IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOE THOMPSON,

Plaintiff,

v.

EATON CORPORATION,
Cutler-Hammer Division,

Defendant.

OPINION AND ORDER

02-C-051-C

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In this civil action for monetary and injunctive relief, plaintiff Joe Thompson contends that his employer, defendant Eaton Corporation, refused to reasonably accommodate his disability in violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213. In addition, plaintiff contends that defendant discriminated against him because of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 623-634. Subject matter jurisdiction is present under 28 U.S.C. § 1331. The case is before the court on defendant's motion for summary judgment.

Defendant's motion will be granted in part and denied in part. I conclude that plaintiff is not an "individual with a disability" within the meaning of the ADA.

Accordingly, plaintiff's claim under the ADA will be dismissed. However, I conclude that plaintiff has adduced sufficient evidence to permit a reasonable jury to find that defendant discriminated against plaintiff on the basis of age. Therefore, I will deny defendant's motion with respect to plaintiff's claim under ADEA.

From the proposed findings of fact and the record, I find the following material facts to be undisputed.

UNDISPUTED FACTS

A. Plaintiff's Record of Employment

Plaintiff Joe Thompson worked in the electronics repair and testing field from 1941 until June 9, 2000. In 1977, plaintiff was hired as a tester by Cutler-Hammer, which was later acquired by defendant Eaton Corporation.

Plaintiff was promoted in 1998 to Competency Level 5 and was responsible for the testing on the SVFC-4 product line from 1998 to 2000 in Department 602. Competency Level 5 was the highest competency level. Plaintiff performed his job competently. All of plaintiff's performance reviews conducted during his employment with defendant were satisfactory and he received periodic merit increases. At no time before June 9, 2000, was plaintiff informed that there was any problem with his job performance. Plaintiff was 77 years old on June 9, 2000.

B. Module Testing

1. Decision to conduct module testing

In April 2000, two departments at Eaton, including Department 602, were involved in the Automated Modular Program project. The project concerned the production and testing of a series of electronic controls for use by the United States Navy in its nuclear attack submarines. Defendant's customer on the project, BPMI, was the distributor of the project components to the Navy. BPMI sent several letters to defendant expressing concern over defendant's quality control. BPMI scheduled a site visit to Eaton in late April 2000 to examine quality assurance. Just before BPMI's visit, defendant decided to impose its own quality assurance and to initiate a corrective action plan involving training and testing.

Defendant contracted with Jim Cotey to create a module training program to retrain employees in the knowledge and skills that were essential to the effective performance of the project. In addition, Cotey was to develop a task-based testing program to confirm that the employees trained had learned the material in the module training program and could perform tasks required by the contract. Gregory Stasinopoulos, defendant's manufacturing manager for Navy Nuclear, was in charge of module testing.

2. Preparation for module testing

Although plaintiff's responsibilities had little to do with the Automated Modular

Program, he was required to participate in the training and testing. All of the other employees affected by the plan were at least 20 years younger than plaintiff except Dorothy Luciani, who was 11 years younger.

Starting in late April 2000, defendant provided classroom training on each module to every associate for approximately four hours a week. The classroom training lasted from 45 minutes to 90 minutes for each module depending upon its size and complexity. During classroom training, plaintiff participated in practice tests that were graded. Plaintiff missed some of the classroom training because of funeral leave from May 26 to June 6, 2000, and because of a medical appointment the morning of June 9, 2000. Plaintiff never indicated to anyone that he wanted to make up the classes he missed while on funeral leave.

At his first module training class, and prior to taking any module test, plaintiff was informed of the following: (1) like everyone else in Departments 602 and 804, he was required to take module training and pass all seven module tests with a grade of 100 percent; (2) he would have three opportunities to pass all seven module tests; and (3) if he failed to pass all seven modules, he would be demoted from his position at Competency Level 5 and transferred out of Department 602. Plaintiff was not told in advance when the module testing was to occur.

3. Implementation and consequences of module testing

In May 2000, defendant began module testing of employees in plaintiff's department. According to defendant's procedures, any associate that failed any module three times would be disqualified from his or her current classification and would not be allowed to hold any of the assembly positions within Department 804 or any of the tester positions within Department 602. Instead, the person would be reassigned to a Competency Level 2 position outside Departments 804 and 602, or to a Competency Level 1 position based on seniority. Alternatively, employees could elect layoff or severance. Each module test was graded immediately upon completion. Each employee received feedback on any mistake and was briefed on the correct response.

