UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

UNITED STATES OF AMERICA

Plaintiff

v. **CIVIL ACTION NO.** 3:00CV377BN

MISSISSIPPI DEPARTMENT OF PUBLIC SAFETY

Defendant

PLAINTIFF UNITED STATES' MEMORANDUM IN SUPPORT OF MOTION IN LIMINE

I. INTRODUCTION

Pursuant to Federal Rules of Evidence 401, 402, 403 and 702, this court should exclude the report and testimony of Dr. Frederick Carlton (the Mississippi Department of Public Safety's (MDPS) expert witness)[1], and the testimony of any other MDPS witness, to the extent they seek to challenge or criticize Mr. Collins' 1993 insulin regimen and diabetes care as prescribed by his physician. Considerations of fairness require that MDPS be estopped from relying upon a 2003 medical opinion with respect to Mr. Collins' 1993 diabetes care, where the 2003 opinion is contrary to the opinion of MDPS' own physician, who in 1993 examined Mr. Collins, discussed his diabetes and insulin treatment with him and concluded that he was medically qualified to

[1]Defendants disclosed Dr. Frederick Carlton as an expert witness and provided his written report on September 19, 2003 and his deposition testimony on October 21, 2003.

attend the Academy.[2] In addition, Dr. Carlton's opinions on Mr. Collins' 1993 insulin regimen and diabetes care are not relevant to the legal issues in this case and will not assist the trier of fact in understanding the evidence or determining a fact in issue.[3]

The essence of Dr. Carlton's opinion is that in 1993, Mr. Collins was "destined to have problems with hypoglycemia" while at the MDPS Academy. In his report, Dr. Carlton states that Mr. Collins:

> was poorly prepared to enter training at the MS Law Enforcement Officers Training Academy because of the insulin regimen he was taking as well as his poor understanding of his disease. Given his regimen and understanding of diabetes management, he was destined to have problems with hypoglycemia as long as he was a cadet. Hypoglycemia could have been avoided or drastically reduced had he made basic changes in his care. This was his responsibility and it is unreasonable to expect others (except for his physician) to have known what changes to make.

(Ex. 2, Expert Report of Frederick B. Carlton, Jr., M.D. at 3.) Dr. Carlton's report also states that the insulin regimen prescribed by Mr. Collins' physician in 1993 was "the least effective way to manage a type 1 diabetic." (Id. at 2.) In Dr. Carlton's view, Mr. Collins should have been taking more than one shot of insulin per day to effectively manage his diabetes, and should have known to reduce his insulin dosage at the Academy, in light of exercise.[4] (Id.; Ex. 3,

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[2] In contrast, Dr. Carlton has never examined Mr. Collins. Also, because Dr. Carlton assesses Mr. Collins' 1993 diabetes care through the *retro-spectroscope* of 2003 medical understandings, his opinion is inappropriate and will confuse the jury. (Ex. 1, Vinicor Dep. at 19-21.)

[3] Defendants, as the parties offering this expert testimony, have the burden to prove its reliability and relevance. Greer v. Bunge Corp., 71 F.Supp.2d 592, 594 (S.D. Miss. 1999); see also Federal Rule of Evidence 401.

[4] Insulin lowers blood sugar. Exercise can also lower blood sugar. Since Mr. Collins experienced hypoglycemia (low blood sugar) at the Academy, Dr. Carlton opines that Mr. Collins should have injected a lesser-than-normal dose of insulin to account for the intense exercise at the Academy.

Carlton Dep. at 10.)

Dr. Carlton's opinion that Mr. Collins could have prevented or treated his hypoglycemia at the Academy *if* he had a different insulin regimen and *if* he had a different understanding of how to care for his own diabetes is irrelevant because it does not "make the existence of any fact that is of consequence to the determination of the action more probable or less probable." See FRE 401. The legal issues in this case are whether MDPS failed to grant Mr. Collins' requests for reasonable accommodation (requests for available food to raise his blood sugar) and whether MDPS terminated Mr. Collins because of his disability. Dr. Carlton's report and deposition testimony do not address these issues. Instead, Dr. Carlton suggests, based on 2003 science and his own speculation, that had Mr. Collins been using a multiple injection insulin regimen in August 1993 (which he was not), and had he been self-adjusting his insulin (which he was not), he could have controlled his own hypoglycemia and thereby eliminated his need for the food that he requested as a reasonable accommodation for his diabetes.

