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Dulling a Needle: Analyzing Federal Employment Restrictions on People with Insulin-Dependent Diabetes

MARK L. BAYLER*

INTRODUCTION

Denying a person a job for discriminatory reasons has always been one of the more insidious ways of repressing a group of people who are stereotyped. These stereotypes often result from misunderstanding or mistrust of a particular group. This discrimination is particularly troubling when it is done by the organization that is charged by society with the main responsibility of eliminating discrimination—the federal government.

The federal government excludes anyone from jobs connected with public safety when it has determined that their hiring would increase the risk of harm to the public. For this reason, several types of federal jobs are routinely denied to people with insulin-dependent diabetes.¹ Often these employment decisions and the rules undergirding them are made with little regard for medical fact; the real bases for these decisions are false information about diabetes and an agency's unwillingness to make changes in the way it functions. The Rehabilitation Act of 1973² was intended in part to protect handicapped individuals from employment discrimination by government agencies. People with insulin-dependent diabetes, who are covered by the Rehabilitation Act,³ have fought unwarranted employment discrimination by suing the agencies under this statute. In interpreting the Rehabilitation Act, courts have sought to balance the government's interest in protecting the public's safety with the individual's right to be free from employment discrimination. The troubling fact is that the federal government's actions have not been scrutinized as closely as they need to be in order to protect the handicapped individual from discrimination. Particularly, in *Davis v. Meese*,⁴ a person with insulin-dependent diabetes was denied the chance for certain positions with the FBI solely because he had diabetes. This Note criticizes the way the Rehabilitation Act has been used

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1. See *infra* notes 46-51 and accompanying text.

2. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C. §§ 701-796 (1988)).

3. 28 C.F.R. § 41.31(b)(1) (1991).

4. 692 F. Supp. 505 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3d Cir. 1989).

to continue unwarranted employment discrimination by the federal government against people with insulin-dependent diabetes. Part I explains diabetes—the medical complications, treatment plans, and nonmedical effects of diabetes on those who have the disease. Part II explores the Rehabilitation Act and courts' interpretations of the statute. Part III criticizes the exclusion of people with insulin-dependent diabetes from even being considered for some jobs by analyzing the decision in *Davis v. Meese*.

I. DIABETES: AN EXPLANATION OF THE DISEASE AND ITS EFFECTS

*Diabetes mellitus*⁵ affects an estimated 12 million Americans and over 100 million people worldwide.⁶ Despite the disease's widespread effect and the millions of dollars spent to fund research and education about diabetes,⁷ the disease and its impact on those it harms is still misunderstood. The perception that people with diabetes must greatly curtail their activities because of the disease is often unfounded. The extent to which a person with diabetes must limit himself depends on the severity of his illness, the education he receives about diabetes, and the diligence he exerts to monitor and control his disease. This Part explores the medical explanation for diabetes, the physical complications of diabetes, the typical treatment plan for diabetes, and the psychological and social effects of diabetes on its victims.

A. *An Explanation of Diabetes*

Diabetes is, in simplest terms, a human body's inability to process glucose, a type of sugar. The body uses glucose as fuel. It is carried along in the blood stream and placed in each cell. Insulin is the hormone that allows glucose to enter cells.⁸ Insulin, produced by a gland called the pancreas, helps to keep the amount of glucose in the blood of a person without diabetes at between 60 and 120 milligrams per deciliter (mg/dl) at virtually all times.⁹

When a person contracts diabetes, the level of glucose in the blood becomes extremely high because of a lack of insulin. The pancreas may have stopped producing insulin, or the insulin that is produced is either defective or insufficient to do its job. The lack of insulin prevents the cells

5. Diabetes, a Greek word, means "to flow through; urine." Mellitus, a Latin word, means "sweetened or honey-like." L. KRALL & R. BEASER, *JOSLIN DIABETES MANUAL* viii (12th ed. 1989).

6. *Id.* at 1.

7. Cahill, *Current Concepts of Diabetes*, in *JOSLIN'S DIABETES MELLITUS* 11 (A. Marble, L. Krall, R. Bradley, A.R. Christlieb & J.S. Soeldner, 12th ed. 1985).

8. L. KRALL & R. BEASER, *supra* note 5, at 2.

9. *Id.*

from receiving the glucose from the blood stream. Because the body's main energy source has been cut, the person will be tired and weak.¹⁰ After a while, the body will try to regain the lost energy, and the newly ill person with diabetes will be very hungry.¹¹ The increase in the intake of food only makes the level of glucose in the blood rise. The excess glucose is sent to the kidneys. Soon the kidneys are unable to handle the glucose, and the glucose is passed out of the body in the urine. However, the body tries to reduce the amount of glucose in the urine by increasing its desire for liquid. This results in a cycle of increased thirst and urination.¹² Sometimes the body satisfies its desire for energy by breaking down fat cells. The fat is broken down further into ketones. The ketones also eventually appear in the urine, and if the level of ketones is very high over a period of time, the person with diabetes could become unconscious or fall into a coma.¹³ Other symptoms include weight loss, blurred vision, and numbness in the limbs.¹⁴

Two types of diabetes have been found. The first is insulin-dependent diabetes. This type is also called Type I diabetes or juvenile-onset diabetes. As the name suggests, the person with insulin-dependent diabetes must receive insulin injections to survive because his pancreas has stopped producing insulin altogether or is only producing a very small amount.¹⁵ The person who contracts Type I diabetes is usually under the age of forty.¹⁶ Twenty percent of all people with diabetes have Type I diabetes.¹⁷ The second type of diabetes is non-insulin-dependent diabetes, also called Type II diabetes. This type is caused by a resistance to the insulin produced by the body or a small reduction in the production of insulin. Type II diabetes is usually treatable by a low-sugar diet, an exercise plan, and medication that can reduce resistance to insulin. Most of the people who contract Type II diabetes are over forty.¹⁸

While the exact cause of diabetes is not known, many factors seem to contribute. Diabetes is hereditary. Some viruses seem to help cause diabetes. Other researchers have posited that stress, illness, obesity, aging, hormones, certain medications, and a diet high in carbohydrates can all be influences that trigger diabetes.¹⁹

10. *Id.* at 13.

11. This condition is called polyphagia. *Id.*

12. The increase in thirst is called polydipsia, and the increase in urination is polyuria. *Id.* at 14.

13. This condition is called ketoacidosis. *Id.* at 258.

14. *Id.* at 26-27.

15. *Id.* at 15.

16. *Id.* at 16 (Table 1-1).

17. *Id.*

18. *Id.* at 17-18.

19. *Id.* at 19-25. A common belief is that eating food that contains a lot of sugar causes diabetes. Research has shown this to be untrue. *Id.* at 22-23.