There was no deadline for the completion of module testing. Stasinopoulos told supervisors that if an employee was not ready to take a module test, the employee should not be forced to take it. It was Stasinopoulos's intent that employees should feel as prepared as possible before taking the test. It was Cotey's practice to excuse employees who felt they were not ready to take the module test and he did excuse employees who indicated they were not ready to take the test.

4. Tutoring begins

On May 15, 2000, the union began tutoring on the modules. Greg Burzynski, shop steward for plaintiff's department, was appointed as union tutor for employees that needed

assistance. Defendant decided that any employee failing a module test before tutoring began should be given the option of receiving personal tutoring from the union. Plaintiff had access to personal tutoring with Burzynski before he took the module tests three times. However, plaintiff was displeased with his training and tutoring by Burzynski.

5. Plaintiff's first and second module tests

Plaintiff took his first round of testing on May 15-17, 2000. Plaintiff failed six of the seven test modules. Any associate failing three or more modules during the first round of testing was required to be re-tested on all seven modules. Burzynski reviewed the test results with plaintiff.

The day plaintiff returned from funeral leave, plaintiff began his second round of testing. This time, plaintiff failed five of the seven test modules. After plaintiff and others failed the module tests in the second round, Stasinopoulos went over the test results on each test with everyone in the room and pointed out what mistakes had been made.

6. Treatment of other employees failing the module testing three times

Four employees failed the module testing three times before May 15, 2000, when the union began its tutoring program. Defendant allowed these employees to take the test a fourth time to allow them the benefit of the tutoring.

C. Plaintiff's Diabetes

1. Plaintiff's Diabetes

Plaintiff was first diagnosed with adult-onset Type 2 (non-insulin dependent) diabetes on February 9, 1999. On that date, plaintiff was hospitalized with a blood sugar level of 534, which put him at risk of a diabetic coma. Plaintiff's physician, Dr. Anselm Lam, instructed plaintiff to regulate his blood sugars using oral medications and diet. While hospitalized, plaintiff received training on how to regulate his blood sugars including but not limited to diet, exercise, the use of a glucometer to test and monitor his blood sugars and the use of the prescribed oral medication Glucophage. On February 10, 1999, plaintiff was discharged from the hospital.

Plaintiff was off work and unable to perform any type of job until March 14, 1999. Defendant knew plaintiff had diabetes and that it was the reason for his absence from work. During the period from February 9, 1999, to March 13, 1999, plaintiff had trouble adjusting to the medication prescribed by Dr. Lam. He was very weak and experienced periods of nausea, loss of balance, dizziness, blurred vision and muscle cramping.

Plaintiff began monitoring his blood sugar three times every day: once in the morning before breakfast, once at noon before lunch and then once in the evening. Plaintiff has also taken two oral tablets of Glucophage every day since February 1999.

Despite plaintiff's efforts to monitor his blood sugar, he experienced at least four hypoglycemic reactions between February 9, 1999, and June 9, 2000. Three of the reactions occurred while plaintiff was at work and one occurred while he was at home. The hypoglycemia caused him to experience dizziness, weakness, nausea, shaking and blurred vision. As a general rule, after plaintiff ate in response to his hypoglycemia, it took one hour for his blood sugar to come back to normal and for the symptoms to dissipate. If plaintiff had a low blood sugar reaction, he would eat something sweet such as a glucose tablet.

Between February 9, 1999, and June 9, 2000, plaintiff experienced symptoms of diabetic neuropathy, including pain, numbness and burning in his feet. Any symptoms of peripheral neuropathy that plaintiff experienced were intermittent and were adequately addressed by medication.

Upon plaintiff's return to work on March 14, 1999, Dr. Lam placed no written work restrictions on plaintiff because of his diabetes. Before June 9, 2000, plaintiff never approached defendant with any complaint of physical pain in performing his work or expressed any concerns about his ability to perform his job. Before June 9, 2000, there was no part of plaintiff's job that he could not do because of his diabetes.