II. ARGUMENT

A. Because MDPS' Physician Medically Cleared Mr. Collins to Attend the Academy in 1993 – While Aware of His Diabetes and Treatment – MDPS Should Be Estopped from Introducing The Testimony of A Second Physician, Ten Years Later, Which Contradicts Its Own Physician's Earlier Finding

In 1993, Dr. Mark Franklin Brooks, M.D., conducted a pre-employment medical examination of each MDPS cadet applicant, including Mr. Collins. (Ex. 4, Stewart Dep. at 19; Ex. 5, 30(b)(6) Dep. at 55-60.)[5] That 1993 medical examination (which was based upon the

[5] Douglas Stewart was the MDPS Personnel Director in 1993. Counsel for MDPS stated at the 30(b)(6) deposition that Mr. Stewart's deposition testimony regarding Mr. Collins' preemployment medical exam is also binding on the agency as 30(b)(6) deposition testimony on this issue. (Ex. 5, 30(b)(6) Dep. at 62.)

military's exam) included, among other things, a medical history, a physical exam, and a test of each applicant's blood sugar. (Ex. 4, Stewart Dep. at 9; Ex. 5, 30(b)(6) Dep. at 56-57.) In conducting the MDPS examination, it was Dr. Brooks' responsibility to seek further information about each applicant's medical conditions and treatments thereof, if he deemed it necessary (including a referral back to the applicant's treating physician), and to eliminate any candidate whom he believed was "destined to fail." (Id. at 63-64.) Dr. Brooks discussed Mr. Collins' diabetes and insulin regimen with him at his pre-employment exam. (Ex. 4, Stewart Dep. 19-20, 45.) MDPS' 1993 Personnel Director, Douglas Stewart, was also present at Mr. Collins' preemployment medical exam and he discussed Mr. Collins' insulin dependent diabetes with him. (Id.) After the examination, Dr. Brooks medically approved Mr. Collins to attend the Academy. (Ex. 5, 30(b)(6) Dep. at 65.) Dr. Brooks did not raise any concerns with Mr. Collins about his diabetes or insulin regimen in light of the particular physical requirements of the Academy. (Id.)

Considerations of fairness dictate that MDPS – whose physician approved Ronnie Collins to attend the Academy in 1993, knowing his insulin regimen, having the opportunity to interview him, and having the responsibility to get further information if he deemed necessary – should be estopped, more than ten years later, from asserting a contradictory opinion though Dr. Carlton. Stated another way, MDPS should not be permitted to submit purported "expert testimony" that Mr. Collins was destined to fail at the Academy because of his medication, when its own physician, in 1993, deemed him qualified, without reservation, to attend the Academy. Further, Mr. Collins relied on the MDPS doctor's determination that he was qualified, given his diabetes treatment, and he was not advised by any MDPS representative to make any modifications to his

diabetes treatment.

In addition, Dr. Carlton's report should be excluded because Dr. Carlton evaluates Mr. Collins' August 1993 diabetes care in light of 2003 medical knowledge and recommendations, rather than what was known in 1993. (See Ex. 1, Dr. Vinicor Dep. at 19-21.)[6] His anachronistic evaluation, which conflicts with the evaluation of MDPS' own physician in 1993, is inappropriate and likely to confuse the proceedings.

B. Dr. Carlton's Views About Mr. Collins' Insulin Regimen Are Not Relevant To MDPS' Liability For Failing To Accommodate and Terminating Him

Dr. Carlton's opinions on Mr. Collins'1993 diabetes care are not relevant to MDPS' liability; an employer is not excused from the obligation to provide a reasonable accommodation because it believes that an individual with a disability should be on a different medication, or using different mitigating measures. The ADA requires that a determination of whether an individual has a disability (an impairment that substantially limits a major life activity) be based on the individual's condition "as is." As the Supreme Court has instructed, an individual with a disability must be evaluated in light of the mitigating measures that he actually uses, not what measures might be available to him. Sutton v. United Air Lines, Inc., 527 US 471, 482 (1999) (Courts should consider whether an individual is "presently – not potentially or hypothetically – substantially limited.") The employer is not allowed to second-guess the medication or other mitigating measures recommended by a physician and/or chosen by the individual. See also