B. Complications of Diabetes

The most common complication of diabetes is hypoglycemia. Hypoglycemia occurs when the level of glucose in the blood is too low. Hypoglycemia occurs for many reasons. The person may have injected too much insulin²⁰ or taken too much medication. Or the person may have eaten too little food or exercised too much without eating.²¹

The person with diabetes will feel certain symptoms at the onset of hypoglycemia. He may feel nervous or anxious. He may start to shake and feel dizzy. He also may sweat and feel a tingling sensation in his tongue and lips. As the condition gets worse, he becomes disoriented and has blurred vision. He eventually loses consciousness. To combat a hypoglycemic episode, the person with diabetes must eat something with a lot of sugar; common items are orange juice, candy, and special tablets of glucose that can be bought without a prescription. If this is done, the level of glucose will rise, and the person will recover.²² While insulin reactions can happen without warning,²³ most reactions are accompanied by the above symptoms. If the person with diabetes recognizes them and has access to food, he can prevent hypoglycemia. The risk of an insulin reaction can be reduced dramatically if the person with diabetes sticks to his diet, eats regularly, eats before he exercises, and gives himself the right amount of insulin.²⁴

Another complication of diabetes is the opposite of hypoglycemia—hyperglycemia. Hyperglycemia is caused by having too much glucose in the blood stream. The person with diabetes may have eaten too much food, taken too little insulin, exercised very infrequently, or some combination of the three. Illness can also bring on hyperglycemia.²⁵ Hyperglycemia, if untreated, usually results in the patient lapsing into a coma; however, unlike hypoglycemia, the condition takes at least days to become acute.²⁶

The hyperglycemic person will feel many of the same symptoms as the newly diagnosed person with diabetes. He will be extremely thirsty, urinate frequently, and be very weak.²⁷ In time, the person will experience ketoacidosis and eventually fall into a coma.²⁸ Treatment of early stages of

20. For this reason, a hypoglycemic episode is often called an insulin reaction when it happens to a person with Type I diabetes. *Id.* at 247.

21. M. DAVIDSON, *DIABETES MELLITUS: DIAGNOSIS AND TREATMENT* 444-45 (2d ed. 1986).

22. *Id.* at 446-48.

23. Marble, *Insulin in the Treatment of Diabetes*, in JOSLIN'S *DIABETES MELLITUS*, *supra* note 7, at 400.

24. M. DAVIDSON, *supra* note 21, at 449.

25. L. KRALL & R. BEASER, *supra* note 5, at 258.

26. *Id.* at 259.

27. *Id.*

28. See *supra* note 13 and accompanying text.

ketoacidosis requires immediate injection of insulin and replacement of lost fluids.²⁹ Hospitalization is required in advanced cases.³⁰

C. A Treatment Plan for Diabetes

The person with Type I diabetes is usually treated with a combination of injections of insulin, a special diet, an exercise plan, and a regimen of self-monitoring to help him to maintain as normal a life as possible.³¹ The person with Type II diabetes does not have to take insulin; accordingly, his treatment substitutes oral medication for the insulin injections.³²

The person with Type I diabetes takes at least one injection of insulin daily. If more than one injection is needed, two or more kinds of insulin are mixed to ensure that a steady stream of insulin is always working to process the glucose ingested from food throughout the day.³³ The timing of the injections is important. If injections are taken too close together in time, the increase of insulin in the body could cause an insulin reaction.³⁴ If the injections are too far apart, the level of glucose in the blood would rise above the normal range because insulin is not available to the body.³⁵ Ideally, insulin should be refrigerated; but insulin loses very little of its potency if it is kept at room temperature (up to seventy-five degrees Fahrenheit).³⁶

A proper diet is important to people with either Type I or Type II diabetes. Foods that are high in glucose are limited but not removed entirely, because the body needs glucose to survive.³⁷ Not only is the type of food regulated, but the amount of food and the times to eat are also regulated. The food must be eaten at the time when the insulin that has been injected (or the pills that have been taken) is working and available to process the glucose. Too much food will overwhelm the available insulin or medication, and too little food will cause the body to experience hypoglycemia.³⁸ Exercise is important because it causes the body to use excess glucose, it helps the body process insulin,³⁹ and it helps the person with diabetes to lose excess weight hindering control of his disease. The final component in a plan of

29. M. DAVIDSON, *supra* note 21, at 454.

30. *Id.*

31. L. KRALL & R. BEASER, *supra* note 5, at 31.

32. *Id.* at 191.

33. *Id.* at 156.

34. *See supra* note 20 and accompanying text.

35. *See supra* text accompanying note 25.

36. L. KRALL & R. BEASER, *supra* note 5, at 119. Insulin begins to weaken after six to eight weeks without refrigeration or after exposure to extreme temperatures. *Id.*

37. *Id.* at 55-56.

38. *See supra* text accompanying notes 21, 25. Of course, an increase in the quantity of food has much to do with obesity, one of the conditions that can harm a person with diabetes.

39. L. KRALL & R. BEASER, *supra* note 5, at 82-84.

treatment is the person's self-monitoring of the level of glucose in his blood. While the person with diabetes, ideally, sees his doctor often, the testing done outside the doctor's office is of equal value.

The person with diabetes is able to check the level of glucose in his blood by using a small⁴⁰ machine called a glucometer.⁴¹ The person pricks his finger. He puts a drop of blood on a chemically treated strip, wipes the blood from the strip, and puts the strip in the glucometer. In minutes, the glucometer gives him an accurate reading of the level of glucose in his blood.⁴² With this knowledge, the person with diabetes can adjust his dosage of insulin or oral medication and also alter his diet to change the amount of glucose he eats.

Regular visits to a doctor are also important. The information gained from a visit is a measure of the average level of glucose in the blood over the previous two months. This information is gained from a simple blood test called glycohemoglobin measurement. The measurement gives an accurate estimate of the average state of control that a person with diabetes has over his glucose level.⁴³

D. *The Psychological and Social Effects of Diabetes*

The person with diabetes has much more to deal with than the medical aspect of his disease. He has to confront the fact that he is different. He must face the prospect of living with an incurable disease. The economics of diabetes are also stressful. The costs of diabetes include visits to the doctor, life insurance, health insurance, equipment, and insulin. These costs have been steadily rising.⁴⁴

The stress of diabetes is multiplied when the person with diabetes faces problems with employment. The 1976 National Health Interview Survey revealed some distressing trends. Men with diabetes between the ages of twenty and forty-four and women with diabetes between the ages of forty-five and sixty-four had significantly higher unemployment rates than those without diabetes in the same age groups.⁴⁵

40. My glucometer is approximately eight inches long. Other glucometers vary slightly in length.

41. At least fifteen brands of glucometers are available. See L. KRALL & R. BEASER, *supra* note 5, at 141-43.

42. The method described above is the one that the author uses. Other machines vary in the method of testing and the time needed. *Id.*

43. *Id.* at 135-37.

44. See Galloway, Sinnock & Davidson, *Economic Impact of Diabetes Mellitus*, in *DIABETES MELLITUS MANAGEMENT AND COMPLICATIONS* 377-88 (J. Olefsky & R. Sherwin ed. 1985); see also Krall, Entmacher & Drury, *Life Cycle in Diabetes: Socioeconomic Aspects*, in *JOSLIN'S DIABETES MELLITUS*, *supra* note 7, at 924-28.