D. Events of June 9, 2000

1. Plaintiff's medical appointment

On the morning of June 9, 2000, plaintiff went to the doctor for his regular diabetes checkup and blood test. Believing that his doctor had instructed him not to eat the morning of his appointment, plaintiff did not eat anything before the blood tests were taken. The results of plaintiff's blood test at 9:30 am indicated a glucose level of 131, which is slightly elevated. Plaintiff reported to Dr. Goetz, a colleague of Dr. Lam, that he had no physical complaints. Plaintiff also reported that he could spend over an hour cutting grass uphill with a walk-behind mower. Dr. Goetz granted plaintiff's request to resume playing tennis. When plaintiff left Dr. Lam's office, the personnel at Dr. Lam's office instructed him to eat his breakfast and take his Glucophage medication. Taking Glucophage medication without food can cause a drop in blood sugar.

2. Plaintiff's return to work

When plaintiff returned to work, he checked his blood sugar level, which was 60. A blood sugar level of 60 is borderline hypoglycemic. After performing the blood test, plaintiff took his Glucophage and knew that he needed to eat. Plaintiff's lunch consisted of a baloney sandwich, an apple, a banana and orange juice. The lunch could have helped him bring up his glucose level in a couple of minutes. Glucose tablets also could have brought up his glucose level. Plaintiff did not take any glucose tablets that morning and he had only two

bites of his baloney sandwich before he took his module tests before his supervisor, Merrill Robinson, told him it was time for module training and testing.

3. Module testing of plaintiff

Immediately after Robinson's instruction, plaintiff went to the module testing area. Even though other training was over before plaintiff arrived, plaintiff met Burzynski for 15 minutes of tutoring on the DM1i module and Burzynski told him that he would have to take the module test that day. Plaintiff then began the third round of module testing, which was proctored by Cotey. Plaintiff was dizzy, shaking, could not concentrate, had blurred vision and was unable to see the computer screen during the testing.

Plaintiff failed the DM1i Drawing Inquiry Quiz module, a module that he had failed before, on May 15 and June 6. Cotey told Stasinopoulos that plaintiff had failed and Stasinopoulos then told Cotey to inform Human Resources. Stasinopoulos knew plaintiff was a diabetic. Shortly after he completed the test, plaintiff was called to the Human Resources office to meet with Eric Duerksen.

4. Termination of plaintiff

Duerksen told plaintiff that he had failed the test and that he had a choice of accepting one of four options (1) a position as either a navy cell operator or an employee in

the glass operating department at a Competency Level 2 salary range of $13.80 per hour; (2) a position as a custodian at Competency Level 1 salary range $12.33 per hour; (3) a layoff; or (4) a severance package. The custodial position was a night shift position and the description provides that the job requires "sustained physical effort manually brushing floors or operating machines" and that working conditions are "somewhat disagreeable" because of "noise, dirt, etc." Burzynski asked the Human Resource Manager, Reb Kavalec, whether plaintiff could continue working in Department 602 testing circuit boards in the lab, but she said he could not. Plaintiff chose the severance package. At the end of the meeting, Stasinopoulos told plaintiff "Life is too short. We are not getting any younger. Go and enjoy your life."

OPINION

A. Summary Judgment Standard

The standards for summary judgment are well known. Summary judgment is appropriate if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Weicherding v. Riegel, 160 F.3d 1139, 1142 (7th Cir. 1998). If the non-movant fails to make a showing sufficient to establish the existence of an essential element on which that party will bear the burden of proof at trial, summary judgment for the moving party is proper. Celotex Corp. v. Catrett, 477 U.S. 317,

322 (1986). When considering a motion for summary judgment, the court must examine the facts in the light most favorable to the non-moving party. Sample v. Aldi, Inc., 61 F.3d 544, 546 (7th Cir. 1995).

B. Americans with Disabilities Act

Although in his amended complaint, plaintiff alleges that defendant violated both the Americans with Disabilities Act and the Rehabilitation Act, he makes no argument in his brief regarding the Rehabilitation Act in response to defendant's argument that it is entitled to summary judgment on plaintiff's claim under that act. "Arguments not developed in any meaningful way are waived." Central. States, Southeast & Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 808 (7th Cir. 1999). Accordingly, I will consider only the Americans with Disabilities Act in this opinion.