[6]In fact, as Plaintiff's evidence will show, Mr. Collins had acceptable diabetes treatment in August 1993. (Ex. 1, Vinicor Dep. at 15, 20:19-22; 51-52.) He also had a reasonable understanding of how to manage his diabetes and knew the relationship between food, insulin, and exercise sufficiently to work two jobs (as a police officer and correction officer) without his work ever suffering as a result of his diabetes. (Id. at 15, 31:3-11; 52:11-22; 54:17-20; See also Ex. 6 and Ex. 7, attached affidavits of Robert Armstrong and Albert Robinson)

Nawrot v. CPC Int'l, 277 F.3d 896, 904 (7th Cir. 2002) (When considering the effects of mitigating measures, the court "consider[s] only the measures actually taken and consequences that actually follow."); Saks v. Franklin Covey Co., 117 F. Supp. 2d 318 (S.D.N.Y. 2000) (Plaintiff alleging substantial limitation in reproduction because of infertility should be assessed in her actual condition without speculation whether she could become pregnant with more procedures such as in vitro fertilization); Finical v. Collections Unlimited, Inc., 65 F.Supp.2d 1032 (D. Ariz. 1999) (Court refused to evaluate plaintiff's hearing limitation with hearing aids, where she did not use them because they picked up too much background noise).

In accord with the Supreme Court's instruction, MDPS' obligation to provide a reasonable accommodation was not dependent upon the medication regimen followed by Mr. Collins. Rather, that obligation depended upon whether Mr. Collins requested an accommodation and whether that request was reasonable. Ronnie Collins' insulin regimen in 1993 – as prescribed by his physician – was one injection of intermediate acting insulin per day, and Mr. Collins had never been advised or instructed to manipulate his insulin dose. Hence, once Mr. Collins requested additional food to assist him in controlling his diabetes, MDPS was obligated to accommodate his request in light of his current condition, so long as the accommodation requested did not cause an undue hardship.

Even assuming, arguendo, that a different insulin regimen might have been more effective in managing his diabetes at that time, MDPS was still obligated to grant Mr. Collins' request for more food if that request was a "reasonable accommodation" that would have enabled him to perform the functions of a cadet. Consequently, Dr. Carlton's opinions as to what may have been more effective treatment have no probative value when the trier of fact assesses

whether Mr. Collins' requests were reasonable, or whether MDPS' responses to his requests were effective. Likewise, Dr. Carlton's opinion about Mr. Collins' insulin regimen does not bear upon whether he was impermissibly terminated because of his diabetes.[7]

Further, even *if* Mr. Collins' physician had placed him on a multiple-shot insulin regimen prior to August 1993, and even *if* Mr. Collins had been instructed as to how to manipulate his insulin dose in light of exercise, it would not have been possible at the Academy. As both Dr. Carlton and Dr. Vinicor have testified, to manipulate insulin in light of exercise, one must know, in advance, the timing, intensity and duration of exercise, (Ex. 1, Vinicor Dep. at 28-30; Ex. 3, Carlton Dep. at 38-40). As MDPS has admitted in its 30(b)(6) deposition, the Academy did not provide cadets with this information. (Ex. 5, 30(b)(6) Dep. at 60:3-11, 63:7-14; Ex. 8, Cadet Class 48 Manual at 20.) In light of the circumstances, Mr. Collins responded to the symptoms of hypoglycemia he experienced at the Academy in the most appropriate way possible, by seeking additional food.

For all the foregoing reasons, the United States asks this Court to exclude any evidence by Dr. Carlton, or any MDPS witness, challenging or criticizing Mr. Collins' 1993 diabetes care and insulin regimen. Specifically, this Court should exclude issues one, two and three of Dr. Carlton's report as well as his summary paragraph and should exclude any reference by him or MDPS to the opinions expressed therein.

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[7]Dr. Carlton's views are also not relevant to the determination of whether, in 1993, Mr. Collins was qualified to perform the essential functions of a cadet, with or without a reasonable accommodation. 42 USC §12111(8). Dr. Carlton's report does not give any opinion as to whether Mr. Collins, in his actual "mitigated" state, could have performed the functions of a cadet with the reasonable accommodations (additional food) that he requested. Further, as Dr. Carlton admits in his deposition, ingesting glucose is the appropriate – and effective – response to hypoglycemia. (Ex. 3, Carlton Dep. at 42:5-10.)

Respectfully submitted,

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BY:_____ Date: 3/1/04

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