45. Krall, Entmacher & Drury, *Life Cycle in Diabetes: Socioeconomic Aspects*, in *JOSLIN'S*

The federal government restricts adults with diabetes from certain jobs that are connected with public safety. Two agencies controlled by the Department of Transportation have regulations prohibiting people with diabetes from holding particular positions. The Federal Highway Administration, beginning in 1970, required that a person have "no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control" in order to be physically qualified to be a driver of a commercial motor vehicle in interstate commerce.⁴⁶ The Federal Aviation Administration makes insulin-controlled diabetes an absolute disqualifying condition for people seeking to become pilots.⁴⁷ The Federal Aviation Administration, in a rule that became effective in 1990, also prohibited all people with insulin-dependent diabetes from being air traffic control specialists.⁴⁸ The Justice Department has also discriminated against people with diabetes. The Federal Bureau of Investigation prohibits people with insulin-dependent diabetes from occupying the positions of special agent or investigative specialist. However, the FBI does allow people who have non-insulin-dependent diabetes to be special agents or investigative specialists.⁴⁹ Similar restrictions by the Treasury Department prevent people with insulin-dependent diabetes from being Secret Service agents, and the Drug Enforcement Agency also keeps people with insulin-dependent diabetes from being special agents.⁵⁰

The justification universally given by these agencies is that people with diabetes, especially insulin-dependent diabetes, pose too great of a threat to public safety. The driver or pilot with diabetes may experience hypoglycemia and have an accident. The special agent with diabetes may be incapacitated at a critical moment in his investigation of a suspect. Protecting the safety of the public is, of course, an interest of great importance. But, as Congress

DIABETES MELLITUS, *supra* note 7, at 920 (Table 45-5). Adults with diabetes that have some impairments of activity or limitations that do restrict their abilities to work are less likely to be employed than those adults with diabetes who have no such impairments or limitations. *Id.* at 919.

Adults with diabetes miss more work days on the average than adults without diabetes. However, over one-half of the total number of work days lost by workers with diabetes belonged to a small minority—approximately one-third—of those workers. *Id.* at 918-19. These findings show that making a judgment about the work performance of a diabetic by looking at statistics based on the aggregate number of adults with diabetes is risky at best.

46. 49 C.F.R. § 391.41(b)(3) (1990). The Federal Highway Administration made this rule because of some studies showing drivers with diabetes have a higher rate of accidents. 55 Fed. Reg. 41,028-29 (1990) (to be codified at 49 C.F.R. § 391) (proposed Oct. 5, 1990).

47. 14 C.F.R. § 67.13(f)(1) (1991) (first-class); 14 C.F.R. § 67.15(f)(1) (1991) (second-class); 14 C.F.R. § 67.17(f)(1) (1991) (third-class).

48. R. Ratner, American Diabetes Association Memorandum (Sept. 21, 1990).

49. *Cf. Davis v. Meese*, 692 F. Supp. 505, 510 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (2d Cir. 1990).

50. *Id.* at 515. The United States Customs Service does employ people with insulin-dependent diabetes. *Id.*

realized, this reason can be used as an excuse to keep people with diabetes out of jobs for which they are qualified. Congress passed the Rehabilitation Act⁵¹ in 1973 in part to protect federal employees with diabetes and other handicaps and people with diabetes and other handicaps who seek federal employment from restrictive federal regulation on the type of jobs they can have. Part II of this Note discusses the Rehabilitation Act and the standards it creates to determine whether a person with diabetes is qualified for a particular job.

II. THE REHABILITATION ACT

A. *Substantive Provisions and Implementing Rules*

The Rehabilitation Act of 1973 was enacted, in part, to "promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment."⁵² The statute contains three sections that require covered employers to give handicapped people equal opportunity for employment.

Section 501(b) mandates that most federal agencies adopt affirmative action plans for employment of the handicapped. Section 501(b) states, in part, the following:

Each department, agency, and instrumentality . . . in the executive branch shall . . . submit to [the Equal Employment Opportunity Commission and to the Interagency Committee on Handicapped Employees] an affirmative action program plan for the hiring, placement, and advancement of individuals with handicaps in such department, agency, or instrumentality.⁵³

Section 503(a) establishes an affirmative action plan for federal contractors. Section 503(a) states, in part, the following:

Any contract in excess of \$2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract, the party contracting with the United States shall take affirmative action to employ and advance in employment qualified individuals with handicaps as defined in section 706(8) of this title.⁵⁴

Section 504 forbids discrimination on the basis of handicap by any program or activity receiving funds from the federal government or by federal executive agencies. Section 504(a) states, in part, the following:

51. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C. §§ 701-796 (1988)).

52. *Id.* § 101(8), 29 U.S.C. § 701(8).

53. *Id.* § 501(a), 29 U.S.C. § 791(b) (1988).

54. As codified at 29 U.S.C. § 793(a) (emphasis added).

No *otherwise qualified* individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of his handicap, 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service.⁵⁵

Section 706(8) delineates who is a handicapped person under sections 501, 503, and 504. A handicapped individual is "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."⁵⁶ To implement section 504, each agency was required to adopt certain regulations.⁵⁷ The Attorney General coordinated all of these regulations⁵⁸ and adopted model definitions of a handicapped person and a qualified handicapped person. The definition of a handicapped person is identical to the definition in the statute.⁵⁹ The Justice Department regulation further defines a physical or mental impairment as "[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting" a body system.⁶⁰ Diabetes is included in a list of afflictions that qualify as physical or mental impairments.⁶¹ A qualified handicapped person is defined to be "[w]ith respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question."⁶²

The requirement of reasonable accommodation is particularly important. The focus shifts from whether the handicapped individual can perform the job to whether the employer has the ability to change the job requirements or alter the job description to allow the handicapped person to work. The Justice Department regulation requires reasonable accommodation from each employer unless the employer can prove that accommodation "would impose an undue hardship on the operation of its program."⁶³

The Justice Department does not further define reasonable accommodation or undue hardship. However, the Equal Employment Opportunity

55. As codified at 29 U.S.C. § 794(a) (emphasis added).

56. 29 U.S.C. § 706(8)(b).

57. *Id.* § 794(a).

58. Exec. Order No. 12,250, 3 C.F.R. 298 (1981).

59. *See* 28 C.F.R. § 41.31(a) (1991).

60. 28 C.F.R. § 41.31(b)(1) (1991).

61. *Id.*

62. 28 C.F.R. § 41.32(a). *See generally* Richards, *Handicap Discrimination in Employment: The Rehabilitation Act of 1973*, 39 ARK. L. REV. 1, 19-29 (1985) (discussing section 504's "otherwise qualified" requirement and the duty to accommodate); Annotation, *Who is "Qualified" Handicapped Person Protected from Employment Discrimination Under Rehabilitation Act of 1973 (29 USCS §§ 701 et seq.) and Regulations Promulgated Thereunder*, 80 A.L.R. FED. 830 (1986).

63. 28 C.F.R. § 41.53.

Commission has passed guidelines in these areas. The Commission suggests such practices as "job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers and interpreters, and other similar actions" as examples of reasonable accommodation.⁶⁴ The Commission also identifies three factors to consider when judging whether job accommodation would impose an undue hardship:

In determining . . . whether an accommodation would impose an undue hardship on the operation of the agency in question, factors to be considered include: (1) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget; (2) the type of agency operation, including the composition and structure of the agency's work force; and (3) the nature and the cost of the accommodation.⁶⁵

The inquiry has two distinct aspects. One is the accommodation itself. The excessive cost of an accommodation may be sufficient to impose an undue hardship and, therefore, make the accommodation unreasonable. The other two factors focus on the agency and take into consideration the particular, individualized nature of that agency.