The ADA prohibits employers from discriminating against disabled employees who are otherwise qualified. 42 U.S.C. § 12112(a). The definition of "discriminate" in the act is broad. Among other things, it includes disparate treatment, disparate impact, failing to make a reasonable accommodation and requiring certain medical examinations or inquiries. 42 U.S.C. § 12112(b); see also Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1032 (7th Cir. 1999). Plaintiff contends that defendant discriminated against him both by failing to accommodate him under § 12112(b)(5)(A) and by failing to select and administer a test in

a way that accurately represents his skills under § 12112(b)(7) when defendant refused plaintiff's request to postpone the test until plaintiff had eaten. (Defendant disputes that plaintiff made such a request.) The parties agree that to prevail on this claim, plaintiff must demonstrate first that 1) he is an "individual with a disability" 2) defendant was aware of his disability; 3) he was a qualified individual who could perform the essential functions of the employment position with or without reasonable accommodation. Basith v. Cook County, 241 F.3d 919, 927 (7th Cir. 2001).

1. Individual with a disability: record of impairment

In their briefs, the parties focus on whether plaintiff is an "individual with a disability" within the meaning of the ADA. A person meets this definition if he or she (a) has a physical or mental impairment that substantially limits one or more major life activities; (b) has a record of such an impairment; or (c) is regarded as having such an impairment. 42 U.S.C. § 12102(2)(A)-(C). Plaintiff contends that he satisfies the second definition, that is, he has a *record* of an impairment that substantially limited at least one major life activity.

The ADA does not define what it means to have a "record" of an impairment, leaving courts to struggle on their own to flesh out the term. For instance, the Court of Appeals for the Eighth Circuit has interpreted "record" literally to mean "documentation." Webber v.

Strippit, Inc., 186 F.3d 907, 915 (8th Cir. 1999); see also Taylor v. Nimock's Oil Co., 214 F.3d 957 (8th Cir. 2000) (following Webber). In contrast, the Court of Appeals for the Seventh Circuit relied on the EEOC's interpretive regulations in holding that § 12102(2)(B) "extends the coverage of the ADA to persons who 'have a history of, or have been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, 509 (7th Cir. 1998) (quoting 29 C.F.R. § 1630.2(k)). The court included in this definition "people who have recovered from previously disabling conditions" such as "cancer or coronary disease." Id.; see also Bailey v. Georgia-Pacific Corp., 306 F.3d 1162, 1169 (1st Cir. 2002) ("The purpose of this provision is largely to protect those who have recovered or are recovering from substantially limiting impairments from discrimination based on their medical history.") (citing H.R. Rep. No. 101-485(II), at 52 (1990)). Thus, the analysis under § 12102(2)(B) is similar to § 12102(2)(A). Specifically, § 12102(2)(B) protects those who would have at one time satisfied the first definition of disabled under § 121012(2)(A) but no longer do so because their impairment has become less severe or no longer exists. (The definition in Midelfort appears to apply to those who have never been substantially impaired but have been "misclassified" as such. If so, however, it is not clear what the difference is between being "misclassified" as disabled and being "regarded" as disabled under § 12102(2)(C). Limiting the definition to those who were formerly misclassified but who are no longer

considered disabled is problematic because it is difficult to imagine circumstances under which an individual would be discriminated against because of a *past* belief the employer held but has now abandoned. In any event, plaintiff does not argue that he was either misclassified or regarded as disabled so it is unnecessary to determine the proper application of those terms.)

The Supreme Court has set forth a three-step inquiry to determine whether a plaintiff is disabled under § 12102(2)(A): (1) whether plaintiff's condition is a physical or mental impairment; (2) whether the impairment affects a major life activity; and (3) whether plaintiff's impairment is a substantial limitation on the identified major life activity. Bragdon v. Abbott, 524 U.S. 624, 632, 637, 639 (1998). Defendant concedes that plaintiff's diabetes was and still is a physical impairment. See Lawson v. CSX Transportation, Inc., 245 F.3d 916, 923 (7th Cir. 2001). Plaintiff identifies seeing, eating, thinking and working as activities that have been affected by his diabetes. Defendant does not dispute that these are major life activities. See 29 C.F.R. § 1630.2(i) (defining major life activity to include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."); see also Nawrot v. CPC International, 277 F.3d 896, 903 (7th Cir. 2002) (thinking is a major life activity); Lawson, 245 F.3d at 923 (eating is a major life activity). The question is whether any of those activities has been substantially limited in the past.

A major life activity is "substantially limited" when the impairment "prevents or severely restricts" an individual's ability to perform the activity. Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184, 198 (2002); see also Sutton v. United Air Lines, Inc., 527 U.S. 471, 491 (1999) (using dictionary to define substantial as meaning "considerable" or "specified to a large degree."); 29 C.F.R. § 1630.2(j)(1) ("substantially limits" means "unable to perform" or "significantly restricted" in performing a major life activity compared to the "average person in the general population"). "The impairment's impact must also be permanent or long term." Williams, 534 U.S. at 198.

