of whether liability will attach on the employee's conduct? The answer is that it does. Public policy, however, would arguably be best served by taking the "qualified individual" approach. This approach would allow a court to require an individual to control her controllable disability while still making her bear responsibility for failure to do so. The benefit, however, is that it does so without placing failure to control diabetes into a category of conduct that has heretofore been reserved for that which is "egregious or criminal" in nature, or at the very least, reprehensible.[182]

Burroughs v. City of Springfield, 163 F.3d 505, 506 (8th Cir. 1998). The definition of mutability being applied here is consistent with the manner in which Professor Key defined mutability. *See* Key, *supra* note 173, at 75.

177. The record on this matter is slightly unclear as it was suggested that oversight of meals and activities was all that was required by Burroughs. *See supra* note 14 and accompanying text. It would seem, however, that Burroughs may also have been on an insulin regimen. *See Burroughs*, 163 F.3d at 507-08. The steps that Burroughs was required to take in order to mitigate his disability are an important component of the analysis. Professor Key proposes that whether a plaintiff should be required to mitigate before being entitled to a "reasonable" accommodation must depend on whether the mitigatory action required would be reasonable in and of itself as determined by the law of "avoidable consequences." *See* Key, *supra* note 173, at 98-103.

178. *Burroughs*, 163 F.3d at 506-07.

179. *See* Key, *supra* note 173, at 103-04.

180. The slightly increased burden would result from the court having to consider the law of "avoidable consequences" and assess whether it would have been reasonable to require the mitigatory action. *See supra* note 177.

181. *See supra* notes 113-39 and accompanying text.

182. Some may argue that Burroughs's conduct *was* reprehensible given the nature of his position and the public trust which he held. Had he gone to work while in the middle of a hypoglycemic episode, there might be merit to this. The episodes, however,

VI. CONCLUSION

The Eighth Circuit's opinion in *Burroughs v. City of Springfield* is significant in that failure to control a controllable disability may now be equated with misconduct sufficient to nullify a cause of action under the ADA. In cases such as this, many would probably agree that the outcome was correct. At the same time, however, future litigants and courts may want to reconsider the decision's basis. Public policy would seem to allow that someone who fails to control a disability is not a "qualified individual." It does not, however, warrant a finding that failure to control diabetes rises to the level of unacceptable misconduct as that classification has traditionally been defined.

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appear to have occurred after he was already on duty. Burroughs v. City of Springfield, 163 F.3d 505, 506 (8th Cir. 1998). There is a difference between someone like Burroughs, who might *not* suffer a hypoglycemic episode (*or* might suffer one inadvertently), and someone who knowingly, intentionally, and often recklessly engages in misconduct.