B. Supreme Court Decisions Interpreting Section 504

The United States Supreme Court, in two cases, interpreted the "otherwise qualified" requirement in section 504. The first is *Southeastern Community College v. Davis*.⁶⁶ Davis was denied admission to the nursing program of Southeastern Community College because of her hearing disability.⁶⁷ The college relied on the assessment of the Executive Director of the North Carolina Board of Nursing in asserting that it could not reasonably accommodate Davis because doing so would prevent her from learning how to practice nursing correctly.⁶⁸ The Court first noted that a handicapped person may not be excluded from participation in a federally funded program simply because that person has a handicap.⁶⁹ However, the Court did interpret section 504 as allowing an institution administering a federally funded program to consider the limitations of the handicapped person. The

64. 29 C.F.R. § 1613.704(b)(2) (1991). See also 45 C.F.R. § 84.12(b)(2) (1991) for almost identical standards adopted by the Department of Health and Human Services.

65. 29 C.F.R. § 1613.704(c). The regulation does not identify these factors as being the only relevant ones.

66. 442 U.S. 397 (1979).

67. *Id.* at 401-02.

68. *Id.* The expert also implied that Davis would pose a threat to her future patients. *Id.* at 401 n.1.

69. *Id.* at 405.

Court stated, "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap."⁷⁰

The Court concluded that Davis was not otherwise qualified because she could not benefit from any changes in curricula or teaching practices that the regulation could require the college to make.⁷¹ The Court stated that accommodation was unreasonable if it caused a "fundamental alteration" in the program.⁷² The Court did issue a minor warning to institutions and agencies by implying that a refusal to accommodate may not be based only on an unwillingness to change past practices and to adjust to new realities:

It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of these goals without imposing undue financial and administrative burdens upon a State. Thus, situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory.⁷³

The Supreme Court interpreted the "otherwise qualified" provision of section 504 again in *School Board v. Arline*.⁷⁴ Arline was an elementary school teacher in Nassau County, Florida. The school board fired her after she contracted tuberculosis.⁷⁵ In addressing whether Arline was otherwise qualified, the majority stated that the district court had to "conduct an individualized inquiry."⁷⁶ The majority called an individualized inquiry "essential" because it would protect the handicapped person from prejudice or stereotypes.⁷⁷ In addition to important interests such as the health and safety of the handicapped person and protecting others from "significant health and safety risks,"⁷⁸ the Court said that the nature, duration, and severity of any possible risk should be evaluated.⁷⁹ The trial court would

70. *Id.* at 406.

71. *Id.* at 409-10.

72. *Id.* at 410.

73. *Id.* at 412-13.

74. 480 U.S. 273 (1987).

75. *Id.* at 276.

76. *Id.* at 287. The majority first decided whether an individual with a contagious disease was covered by section 504. They concluded that the purpose of section 504, protecting the handicapped from discrimination based on irrational beliefs and prejudices, would be frustrated if the section did not encompass people with contagious diseases. *See id.* at 284-86. The dissent criticized the majority's extension of section 504 and did not mention the requirement of "otherwise qualified." *See id.* at 289-93 (Rehnquist, J., dissenting).

77. *Id.* at 287.

78. *Id.*

79. *See id.* at 288 (citing Brief for American Medical Association as Amicus Curiae at 19, *School Board v. Arline*, 480 U.S. 273 (1987)). The majority stated that courts should normally defer to judgments of public health officials. *Id.* at 288. However, the majority declined to decide whether courts should defer to the judgments of private physicians upon which an employer has already relied. *Id.* at 288 n.18.

then decide if the employer could reasonably accommodate the handicapped person.⁸⁰

The Supreme Court, in these two cases, added some flesh to what were previously very bare-boned guidelines. The Court gave the section 504 employer much room to argue that a proposed accommodation would be unreasonable. However, the Court also stated that the specific medical risks should be carefully studied before making a decision. The Court further stated that the risks evaluated should not be the general risks associated with those who have a particular handicap, but the risks that the handicapped individual faces and the risks that he poses to others. These risks should also be evaluated in light of technological innovations that can diminish the risks and allow the agency to reasonably accommodate the handicapped individual.

C. Cases Applying Section 504 to People with Diabetes

Several people with diabetes have brought suit against their employers charging them with employment discrimination in violation of section 504. In most of these cases, the employer had either fired the person when the existence of the diabetes became known or had denied them employment altogether. In general, the people with diabetes fared well in these cases if they were able to perform the job or could do so with reasonable accommodation in spite of their condition. People with diabetes who had severe limitations because of the disease justifiably lost. However, one case illuminates the bias that still exists against people with diabetes and shows the unwarranted amount of deference that is given to a government agency.⁸¹

People with diabetes suing under section 504 have succeeded in two cases in state courts—*Jackson v. State*⁸² and *Commonwealth v. Tinsley*.⁸³ In both

80. *Id.* at 288. The majority remanded the case to the district court to determine whether Arline was otherwise qualified. *Id.* at 289.

81. There are some minor cases that either did not resolve the employment situation of the person with diabetes or decided the case on different grounds. *Brown v. County of Genesee*, 37 Fair Empl. Prac. Cas. (BNA) 1595 (W.D. Mich. 1985), was a ruling on a motion for summary judgment. The court decided that a genuine issue of fact existed as to whether the plaintiff, a prison guard with diabetes, was otherwise qualified. *Id.* at 1597. In *Wimbley v. Bolger*, 642 F. Supp. 481 (W.D. Tenn. 1986), the court rejected the plaintiff's claim under section 504, but the court ruled that his diabetes did not "substantially limit[] one or more major life activities that would interfere with plaintiff's work." *Id.* at 485 (citing 28 C.F.R. § 41.31 (1991)). The court, in dicta, stated that an agency is not obligated to transfer an employee in order to accommodate his handicap. *Id.* at 486. See also *Newsome v. Brady*, No. 91-C2166 (N.D. Ill. Sept. 26, 1991) (WESTLAW, Allfeds library, DCT file).

82. 544 A.2d 291 (Me. 1988), cert. denied, 491 U.S. 904 (1989). The plaintiff applied for jobs as a school bus driver and as a school custodian. He was not made a driver because of his diabetes. Maine changed its policy before the case was heard, and the plaintiff was later hired as a school bus driver. *Id.* at 295.

83. 128 Pa. Commw. 594, 564 A.2d 286 (1989), allocatur denied, 525 Pa. 605, 575 A.2d 570 (1990). The plaintiff, a school bus driver, had her license revoked because she had non-insulin-dependent diabetes. The revocation was required by PA. CODE § 71.3 (1989).

cases, the plaintiffs were in good control of their diabetes.⁸⁴ The two courts recognized that the employer had at least some obligation to show that the plaintiff was not otherwise qualified because of the stage of his disease and not just because he had insulin-dependent diabetes. The *Tinsley* court, in particular, overturned the state agency's decision because it was based on "speculation" about the risks of diabetes.⁸⁵ The *Tinsley* court also noted that accommodating the plaintiff by checking her blood glucose level would not cause an undue hardship or change the essential nature of the state school bus licensing program.⁸⁶

People who have insulin-dependent diabetes and are in control of their glucose level have also been successful in federal courts. The Ninth Circuit in *Bentivegna v. United States Department of Labor*⁸⁷ ruled for the person with diabetes, noting that "[b]lanket requirements must . . . be subject to the same rigorous scrutiny as any individual decision denying employment to a handicapped person."⁸⁸ The court went on to say that the regulation keeping a person with diabetes from a certain job must be "directly connected with, and must substantially promote 'business necessity and safe performance.'"⁸⁹ Los Angeles's job restriction did not meet this standard, and the Labor Department's speculation about the long-term health risks to the plaintiff reduced the protection given by section 504.⁹⁰

In contrast, the plaintiffs with poorly controlled diabetes in *Serrapica v. City of New York*⁹¹ and *Barth v. Gelb*⁹² lost. Both plaintiffs had high glucose levels and suffered from many of the health complications caused by diabetes.⁹³ The two courts ruled that the employers could not reasonably accommodate the two plaintiffs without increasing the risk of harm to both the plaintiffs and their coworkers.