Although there is no question that diabetes is an impairment, the court of appeals has held that in and of itself diabetes is not a disability. Nawrot, 277 F.3d at 904. Rather, a court must make an "individualized inquiry" of the impairment's effect on each person seeking ADA protection. See Sutton, 527 U.S. at 483; Bragdon, 524 U.S. at 641-42. In addition, the determination whether an individual is disabled "depends on whether the limitations an individual with an impairment *acutally* faces are in fact substantially limiting." Sutton, 527 U.S. at 488. Therefore, even if an impairment,"'might,' 'could,' or 'would'" be substantially limiting if left untreated, an individual is not disabled if he or she is not substantially limited when mitigating or corrective measures are taken into account. Id. at 482. However, both the positive *and* negative side effects of mitigating measures should be considered. Id. at 484.

It is undisputed that, for the most part, plaintiff is able to keep his diabetes under control with medication. Although even with his medication, plaintiff must adhere to a number of dietary restrictions, the court of appeals has held that this does not constitute a substantial limitation of the major life activity of eating. Lawson, 245 F.3d at 924-25. (Plaintiff has also proposed facts regarding pain, numbness and burning in his feet as a result of diabetic neuropathy. However, he does not argue in his brief that he was substantially limited in the major life activity of walking or standing. Therefore, plaintiff has waived this argument. Central States, 181 F.3d at 808. Furthermore, it is undisputed that plaintiff could control the symptoms regarding his feet with medication.)

What remains, then, is plaintiff's hospital stay on February 9 and 10, the following five-week period of recovery before plaintiff returned to work and the four hypoglycemic reactions he experienced despite his efforts to monitor his blood sugar. It is undisputed that during plaintiff's five-week recovery period from February 10, 1999, to March 13, 1999, he was unable to perform any type of job. However, plaintiff has proposed no facts regarding other limitations that he experienced during this time. It is also undisputed that when he has a hypoglycemic reaction, which may last an hour, plaintiff experiences dizziness, weakness, nausea, shaking, difficulty concentrating and blurred vision. Again, however, plaintiff has proposed no facts regarding the severity of these symptoms, with the exception that he was unable to see the computer screen on June 9, 2000. The question is whether

these facts are sufficient to permit a reasonable jury to find that plaintiff has a record of being substantially limited with respect to at least one major life activity.

On its face, one Supreme Court case suggests that they are sufficient. In School Board of Nassau County v. Arline, 480 U.S. 273 (1987), the plaintiff was hospitalized for tuberculosis in 1957, her tuberculosis was in remission for 20 years and she tested positive for active tuberculosis in 1977 and 1978. Id. at 276. In 1978, she was terminated from her position as an elementary school teacher because of the recurrence of her tuberculosis. Id. at 276-77. The court held that the plaintiff's tuberculosis was a disability because "[t]his impairment was serious enough to require hospitalization, a fact more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment. Thus, Arline's hospitalization for tuberculosis in 1957 suffices to establish that she has a 'record of . . . impairment' . . . and is therefore a handicapped individual." Id. at 281.

Stripped of its facts, Arline seems to suggest that any impairment "serious enough to require hospitalization" is substantially limiting. In context, however, Arline is not so broad. The plaintiff had been hospitalized from May 1957 until August 1958. Arline v. School Board of Nassau County, 692 F. Supp. 1286, 1289 (M.D. Fla. 1988). See also Byrne v. Board of Education, 979 F.2d 560, 566 (7th Cir. 1992) (declining to interpret Arline "as establishing the nonsensical proposition that any hospital stay is sufficient to evidence a

'record of impairment'"). This suggests that a hospital stay must be lengthy for it to establish disability on its own. That interpretation would be consistent with later Supreme Court cases, such as Williams, 534 U.S. at 198, which have held that an impairment's impact must be permanent or long term to qualify as substantially limiting.