The *Serrapica* court held that the plaintiff was not otherwise qualified to hold the job of a sanitation worker because he was a potential threat to

84. *Jackson*, 544 A.2d at 293; *Tinsley*, 128 Pa. Commw. at 599, 564 A.2d at 288.

85. *Tinsley*, 128 Pa. Commw. at 599, 564 A.2d at 288.

86. *Id.*

87. 694 F.2d 619 (9th Cir. 1982). The plaintiff was a "building repairer" employed by Los Angeles. The city fired him because it claimed that he had poorly controlled diabetes, claiming that this increased the risk of danger to himself. The plaintiff filed a complaint with the Labor Department, which ruled in his favor. An administrative law judge reversed the decision. *Id.* at 620-21.

88. *Id.* at 621.

89. *Id.* (citing 29 C.F.R. § 32.14 (1991)). The court warned that "business necessity" and "mere expediency" should not be the same. *Id.* at 621-22.

90. *Id.* at 622.

91. 708 F. Supp. 64 (S.D.N.Y.), *aff'd*, 888 F.2d 126 (2d Cir. 1989). The plaintiff tried to become a sanitation worker but was rejected because he had insulin-dependent diabetes. The city justified its decision by claiming that the plaintiff was a threat to himself, his coworkers, and the public.

92. 761 F. Supp. 830 (D.D.C. 1991).

93. *Serrapica*, 708 F. Supp. at 65-67; *Barth*, 761 F. Supp. at 836.

himself and his coworkers.⁹⁴ He could not perform the essential functions of the job—driving a truck and operating its heavy machinery.⁹⁵ The court stated that the city was “not obligated to materially rewrite its job description . . . or to overlook the handicap when the impairment relates to reasonable criteria for employability in a particular position.”⁹⁶

In *Barth*, the plaintiff applied to the United States Information Agency (USIA) for a job with an overseas Voice of America station. State Department regulations made him unavailable for worldwide duty because of his insulin-dependent diabetes, and he applied for a medical waiver of those regulations, which was denied. The *Barth* court found that the plaintiff was not otherwise qualified.⁹⁷ Few Voice of America posts to which he could be sent guaranteed him access to adequate medical care, and he needed medical care often because his medical condition would get progressively worse.⁹⁸ “The job involved more flexibility and wider availability than Mr. Barth could offer.”⁹⁹

These cases illustrate the correct application of section 504. The government agencies’ rules were evaluated in the light of the individual’s qualifications and the relationship of the rules to the promotion of safety. The plaintiffs who were otherwise qualified for the jobs prevailed, and the ones who were very ill from diabetes lost. However, the next case illustrates that courts are still willing to ignore the handicapped as individuals and rely on an agency’s speculations about a disease and the risks it supposedly creates.

*Davis v. Meese*¹⁰⁰ concerned the Federal Bureau of Investigation’s (FBI) blanket disqualification of people with insulin-dependent diabetes from the positions of special agent and investigative specialist.¹⁰¹ The plaintiff, a person with insulin-dependent diabetes, was already employed by the FBI as an accounting technician. He applied for jobs as a special agent and investigative specialist. The FBI summarily rejected his applications even though he met all of the other basic requirements needed to make the applications.¹⁰² The court upheld the FBI’s regulation, agreeing that people with insulin-dependent diabetes could not perform the essential functions

94. *Serrapica*, 708 F. Supp. at 72-73.

95. *Id.* at 73 (citing *Cook v. United States Dep’t of Labor*, 688 F.2d 669-70 (9th Cir. 1982 (per curiam)), *cert. denied*, 464 U.S. 832 (1983)).

96. *Id.*

97. *Barth*, 761 F. Supp. 830.

98. *Id.* at 835.

99. *Id.*

100. 692 F. Supp. 505 (E.D. Pa. 1988), *aff’d*, 865 F.2d 592 (3d Cir. 1989).

101. The FBI evaluates people with non-insulin-dependent diabetes on a case-by-case basis. *Id.* at 511.

102. *Id.* at 507. These requirements did not include a physical examination. A physical examination is given much later in the hiring process. *Id.* at 509. Therefore, Davis was not even given an opportunity to show that he had adequate control of his glucose level. *See also id.* at 511.

of special agent and investigative specialist and that the accommodation required of the FBI would be unreasonable.¹⁰³

III. CRITICISM OF DAVIS V. MEESE AND BLANKET PROHIBITIONS OF PEOPLE WITH INSULIN-DEPENDENT DIABETES FROM JOBS

A. *The Issue of Reasonable Accommodation and the FBI*

The FBI prevents people with insulin-dependent diabetes from occupying two jobs: special agent and investigative specialist. The position of special agent largely consists of office work with regular hours and scheduled tasks.¹⁰⁴ However, the special agent is required to be ready at a moment's notice to leave the office and perform in situations such as raids and surveillances. Meals may be delayed or missed altogether, and the agent could be required to perform heavy physical activity.¹⁰⁵ The investigative specialist conducts surveillance of foreign counterintelligence activity. The assignments can be long, occur at all hours of the day, and involve missing or delaying meals. Agents also, of course, have to be inconspicuous when doing surveillance.¹⁰⁶ Special agents and investigative specialists occasionally work without partners and "back-up" personnel.¹⁰⁷

The FBI claimed that budget limitations prevented it from reasonably accommodating people with insulin-dependent diabetes.¹⁰⁸ The FBI rejected proposed accommodations creating limited-duty positions and exempting people with insulin-dependent diabetes from dangerous missions.¹⁰⁹ In addition to problems of financing, the FBI claimed that the morale of special agents, investigative specialists, and the whole agency would suffer if people with insulin-dependent diabetes were given special treatment.¹¹⁰

The *Davis* court accepted the FBI's arguments. It found the hazards of the jobs too great to allow a person with insulin-dependent diabetes to occupy them. The court found that the uncertain working conditions could cause those with insulin-dependent diabetes to experience hypoglycemia,¹¹¹ posing a risk to coworkers and others around them.¹¹² The court also stressed that because no accurate test existed to determine which people

103. *See id.* at 518-20.

104. *Davis v. Meese*, 692 F. Supp. 505, 511 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3d Cir. 1989).

105. *Id.* at 512.

106. *Id.*

107. *Id.*

108. *Id.* at 515.

109. *Id.* at 515-16.

110. *Id.* at 516.

111. *See supra* notes 20-24 and accompanying text.