Plaintiff's hospital stay was only one or two days, but it was followed by five weeks during which he was unable to work. The Supreme Court has not yet decided whether "working" is a major life activity. See Toyota, 534 U.S. at 200 ("Because of the conceptual difficulties inherent in the argument that working could be a major life activity, we have been hesitant to hold as much, and we need not decide this difficult question today.") The Court of Appeals for the Seventh Circuit, however, has held repeatedly that it is. See, e.g., Stein v. Ashcroft, 284 F.3d 721, 724 (7th Cir. 2002); Amadio v. Ford Motor Co., 238 F.3d 919, 925 (7th Cir. 2001). To establish a substantial limitation on the major life activity of working, a plaintiff must show an inability to perform either a class of jobs or a broad range of jobs in various classes, as compared to the average person of comparable training, skills and abilities. Sutton, 527 U.S. at 492; EEOC v. Rockwell International Corp., 243 F.3d 1012, 1017 (7th Cir. 2001); 29 C.F.R. § 1630.2(j)(3)(i). Generally, this requires evidence of the demographics of the relevant labor market. Rockwell, 243 F.3d at 1017-18. However, because defendant does not dispute that plaintiff was unable to work at *any* job from February 9 until March 14, such evidence is unnecessary for the purpose of defeating

defendant's motion for summary judgment.

The problem is that even five weeks is an insufficient period of time to establish a substantial limitation, at least in this circuit. See, e.g., Ogborn v. United Food and Commerical Workers Union, 305 F.3d 763, 767 (7th Cir. 2002) (plaintiff was not impaired in major life activity of working when his depression caused him to miss work for eight weeks). See also Hilburn v. Murata Elecs. N. Am., Inc., 181 F.3d 1220, 1229 (11th Cir. 1999) (since plaintiff did not demonstrate any substantially limiting residual effects from her heart problems, 38-day absence from work following her heart attack did not constitute a record of impairment) Colwell v. Suffolk County Police Dep't, 158 F.3d 635, 645-46 (2d Cir. 1998) (finding that jury could reasonably believe that plaintiff was unable to work for seven months, but that seven-month impairment with unparticularized residual limitations too brief and too vague to constitute substantially limiting record of impairment); Heintzelman v. Runyon, 120 F.3d 143 (8th Cir. 1997) (inability to work while recovering from surgery not substantial impairment); McDonald v. Pennsylvania, 62 F.3d 92 (3d Cir. 1995) (inability to work for two months following surgery not substantial limitation). Thus far, the Court of Appeals for the Seventh Circuit has found a record of impairment in cases in which the plaintiff was substantially impaired for a number of years. See, e.g., Lawson, 245 F.3d at 926-27 (finding that jury could conclude that plaintiff's inability to maintain any significant employment for number of years constituted record of diabetes that

substantially limited his ability to work); Davidson, 133 F.3d at 510 (finding that plaintiff presented enough evidence to raise question of fact whether she had record of impairment because she confronted impediments to her ability to learn throughout high school, college and graduate school). But see McKenzie v. Dovala, 242 F.3d 967, 968, 972-73 (10th Cir. 2001) (finding that reasonable jury could conclude that plaintiff had record of disability when her disorder caused her to miss work for approximately two months); Wheaton v. Ogden Newspapers, Inc., 66 F. Supp. 2d 1053, 1064 (N.D. Iowa 1999)(plaintiff's two hospitalizations for back pain and record of employer's accommodations for plaintiff's severe back pain enough to create genuine issue of material fact whether plaintiff had record of impairment).

This is a closer case because plaintiff continued to experience recurrent limitations in the form of hypoglycemic reactions even after he was able to work again. Some courts have held that intermittent symptoms of a chronic impairment are sufficient to show that a plaintiff is an individual with a disability. See, e.g., Otting v. J.C. Penney Co., 223 F.3d 704 (8th Cir. 2000) (holding that plaintiff with epilepsy was disabled when, even with medication, she continued to suffer 2-3 seizures each month, during which she could not see, hear, speak, walk or work); Criado v. IBM Corp., 145 F.3d 437 (1st Cir. 1998) (holding that reasonable jury could conclude that plaintiff who had recurring, short-term bouts of depression over period of seven years was disabled under ADA).