112. *Davis*, 692 F. Supp. at 518.

with insulin-dependent diabetes were predisposed to hypoglycemia, the FBI was justified in excluding all people with insulin-dependent diabetes from the positions.¹¹³ The court also believed the FBI's contention that budget problems prevented the agency from creating limited-duty positions and doing so "would seriously impede the basic function of the FBI."¹¹⁴

The *Davis* court exaggerated the accommodation that would be necessary to allow the person with insulin-dependent diabetes to function as a special agent and an investigative specialist. The effects of the change in the job routine could be mitigated by certain actions of the agent. These actions require little or no help from the FBI. The court also gave the FBI excessive leeway in its claim that structural, budgetary, and morale factors preclude changing the jobs to allow people with diabetes to perform them. The changes required of the FBI would definitely not alter the FBI as much as it claimed. Furthermore, one other agency with a similar restriction might take the lead and open up opportunities for people with diabetes, and it does not make the claims the FBI does.

1. Precautions by the Special Agent or Investigative Specialist with Insulin-Dependent Diabetes

The person with insulin-dependent diabetes can control an insulin reaction. Some reactions come without warning,¹¹⁵ but those who maintain good control over their blood sugar levels can recognize the symptoms.¹¹⁶ Food eaten promptly will raise the blood sugar level back to normal and stop the hypoglycemic reaction.¹¹⁷

The agent or specialist with diabetes can do several things that will severely reduce the chance of a hypoglycemic reaction. He can carry food at all times. Candy and glucose tablets are small and can easily fit in a coat pocket, a wallet, or a purse. He can obtain a small glucometer that would be amenable to travel.¹¹⁸ Glucometers require very little space and light to use; consequently, they are adaptable to many of the adverse conditions agents and specialists face.¹¹⁹ Also, the person with diabetes can

113. *Id.* at 517. The FBI did not argue that the possibility of hyperglycemia was also a threat to safe job performance. *Id.* at 512.

114. *Id.* at 519.

115. *See supra* note 23 and accompanying text.

116. *See supra* note 24 and accompanying text.

117. *See supra* note 22 and accompanying text. People with non-insulin-dependent diabetes can also have hypoglycemic reactions. *See supra* notes 20-21 and accompanying text.

118. *See supra* notes 39-41 and accompanying text. Certain glucometers are no bigger than a pen and take thirty seconds to use. *See Diabetes Forecast*, Mar. 1991, at 37, 63.

119. The court concluded that a person with diabetes could carry a glucometer along with insulin and syringes. However, it disparaged this practice by saying that there would not be enough light to read the glucometer or the syringes. *Davis*, 692 F. Supp. at 513-14. In this author's experience, glucometers require very little light to read.

prepare syringes in advance and carry them on the job. Unrefrigerated insulin's effectiveness lasts for six to eight weeks¹²⁰—longer than any FBI mission under harsh conditions would likely last. The person with diabetes can also raise his glucose level by eating more food than normal or reducing his insulin dosage. This does put his health at risk by a small amount, possibly causing hyperglycemia.¹²¹ However, doing this would reduce the risk of an insulin reaction, the main concern of the FBI. The chance of harm occurring to others would be reduced accordingly. The only accommodation the FBI would have to make for any of the above precautions would be allowing the agent or specialist to carry extra equipment; indeed, in some situations, the person could accommodate himself without the knowledge of the FBI.

2. Possible Changes in the Selection System and Positions

The FBI could reasonably accommodate people with insulin-dependent diabetes by changing some of the agency's procedures. First, the FBI could allow people with insulin-dependent diabetes to enter the selection process. Currently, the FBI disqualifies these people from even applying for the positions.¹²² The FBI's procedure used for hiring special agents and investigative specialists is extensive. It consists of personal interviews, entrance testing, and background checks.¹²³ The relatively few applicants who have insulin-dependent diabetes,¹²⁴ in combination with the slim chance of any one applicant being hired, means that the number of people with diabetes that will become special agents or investigative specialists will be very small. Therefore, the FBI will not have to accommodate many people.

Second, the FBI could alter the duties of some special agents. All applicants for the position of special agent enter under five programs: Law, Accounting, Engineering/Science, Language, and Diversified. Each program requires a college degree and either specialized education, ability, or work experience.¹²⁵ The FBI could restrict the duties of those people with diabetes who have graduate degrees or advanced work experience. For example, the

120. See *supra* note 35 and accompanying text. Several products exist that keep insulin cool. These products usually have extra space for syringes.

121. The symptoms of hyperglycemia take days or weeks to appear. See *supra* note 26 and accompanying text. However, hyperglycemia does not always occur when the level of glucose is higher than normal. Glucose does not appear in the urine until the glucose level reaches 160-180 mg/dl—above the normal level of 60-100 mg/dl. L. KRALL & R. BEASER, *supra* note 5, at 14.

122. *Davis*, 692 F. Supp. at 507.

123. See *id.* at 508-10. The process can certainly be considered selective: between January, 1985 and November, 1987, only approximately 1,700 out of 29,000 applicants for the position of special agent were chosen. *Id.* at 509.

124. See *supra* text accompanying note 17.

125. *Davis*, 692 F. Supp. at 508.

person with diabetes who has a Ph.D. in Russian or ten years as a C.P.A. would not take part in arrests or surveillance activities that present hazardous conditions.¹²⁶ This person would concentrate more on the investigative aspect of the position of special agent. The agents with diabetes who could meet this requirement would be relatively small; therefore, the accommodation would also be small. The change would fall short of the "fundamental alteration"¹²⁷ that the *Davis* court felt was necessary. The "basic function" of the FBI¹²⁸ would not be hindered, and this accommodation would not, therefore, be an undue hardship.¹²⁹

The FBI argued that the limited funding it received from Congress precluded it from changing the functions of special agent or investigative specialist.¹³⁰ However, the court's opinion contains no figures supporting the FBI's assertion. It is possible that because of the limited number of people with diabetes that would be hired the FBI could afford to change the job of special agent in the limited way outlined above. The Supreme Court in *Southeastern Community College v. Davis*¹³¹ warned that this type of arbitrary argument would be unacceptable: "an insistence on continuing past requirements and practices . . . [that] arbitrarily deprive[s] genuinely qualified handicapped persons"¹³²

The *Davis* court, instead of the FBI, should have set the guidelines for what was reasonable accommodation.¹³³ Because of the small number of

126. The FBI does place special agents on temporary limited duty. *Id.* at 519.

127. *Id.* at 519-20.

128. *Id.* at 519.

129. 28 C.F.R. § 41.53 (1991); see also *Prewitt v. United States Postal Service*, 662 F.2d 292, 310 (5th Cir. 1981).

130. *Davis*, 692 F. Supp. at 515-16.

131. 442 U.S. 397 (1979).

132. *Id.* at 412. Changing the position to highlight the skills of such "overqualified" agents could even be seen as conserving the resources of the FBI by utilizing an agent's special talent to its potential. The morale problems that the FBI feared are speculative; it is the kind of risk the *Tinsley* court rejected. *Commonwealth v. Tinsley*, 128 Pa. Commw. 594, 564 A.2d 286 (1989), *allocatur denied*, 525 Pa. 605, 575 A.2d 570 (1990). The psyches of thousands of men and women are not proper issues for a court to evaluate with only the prediction of an agency as support. *But see Barth v. Gelb*, 761 F. Supp. 830, 838 (D.D.C. 1991) (accepting USIA's assertion that morale would be hurt if plaintiff were assigned only to certain stations).

For a cost-based method of deciding section 504 claims, see Janis, *A Unified Theory for Section 504 Employment Discrimination Analysis: Equivalent Cost-based Standards for "Other-wise Qualified" and "Reasonable Accommodation"*, 43 WASH. & LEE L. REV. 63 (1986).