However, the Court of Appeals for the Seventh Circuit has not embraced this view. In Moore v. J.B. Hunt Transport, Inc., 221 F.3d 944 (7th Cir. 2000), the plaintiff was a man with arthritis. Although he was usually able to control his condition with medication, he experienced "flare ups" once or twice a year during which he could not move for at least a day. The court held that his "infrequent flare-ups" did not "render the condition a disability." Id. at 952. Even assuming that Moore is distinguishable from this case because plaintiff's hypoglycemic reactions were more frequent, plaintiff has proposed no facts suggesting that his reactions substantially limited a major life activity. See Nawrot, 277 F.3d at 905 (concluding that plaintiff with diabetes was disabled in part because he suffered from hypoglycemic reactions in which he lost consciousness and fell and reactions were "of such extreme consequence that death is a very real and significant risk"). It is undisputed that plaintiff became weak, dizzy and had difficulty concentrating during his reactions, but there is no evidence that these symptoms were severe. Furthermore, it is undisputed that plaintiff's symptoms usually subsided within an hour after eating and as quickly as a few minutes after taking a glucose tablet. Therefore, whether plaintiff's claim is analyzed under § 12102(2)(A) or § 12102(2)(B), I conclude that plaintiff has failed to raise a genuine issue of material fact on his claim that he is disabled under the ADA.

C. Age Discrimination in Employment Act

The ADEA makes it unlawful for an employer "to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). A plaintiff may prove a violation of the ADEA in two ways:

> She may try to meet her burden head on by presenting direct or circumstantial evidence that age was the determining factor in her discharge. Or, as is more common, she may utilize the indirect, burden-shifting method of proof for Title VII cases originally set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 . . . and later adapted to age discrimination claims under the ADEA.

Chiaramonte v. Fashion Bed Group. Inc., 129 F.3d 391, 396 (7th Cir. 1997); see also Swierkiewicz v. Sorema N. A., 534 U.S. 506, 511-12 (2002).

Immediately after plaintiff's termination, Stasinopoulos said, "Life is too short. We are not getting any younger. Go and enjoy your life." Plaintiff has conceded that this statement does not constitute direct evidence of discrimination. See Lim v. Trustees of Indiana University, 297 F.3d 575, 580 (7th Cir. 2002) ("[D]irect evidence should 'prove the particular fact in question without reliance upon inference of presumption.'") (quoting Markel v. Board of Regents of the University of Wisconsin, 276 F. 3d 906, 910 (7th Cir. 2002)). As defendant has pointed out, this statement "could have been made in an attempt by Stasinopoulos to console him and to make him feel better." Dft.'s Br., dkt. #23, at 27. However, "it is not true that to get over the hurdle of summary judgment a plaintiff must

produce the equivalent of an admission of guilt by the defendant. All that is required is evidence from which a rational trier of fact could reasonably infer that the defendant had fired the plaintiff because the latter was a member of a protected class." Troupe v. May Department Stores Co., 20 F.3d 734, 737 (7th Cir. 1994). "Ambiguous statements" and "suspicious timing" can be enough to support an inference of discrimination without going through the McDonnell Douglas burden shifting framework, particularly if the remark (1) is made by the decisionmaker and at the time of the adverse employment action and (2) expresses discriminatory feelings. Gorence v. Eagle Food Centers, Inc., 242 F.3d 759, 762 (7th Cir. 2001).

The comment made by Stasinopoulos could be interpreted reasonably to mean that he believed plaintiff was too old to work. See Sheehan v. Donlen, 173 F.3d 1039, 1045 (7th Cir. 1999) (statement of "Hopefully this will give you some time to spend at home with your children" made by plaintiff's boss before firing her supported jury's finding of intentional discrimination). Furthermore, it is undisputed that Stasinopoulos was a decisionmaker and that the statement was made at the time that plaintiff was given the option of demotion or termination. Combined with plaintiff's allegation that Stasinopoulos refused without explanation to allow plaintiff to retake the test even after plaintiff told him he had failed the test because he had been ill, I conclude that Stasinopoulos's statement would permit a jury to find that plaintiff's age was a motivating factor in defendant's decision to terminate or

demote plaintiff.