133. A model of reasonable accommodation that the *Davis* court could have used is found in *Rodgers v. Lehman*, 869 F.2d 253 (4th Cir. 1989). The plaintiff, a civilian employee of the Navy Department, was an alcoholic. After having been fired for excessive absences, *Rodgers* sued under section 501. Like section 504, section 501 mandates reasonable accommodation unless it imposes an undue hardship. 29 C.F.R. § 1613.704 (1990). The Fourth Circuit decided that in almost all circumstances, a federal agency must allow the employee the opportunity to complete a treatment program twice before it can fire him. See *Rodgers*, 869 F.2d at 259. If a federal agency must give an alcoholic multiple chances to be cured, it is reasonable that the same agency should have to make minor changes in its operation to accommodate the person

people with insulin-dependent diabetes that would be hired and because the accommodation would be limited, the FBI would not experience an undue hardship.¹³⁴ This becomes even more clear when one considers that other agencies are contemplating similar changes to accommodate people with insulin-dependent diabetes.

3. The Federal Highway Administration's Proposed Rule Change

The Federal Highway Administration currently prohibits persons with insulin-dependent diabetes from driving a commercial vehicle in interstate commerce.¹³⁵ The rule, adopted in 1970, was created because the agency believed that persons with insulin-dependent diabetes were more likely to get into accidents and because the agency could not medically determine which people were not increased safety risks.¹³⁶

The Federal Highway Administration, on October 5, 1990, proposed to change this rule.¹³⁷ The new rule would allow people with insulin-dependent diabetes to drive commercial vehicles in interstate commerce after being medically tested to see if they maintained adequate control over their glucose levels. Insulin-dependent drivers would also be subject to some restrictions until they demonstrated that they were not risks to public safety.¹³⁸ The person with diabetes who would be allowed to be a driver must first "have had no severe hypoglycemic reaction resulting in loss of consciousness or seizure during the last five years."¹³⁹ He could not be a driver of vehicles carrying passengers or hazardous materials.¹⁴⁰ The driver would also have to come back to his normal place of work at the end of the day. To get a commercial driver's license, an endocrinologist must certify that the driver has control over his diabetes. The doctor would thoroughly examine the person by testing his glucose level, checking for neuropathies, and looking for other complications that the diabetes may have caused.¹⁴¹ The driver, once qualified, would have to be examined every six months. He would

with diabetes. To allow a person whose disease, alcoholism, puts himself and others at risk, a greater opportunity to keep his job than one who can greatly reduce the risks posed by his disease is unfair and contrary to the spirit and intent of the Rehabilitation Act.

134. See 29 C.F.R. § 1613.704(c) (1990).

135. 49 C.F.R. § 391.41(b)(3) (1990).

136. See 55 Fed. Reg. 41,028 (1990). *But see* Hansotia & Broste, *The Effect of Epilepsy or Diabetes on the Risk of Automobile Accidents*, NEW ENG. J. MED., Jan. 3, 1991, at 22 (People with diabetes have a slightly increased risk of accidents, but the risk is not significantly higher than that of people without diabetes.).

137. 55 Fed. Reg. 41,028 (to be codified at 49 C.F.R. § 391.41). The proposal sought written comments from interested persons and organizations.

138. *Id.*

139. *Id.* at 41,034.

140. *Id.*

141. *Id.*

also have to check his blood glucose level several times during each day that he is driving. The driver must carry insulin and syringes in his vehicle, and he must also carry food that could rescue the driver from an insulin reaction.¹⁴²

The proposed rule is a positive step in the quest for equal opportunity for the person with insulin-dependent diabetes. However, the agency still carries the vestiges of unfounded bias and paternalism toward the driver with diabetes in its requirements that the driver must return to his normal place of work and that the driver not have had any insulin reactions for five years. These restrictions limit the number of miles that a driver can travel, a factor that, in turn, reduces the type of driving jobs available to him. Even so, the proposed rule is evidence that an agency can change its practices when it sees that beliefs held to be true in the past are proven false in the face of conscientious maintenance of personal health and new medical technology. Unfortunately, the proposed rule also shows that old habits of downgrading the handicapped persist even after an agency professes a change in belief and practice.

B. *Correctly Evaluating the Amount of Risk*

The *Davis* court used a "reasonable probability of risk" standard to determine whether the positions of special agent and investigative specialist posed a threat to the person with diabetes and to others around him. If the job requirements created a reasonable probability of risk, the prohibition of people with insulin-dependent diabetes would be upheld.¹⁴³ In actions under the Rehabilitation Act,¹⁴⁴ this test looks different, and *Davis's* case would have come out differently had he sued under section 501. The standard of section 501 is more appropriate for determining reasonable probability of risk, and in the interest of uniformity, courts should use this test for both section 504 and section 501 claims.

The standard under section 501 was first used by the Ninth Circuit in *Mantolite v. Bolger*.¹⁴⁵ The appellate court held that a federal employer could consider the potential of future injury when deciding whether to hire a handicapped person.¹⁴⁶

However, the risk of future injury must rise to the level of a "reasonable probability of substantial harm."¹⁴⁷ The employer, in determining this risk,

142. *Id.* at 41,035.

143. *Davis*, 692 F. Supp. at 520.

144. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 501, 29 U.S.C. § 791 (1988).

145. 767 F.2d 1416 (9th Cir. 1982). The plaintiff had epilepsy, and she applied for a job with the Postal Service working with a letter sorter. The Postal Service rejected her application because it believed that she might be injured by the machine should she have a seizure. *Id.* at 1418-19.

146. *Id.* at 1422 (citing *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Haw. 1980)).

147. *Id.*

has the obligation to consider the person's work history and medical history without relying on the agency's subjective beliefs. The inquiry contemplated by the court was a case-by-case evaluation of all applicants with handicaps.¹⁴⁸ The court realized that a simple elevated risk standard would provide insufficient protection to the handicapped:

Although we can appreciate the federal employer's concern for the safe and efficient operation of a particular workplace, an "elevated risk" standard does little to recognize the appropriate factors affecting the ability of an individual who seeks to work in an environment which the government itself has opened to those with physical or mental handicaps.¹⁴⁹

This test should also be applied to federal agencies which discriminate in the area of employment against people with diabetes. If the plaintiff in *Davis* had sued under section 501,¹⁵⁰ he would likely have prevailed. Had the FBI been required to follow the information-gathering requirements found by the Ninth Circuit in *Mantolete*, it would have clearly failed because the FBI did not even consider any past history of Davis. Also, cases interpreting section 504 clearly imply that an employer covered by the Rehabilitation Act should evaluate each person individually when determining his qualifications for a job.¹⁵¹ Requiring identical standards of risk for section 501 and section 504 would result in a more accurate assessment of each job's risk. Identical standards would also result in a better determination of each handicapped individual's capability—integral components in ensuring equal opportunity for the handicapped.

The *Davis* court, in applying its "reasonable probability" test, did not inquire into the risk of harm that Davis could cause. In fact, the court acknowledged the possibility that the FBI was overstating the potential risk:

Although defendants may be unduly alarmed as to the likelihood and frequency of [severe hypoglycemic episodes], the evidence is convincingly clear that special agents and investigative specialists have frequently been placed in situations where, if they were insulin-dependent diabetics, they would have been in real and substantial danger of a severe hypoglycemic

148. *Id.* at 1423.

149. *Id.* at 1424; see also Perras & Hunter, *Handicap Discrimination in Employment: The Employer Defense of Future Safety Risk*, 6 J.L. & COMM. 377 (1986).

150. The *Mantolete* majority stated that no reason existed to have different definitions of a qualified handicapped person for sections 501 and 504 except that section 501 explicitly requires a federal agency to consider accommodation of the handicapped person. *Mantolete*, 767 F.2d at 1421. Section 501 also has an affirmative action requirement unlike section 504. *Id.* at 1425; compare 29 U.S.C. § 791 (1988) with 29 U.S.C. § 794 (1988). One judge, Judge Rasheedie, voted to keep open the question of whether section 504 should be treated like section 501 because of this lack of an affirmative action provision. *But see* Hentoff, *The Rehabilitation Act's Otherwise Qualified Requirement and the AIDS Virus: Protecting the Public from AIDS-Related Health and Safety Hazards*, 30 ARIZ. L. REV. 571 (1988) (arguing that the section 501 standard should not apply to section 504).

151. See *supra* notes 63-95 and accompanying text.

occurrence because they would have been unable to timely test and/or correct a low blood sugar level.¹⁵²

The *Davis* court used a hypothetical agent and specialist with diabetes to determine whether there was a reasonable probability of harm.¹⁵³ The court assumed that if a person with diabetes was thrust into a new situation, he would suffer an insulin reaction. The court neglected to consider that diabetes is a very "fact-specific" disease. It affects its victims in different ways but is also controlled to varying degrees by each person with diabetes. Some are more susceptible to insulin reactions than others. The information that the *Mantolite* standard¹⁵⁴ requires the employer to obtain would weed out those people with diabetes who are more likely to suffer from hypoglycemic reactions. Those people with diabetes who remain would be ones with such a degree of control over their disease that they would be "thoroughly trained, experienced and well-motivated"¹⁵⁵—excellent traits in an FBI special agent or investigative specialist.

Finally, courts' interpretations of the Rehabilitation Act should be uniform with the Americans with Disabilities Act of 1990.¹⁵⁶ Section 102 of the Act forbids a covered employer from discriminating against a qualified person with a disability on the basis of that disability.¹⁵⁷ Although the Act's definition of a disability and qualified individual with a disability are substantially the same as those contained in the Rehabilitation Act and its accompanying regulations,¹⁵⁸ the Act expands the definition of reasonable accommodation. Furthermore, the inquiry into the risk of injury posed by the disability is reformed. Covered employers are allowed to require that a disabled person not pose a "direct threat" to the safety of others in the

152. *Davis*, 692 F. Supp. at 519.

153. The *Davis* court cited three cases supporting its proposition that blanket exclusion of handicapped people from certain jobs was proper: *Local 1812, Am. Fed'n of Gov't Employees v. Department of State*, 662 F. Supp. 50 (D.D.C. 1987) (People with AIDS were barred from the Foreign Service.); *Sharon v. Larson*, 650 F. Supp. 1396 (E.D. Pa. 1986) (People needing special glasses were denied drivers' licenses.); *Anderson v. USAIR*, 619 F. Supp. 1191 (D.D.C. 1985), *aff'd*, 818 F.2d 49 (D.C. Cir. 1987) (The blind were prevented from sitting by emergency exits on airplanes.). While the risks of danger created by people with AIDS are in dispute, the other two situations create more risk than allowing a person with diabetes to be a special agent or investigative specialist. The visually impaired cannot control their handicaps; many people with diabetes can take steps to decrease the risk to public safety.

154. For other standards used in section 504 cases, see *Strathie v. Department of Trans.*, 716 F.2d 227 (3d Cir. 1983) (appreciable risk); *New York Univ. v. Doe*, 666 F.2d 761 (2d Cir. 1981) (significant risk).

155. *Davis*, 692 F. Supp. at 519.

156. Pub. L. No. 101-336, 104 Stat. 327 (codified in scattered sections of 42 U.S.C.A. (1990)). This Act was passed "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." *Id.* § 2(b)(2) (codified at 42 U.S.C.A. § 12,101(b)(2) (1990)).

157. *Id.* at § 101(5)(b) (codified at 42 U.S.C.A. § 12,111(5)(a) (1990)).

158. Compare 42 U.S.C.A. § 12,111(8) (1990) and 42 U.S.C.A. § 12,102(10) (1990) with 28 C.F.R. § 41.32(a) (1990) and 29 U.S.C. § 706(7)(b) (1988).

workplace.¹⁵⁹ A direct threat is defined as a "significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."¹⁶⁰

Congress intended the determination of whether the risk to the safety of others is significant to be a "fact-specific individualized inquiry."¹⁶¹ The House Education and Labor Committee stated, "The determination that an individual with a disability will pose a safety threat to others must be made on a case-by-case basis and must not be based on generalizations, misperceptions, ignorance, irrational fears, patronizing attitudes, or pernicious mythologies."¹⁶²

Although the employment provision of the Americans with Disabilities Act is far-reaching, federal agencies are not covered by the Act. However, this exemption from the Act does not mean that federal agencies should continue to exclude all people with insulin-dependent diabetes from particular jobs. Congress intended the Act to work hand-in-hand with the Rehabilitation Act to prevent illegal employment discrimination.¹⁶³ Considerations of fairness and equality require that federal agencies be treated the same as private and state employers. Many jobs in the private sector are dangerous and fraught with the same dangers as those contemplated in *Davis*. However, these employers must comply with the strict standards enumerated in the Americans with Disabilities Act. No adequate reason can be given why federal agencies should be treated differently than the average private or state employer when the federal government is expected to lead in battles against discrimination.

CONCLUSION

When deciding an action brought under section 504 by a person with insulin-dependent diabetes, a court should first decide if the risk of future harm would be increased by that person's employment in the job in question. The court should examine that individual's medical history and not base its judgment on the perceived increased chance of danger that diabetes causes generally. A court should also reduce its trust in the assertions of a government agency when it decides what is a reasonable accommodation. The agency's word must not be the sole basis of what accommodation can reasonably be made to allow the person with diabetes to occupy a job. Bureaucratic inertia and intransigence should make a court realize that it must compel an agency to thoroughly study proposed accommodations, and

159. 42 U.S.C.A. § 12,113 (1990).

160. *Id.* § 12,111.

161. H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2., at 57 (1990).

162. *Id.* at 56.

163. 42 U.S.C.A. § 12,117(b) (1990).

the agency's conclusions should be strictly scrutinized if they would deny a job to a person with insulin-dependent diabetes.

The solution to the problem of employment discrimination against people with insulin-dependent diabetes is found in trust and freedom. Diabetes causes many changes in a person's life, but perhaps the most profound is that the person with diabetes realizes how much control he has over his health and his future. With a lot of work and patience, he finds that he can live normally and not much differently than those without diabetes. An agency should aggressively pursue people with diabetes rather than repel them because they have character traits—self-reliance, initiative, and the ability to adjust to new situations—that would make them profitable employees. A little trust invested by the agency in an employee's ability to control his disease would reap a great reward. However, the paternalistic attitudes of many federal agencies dampen the freedom of a person with diabetes that comes with knowing that you can control the quality of your life, that you can do a job as well as a "healthy" person. No person with diabetes can truly enjoy that freedom as long as barriers reach high, doors stay locked, and the needle of discrimination remains sharp.