Even assuming that Stasinopoulos's statement is insufficient on its own, I conclude nevertheless that plaintiff would survive summary judgment under the McDonnell Douglas method of proof. The parties agree that to make out a prima facie case under McDonnell Douglas, plaintiff must show the following four elements: (1) he was in the protected age class (over 40); (2) he was meeting his employer's legitimate expectations; (3) he suffered an adverse employment action; and (4) similarly situated and substantially younger employees were treated more favorably. See Fisher v. Wayne Dalton Corp., 139 F.3d 1137, 1141 (7th Cir. 1998). (Generally, in a discharge or demotion case, the plaintiff can satisfy the fourth part of the test with evidence that the defendant replaced him or her with a substantially younger employee. See Ritter v. Hill 'N Dale Farm, Inc., 231 F.3d 1039, 1043 (7th Cir. 2000); Hoffmann v. PRIMEDIA Special Interest Publications, 217 F.3d 522, 524 (7th Cir. 2000); Bellaver v. Quanex Corp., 200 F.3d 485, 494-95 (7th Cir. 2000). Although it is likely that plaintiff's position was either acquired or absorbed by a substantially younger employee or employees, the parties have proposed no facts regarding plaintiff's replacement). Nevertheless, the McDonnell Douglas inquiry was not intended to be "rigid, mechanized or ritualistic." Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978). Furthermore, the court of appeals has stated that in a discharge case, a plaintiff may establish a prima facie case under McDonnell Douglas "by presenting evidence that he was qualified for the job in

question and that he lost it to, *or* was otherwise treated less favorably than . . . a substantially younger worker." See Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1397 (7th Cir. 1997) (emphasis added). Therefore, I will analyze plaintiff's claim under the framework suggested by the parties.

Defendant does not seriously deny that plaintiff satisfies the first three parts of the test. Plaintiff was 77 years old on June 9, 2000, and was performing his job competently. In addition, after taking the tests, plaintiff was given the option of a demotion, layoff or severance, all of which constitute adverse employment action. See Fortier v. Ameritech Mobile Communications, Inc., 161 F.3d 1106, 1111 n.7 (7th Cir. 1996) ("[A] materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wages or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities or other indices that might be unique to a particular situation.") The dispute is whether defendant treated younger similarly situated employees more favorably.

Plaintiff alleges that he was treated differently in two ways: (1) other employees who failed the tests three time were given another chance "because they had not been adequately trained" but plaintiff was not given this chance; and (2) plaintiff was required to take the test when he was not ready to do so. With respect to plaintiff's first allegation of differential treatment, I agree with defendant that plaintiff was not similarly situated to the employees

who were given a fourth opportunity to take the test. It is undisputed that some employees were given another chance not simply because "they had not been adequately trained," but because they had failed the tests before defendant began tutoring. Plaintiff failed each of his tests *after* he began to receive tutoring. Although the facts show that plaintiff missed some of his training sessions and was not satisfied with the training he received, there is no evidence that defendant refused to allow plaintiff to make up his missed sessions or that the training plaintiff did receive was somehow inferior to the training that the younger employees received.

However, I conclude that there is a material dispute whether defendant allowed substantially younger employees to postpone their test when they were not ready but refused to do the same for plaintiff. It is undisputed that defendant allowed other employees to postpone their tests and that all of these employees were substantially younger than plaintiff. Plaintiff alleges that Robinson, his supervisor, interrupted him during lunch and told plaintiff he had to prepare for testing and that when plaintiff asked Robinson whether he could postpone the test because he was diabetic, had been unable to eat and was feeling ill, Robinson told him he could not. In addition, plaintiff alleges that during the test, he told Cotey, who was administering the test, that he did not feel well, his vision was blurred and he could not see the computer screen. Defendant contends that plaintiff's allegation cannot create an issue of fact because it is undisputed that plaintiff did not ask expressly to be

excused. This is splitting hairs. If plaintiff told Cotey that he was feeling ill and was having difficulty seeing, but Cotey ignored his protests, a reasonable jury could conclude that plaintiff was not receiving the same treatment as other, substantially younger employers who were excused from taking the test.

Because plaintiff has established a prima facie case, the burden of production shifts to the defendant to offer a legitimate, non-discriminatory explanation for its actions. Testerman v. EDS Technical Products Corp., 98 F.3d 297, 302-03 (7th Cir. 1996). When the "burden" shifts to the employer, this "burden is one of production, not persuasion: it can involve 'no credibility assessment.'" Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 142 (2000).

Defendant has not asserted a non-discriminatory explanation for its actions; it has only denied that plaintiff asked for a postponement of the test. Accordingly, defendant's motion for summary judgment will be denied with respect to plaintiff's age discrimination claim

ORDER

IT IS ORDERED that defendant Eaton Corporation's motion for summary judgment is GRANTED with respect to plaintiff Joe Thompson's claims under the Americans with Disabilities Act and the Rehabilitation Act. Defendant's motion is DENIED with respect

to plaintiff's claim under the Age Discrimination in Employment Act.

Entered this 11th day of December, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge