

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

GLEN ARNOLD,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Civil Docket No. 96-294-P-H
)	
UNITED PARCEL SERVICE, INC.,)	
)	
<i>Defendant</i>)	

**RECOMMENDED DECISION ON
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

The plaintiff has sued the defendant under the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 *et seq.*, and the Maine Human Rights Act, 5 M.R.S.A. § 4551 *et seq.*, because the defendant decided not to hire the plaintiff for a replacement mechanic’s position when it learned he has insulin-dependent diabetes. The defendant has moved for summary judgment. For the reasons that follow, I recommend that the defendant’s motion be granted.

I. Summary Judgment Standards

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v.*

Northwest Airlines, Inc., 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give the party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir.) (citing *Celotex*, 477 U.S. at 324), *cert. denied*, 132 L. Ed. 2d 255 (1995); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Assn. of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Context

The plaintiff has Type I insulin-dependent diabetes mellitus. Plaintiff's Answers to Defendant's Interrogatories at ¶ 2. In October 1995, he called Paul Tanguay, a human resources representative with the defendant, to inquire about an available position as a "cover mechanic."¹ A "cover mechanic" covers for fulltime mechanics during planned absences of fulltime mechanics. Affidavit of John Kennedy ("Kennedy Aff.") (Docket No. 8) ¶ 8. The cover-mechanic position for

¹ In support of these preliminary factual propositions the defendant cites pages 27 to 29 of the plaintiff's deposition. The cited pages do not appear in the portion of the deposition transcript supplied by the defendant to the court. The fact that Tanguay is a human resources representative of the defendant appears elsewhere in the summary judgment record, and the plaintiff does not controvert the assertions concerning the circumstances of his inquiry with Tanguay.

which the plaintiff applied involved temporarily replacing a fulltime mechanic based at the defendant's facility in Wells, Maine. Affidavit of Paul Tanguay ("Tanguay Aff.") ¶ 4. The position also required the mechanic to work at the defendant's facilities in Dover, Laconia and Twin Mountain, New Hampshire. Deposition of John W. Kennedy ("Kennedy Dep.") at 33. With one exception, the defendant's delivery trucks that are based in Wells operate exclusively in Maine; the vehicles that operate out of the three New Hampshire locations operate exclusively in that state. Affidavit of Daniel Weir (Docket No. 18) ¶ 5. The exception is an "air car" that transports packages from Wells to the airport in Manchester, New Hampshire for overnight delivery. *Id.* ¶¶ 4-5. With the exception of the air car, when one of the defendant's vehicles breaks down a mechanic on duty from that vehicle's base responds. *Id.* ¶ 7. If the Maine-based air car breaks down in New Hampshire, a mechanic from a New Hampshire facility would respond. *Id.*

After his initial phone inquiry about the cover-mechanic position, the plaintiff met separately with Tanguay and John Kennedy.² Deposition of Glen G. Arnold ("Arnold Dep.") at 30-32; 34. Kennedy offered the position to the plaintiff. *Id.* at 38. The plaintiff replied that he was interested in the job but would have to discuss the matter with his wife before deciding whether to accept. *Id.* Kennedy assumed that the plaintiff knew that among the job requirements was having the necessary permits to road-test the defendant's vehicles and to retrieve vehicles that had broken down. Kennedy Dep. at 105. Road-testing a vehicle involves taking the truck onto the road, as part of the repair process, in an effort to diagnose mechanical problems. *Id.* at 85. A test drive can routinely be performed prior to loading the vehicle with packages. Affidavit of Glen Arnold ("Arnold Aff.")

² Kennedy is the defendant's automotive fleet supervisor for its North New Hampshire division. Affidavit of John Kennedy (Docket No. 8) ¶ 1.

(Docket No. 17) ¶ 13. A road call involves responding to a truck breakdown, either by making a repair at the scene or by transferring the truck's cargo to another vehicle and having the malfunctioning vehicle towed to the defendant's facilities for repair. Kennedy Dep. at 74-75.

The day after their meeting, the plaintiff called Kennedy and indicated he wanted the job; the two agreed on an October 16 start date. Arnold Dep. at 41. Thereafter, Tanguay indicated that he would arrange for the plaintiff to take a driving test, to have fingerprints taken and to submit to a "DOT physical." *Id.* at 46. The plaintiff was fingerprinted and passed the driving test. *Id.* at 52. Tanguay sent the plaintiff to a facility known as Seacoast Redicare for the physical. *Id.* at 56. The examining physician at Seacoast Redicare asked the plaintiff if he had any preexisting medical conditions and the plaintiff replied that he was a diabetic. *Id.* at 59. The physician then told the plaintiff that he could not receive a "DOT card" because of his diabetes. *Id.* Thereafter, Tanguay decided not to hire the plaintiff because the plaintiff failed to meet the physical qualification standards set by the U.S. Department of Transportation ("DOT") for drivers of commercial vehicles. Tanguay Aff. ¶ 5. Tanguay offered the plaintiff an alternative position as a "preloader" but the plaintiff never called Tanguay back to respond to this offer. Arnold Dep. at 65.

As a result of his diabetes, the plaintiff monitors his blood glucose levels several times a day through a process that involves drawing blood, gives himself injections of insulin two to four times a day, pays constant attention to possible signs and symptoms of hypoglycemia, which can lead to loss of consciousness and/or seizure, carries food on his person to treat hypoglycemia if necessary, maintains a strict diet limited to certain foods, eats at consistent times and intervals and maintain a daily aerobic exercise regime. Arnold Aff. ¶ 4. He estimates that these diabetes-related activities take him between one and two hours a day, and prevent him from doing other things during those

times. *Id.* ¶ 5.

According to his physician, the plaintiff would die if he did not take insulin. Affidavit of Sue Taylor, M.D. (“Taylor Aff.”) (Docket No. 19) ¶ 6. His diabetes is a chronic condition and, according to his physician, exposes him to a substantially greater risk than that of the general population of eventually suffering from blindness, kidney failure, heart attacks, strokes and the necessity of leg amputation. *Id.* ¶¶ 6, 8.

Because he has diabetes, the plaintiff is unable to eat whatever he wants at whatever time he desires, cannot chose to skip a meal or otherwise to fast, and is limited in terms of the types of food he can eat. Arnold Aff. ¶ 6. For example, he must avoid eating sugar-laden foods because of their impact on his insulin levels. *Id.* The diabetes interferes with the plaintiff’s sleep approximately 3 or 4 nights a week. *Id.* ¶ 7. On these occasions, the plaintiff wakes up to check his glucose level by performing a blood test, which disrupts his sleep for approximately 30 minutes. *Id.*

The plaintiff’s physician estimates that there is a six percent risk that the plaintiff would transmit insulin-dependent diabetes mellitus to one of his children, a risk that she has determined to be 20 times that of the general population. Taylor Aff. at ¶ 9. The plaintiff’s diabetes — specifically, the risk of genetic transmission of the disease — is one of the more important reasons that he and his wife have decided not to have children. Arnold Aff. ¶ 9.

III. Discussion

The plaintiff asserts claims of disability discrimination under both the ADA and the Maine Human Rights Act. Because interpretation of the Maine statute has historically “proceeded hand in hand” with interpretation of the ADA, and because the ADA has “provided guidance to Maine courts

in interpreting the state statute,” the court’s analysis of the two ADA claims, which separately allege unlawful discrimination and failure to make reasonable accommodations to the plaintiff’s disability, is also dispositive of the plaintiff’s single state-law claim of disability discrimination. *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 14 (1st Cir. 1997) (citing *Winston v. Maine Technical College Sys.*, 631 A.2d 70, 74 (Me. 1993)). The defendant makes this point in its memorandum of law and the plaintiff does not contend that a separate or different analysis should apply to his claim under the Human Rights Act. Accordingly, there is no reason to depart here from the principle articulated in *Soileau*.

I begin with the second of the defendant’s asserted grounds for summary judgment because in my view it is dispositive. The defendant contends that it is entitled to judgment in its favor because the plaintiff is not disabled within the meaning of the ADA. I agree.

The statute defines “disability” as “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment.” 42 U.S.C. § 12102(2). According to the defendant, insulin-dependent diabetes is simply not an ADA disability because a diabetic in his medicated state suffers from no physical or mental impairment that substantially limits one or more major life activities.

The regulations of the Equal Employment Opportunity Commission (“EEOC”) say otherwise. *See* 29 C.F.R. App. § 1630.2(h) (“The existence of an impairment is to be determined without regard to mitigating measures such as medicines”); *id.* at § 1630.2(j) (“a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication.”). However, several federal courts have found this regulatory

language to be at variance with the plain meaning of the ADA and have thus refused to follow the EEOC's guidance as to diabetes. *See, e.g., Moore v. City of Overland Park*, 950 F. Supp. 1081, 1088 (D. Kan. 1996); *Schluter v. Industrial Coils, Inc.*, 928 F. Supp. 1437, 1445 (W.D. Wis. 1996); *Gilday v. Mecosta County*, 920 F. Supp. 792, 795-96 (W.D. Mich. 1996); *Coghlan v. H.J. Heinz Co.*, 851 F. Supp. 808, 813 (N.D. Tex. 1994); *see also Gaddy v. Four B. Corp.*, 953 F. Supp. 331, 337 (D. Kan. 1997) (asthma); *Murphy v. United Parcel Serv., Inc.*, 946 F. Supp. 872, 881 (D. Kan. 1996) (hypertension); *but see Sicard v. City of Sioux City*, 950 F. Supp. 1420, 1439 (N.D. Iowa 1996) (myopia); *Rosenblum v. Colorado Dept. of Health*, 878 F. Supp. 1404, 1407-08 (D. Colo. 1994) (applying EEOC regulations and concluding diabetic presented genuine factual issue as to ADA disability). The District Court for the Western District of Wisconsin articulated succinctly what appears to be an emerging majority view: "To say that a person who needs insulin . . . is disabled in fact is to read out of the act's first definition of disability the requirement that it applies only to those persons who are 'substantially limited' in major life activities." *Schluter*, 928 F. Supp. at 1445; *see also Coghlan*, 851 F. Supp. at 813 ("to allow such an interpretation would be to allow one having no limitation to satisfy a condition that clearly requires limitation."). Although there appears to be no First Circuit case law directly on point, the defendant asks the court to adopt this view and grant summary judgment accordingly.

Responding, the plaintiff initially contends that the defendant should be collaterally estopped from asserting such a position here in light of the decision rendered against it on the same issue in *Sarsycki v. United Parcel Serv.*, 862 F. Supp. 336 (W.D. Okl. 1994). Deciding the case on a stipulated record, the court in *Sarsycki* relied upon the EEOC's controversial view that diabetics should be assessed for ADA purposes in their non-medicated state, finding the diabetic plaintiff disabled within

the meaning of the ADA because it was agreed that without medication he would eventually lapse into a coma and die. *Id.* at 340.

As a matter of federal law in this circuit, the “issue preclusion” branch of the doctrine of collateral estoppel applies when the party invoking the doctrine demonstrates that a prior proceeding involved the same issue of law or fact, that the issue was actually litigated in that proceeding, that the court actually resolved the issue and that such resolution was essential to the court’s judgment or holding. *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973, 978 (1st Cir. 1995) (citing *Restatement (Second) of Judgments* § 27 (1982) (hereinafter “*Restatement*”), other citations omitted). As the plaintiff points out, it is not necessary that he have been a party to the prior proceeding in order to rely on issue preclusion as long as he can show that the defendant, as the party against whom issue preclusion would be applied, had “a fair opportunity to litigate the issue fully.” *Id.* at n.8 (citation omitted).

Absent other cases casting doubt on whether *Sarsycki* was correctly decided, I would follow the precepts of *Monarch Life* and recommend that the court find the defendant to be estopped from relitigating the issue of whether a diabetic is disabled within the meaning of the ADA. However, as the *Restatement* suggests, because the plaintiff was not himself a party to *Sarsycki*, this court may opt against applying issue preclusion precisely because “[t]he determination relied on as preclusive was itself inconsistent with another determination of the same issue.” *Restatement* § 29(4). Another circumstance in which offensive non-mutual collateral estoppel/issue preclusion may be inappropriate is when “[t]he issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based.” *Id.* at subsection (7); *see also Glictronix Corp. v. American Tel. & Tel. Co.*, 603 F. Supp. 552, 571

(D.N.J. 1984) (no collateral estoppel where “[n]umerous other cases” conflict with invoked prior determination on issue of law). The question of whether insulin-dependent diabetes is an ADA disability, and the underlying legal issue of whether persons with diabetes and other serious diseases that are nevertheless controlled by medication should be assessed in their non-medicated states, is clearly one of law, turning on the meaning of the words in the statute. *Sarsycki* is inconsistent with other judicial determinations, including the *Murphy* case to which the defendant was also a party, and to apply collateral estoppel here would also deny the defendant an opportunity to seek reconsideration of a defective legal rule.

In my opinion, the cases holding that diabetes is not automatically an ADA disability represent the better-reasoned view. As pointed out in *Schluter*, although insulin-dependent diabetes is certainly life-threatening if not properly treated with the appropriate medication and monitoring regime, diabetics who are in the appropriate treatment simply cannot be said to experience the substantial limitation of their major life activities. The First Circuit has recently had occasion to offer guidance as to what constitutes a “major life activity” under the ADA, noting that the examples posited in the applicable regulations — “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working” — are not necessarily an exhaustive list. *Abbott v. Bragdon*, 107 F.3d 934, 940 (1st Cir. 1997). The court concluded that reproduction, as “one of the most natural of endeavors,” therefore “fits comfortably within its sweep.” *Id.* As to what constitutes a substantial limitation on such an activity, the First Circuit relied on the regulatory definition: “restricted as to the conditions, manner, or duration under which [it] can be performed in comparison with most people.” *Id.* at 942 (citation omitted).

The plaintiff here has sought to demonstrate that, like the HIV-positive plaintiff in *Abbott*, his

major life activity of reproduction is substantially limited by the risk of transmitting his disease to his offspring. *See id.* at 942 (“No reasonable juror could conclude that an 8% risk of passing an incurable, debilitating, and inevitably fatal disease to one’s child is not a substantial restriction on reproductive activity.”). The First Circuit stressed in *Abbott* that its holding was limited to its facts. *Id.* Unlike HIV, insulin-dependent diabetes is not “inevitably fatal.” The risk that the plaintiff would transmit diabetes to his children is less than that in *Abbott* and, indeed, is not the only reason the plaintiff and his wife choose to remain childless. This case is therefore distinguishable from *Abbott*, and in no other sense can the plaintiff’s diabetes be said to restrict the conditions, manner or duration of the plaintiff’s major life activities as compared to most people. I cannot, of course, rule out the possibility that another case might present facts from which a court could conclude that insulin-dependent diabetes restricts the major life activities of an ADA plaintiff, but the diabetes-related impacts presented in the present case — glucose monitoring, the logistics of insulin medication, the need for careful dietary control, occasional sleep interruption, the taking of diabetes into account in a marital decision to eschew childbearing — do not rise to the requisite level.³

A determination that, in the circumstances of this case, insulin-dependent diabetes is not a disability within the meaning of the ADA also comports with the so-called *Chevron* principles of statutory interpretation. *See generally Strickland v. Commissioner, Maine Dept. of Human Servs.*, 48 F.3d 12, 16-19 (1st Cir. 1995) (citing and discussing *Chevron, U.S.A. Inc. v. Natural Resources*

³ The plaintiff also contends that he is substantially limited in the major life activity of work because his insulin-dependent diabetes disqualifies him from a wide variety of vocational opportunities. Notwithstanding the cases the plaintiff has cited to suggest that other diabetics have been lawfully excluded from other jobs, his statement of material facts does not speak to vocational issues and he has therefore failed to raise this issue effectively. *See Pew v. Scopino*, 161 F.R.D. 1 (D.Me. 1995) (parties bound by their Local Rule 56 factual statements and cannot challenge summary judgment decision based on facts not properly presented therein).

Defense Council, Inc., 467 U.S. 837 (1984)). *Chevron* and *Strickland* speak to the manner and extent to which a court should consult legislative history, and/or defer to an administrative agency's interpretations of the statute at issue, in seeking to discern the intent of the legislature:

We first look to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed. If no such readily apparent meaning springs from the statute's text, we next examine the legislative history, albeit skeptically, in search of an unmistakable expression of congressional intent. And if, at that stage, the statute itself, viewed in connection with the statutory design and the legislative history, reveals an unequivocal answer to the interpretive question, the court's inquiry ends.

Strickland, 48 F.3d at 17. If this inquiry fails to yield a definitive answer, it is only at this point that the court looks to the relevant administrative agency's construction of the statute as expressed by rule, deferring to such a rule if it "flows rationally from a permissible construction of the statute" and even if the court would not necessarily adopt such an interpretation if writing on a fresh slate. *Id.* (citation omitted).

Admittedly, the relevant provisions of the ADA do not themselves unequivocally declare insulin-dependent diabetes either a disability or not a disability for purposes of the statute. In support of its official view that insulin-dependent diabetes is a disabling condition, the EEOC regulations cite two legislative reports in the regulations. *See* 29 C.F.R. App. § 1630.2(j) (citing S. Rep. No. 116, 101st Cong., 1st Sess. 21 (1989) at 23 ("Senate Report") and H.R.Rep. No. 485 Part 2, 101st Cong., 2d Sess. 50-51 (1990) at 52 ("House Judiciary Report")). The Senate Report contains the following observation: "[W]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." Senate Report, *supra*. The House Judiciary Report contains the same sentence, with the following language immediately following:

For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

House Judiciary Report, *supra*.

Like the court in *Schluter*, I think that one need go no further than the language of the statute itself to discern that insulin-dependent diabetes, when controlled by appropriate medication, does not substantially limit major life activities and is therefore not a disabling condition within the meaning of the ADA absent circumstances not presented here. But even assuming that recourse to legislative history is appropriate because the statute does not directly address diabetes, I depart from the view of the EEOC and conclude, to the contrary, that the legislative history actually points the court toward the view adopted in *Schluter*. The same Senate Report quoted by the EEOC also suggests that, to the extent that a person with medically controlled insulin-dependent diabetes enjoys protection under the ADA, the appropriate recourse is the third prong of the statutory definition of disability, which protects persons who are *regarded as* having a disability:

Another important goal of the third prong of the definition is to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified. Such denials are the result of negative attitudes and misinformation.

Senate Report at 24. To the extent that the House Judiciary Report would point to a different interpretation, this speaks to the “uncertainty” about the value of legislative history, and the attendant skepticism with which courts should view such documents, as discussed in *Strickland*. *Strickland*, 48 F.3d at 17. Therefore, because the legislative history is inconsistent on the point, it cannot be said

that the court can discern “an unmistakable clear expression of congressional intent” therein. *Id.* At this point in the analysis, although the need for deference to the agency’s view “looms large,” *id.*, in my opinion deference is inappropriate here because the rule does not flow rationally from a permissible construction of the statute. Instead, while purporting to rely on two documents from the legislative history, the agency ignores one of them and adopts a regulatory scheme that is illogical given that the “regarded as” prong of the disability definition protects such a person from discrimination. *See Murphy*, 946 F. Supp. at 880 (noting similar logical conflict within EEOC regulations themselves). To conclude that insulin-dependent diabetes is automatically an ADA disability would be manifestly contrary to the statute and I therefore recommend that the court reject this view.

The plaintiff would nevertheless be able to go forward with his ADA claim if he could establish that the defendant regarded him as having a disability. The defendant contends that the plaintiff cannot meet this definition of disability because the summary judgment record conclusively establishes that the defendant did not regard him as disabled but only as unable to meet the DOT certification requirements. The plaintiff does not contest this assertion in his opposition to the summary judgment motion, and I therefore deem it to be admitted for purposes of the motion. *See CMM Cable Rep, Inc. v. Ocean Coast Properties, Inc.*, 97 F.3d 1504, 1525-26 (1st Cir. 1996) (party opposing summary judgment motion cannot challenge adverse determination based on arguments not presented in opposition to motion).

Because I conclude that the plaintiff is not disabled within the meaning of the ADA, it is not necessary to address the defendant’s additional contentions that certain regulations of the U.S. Department of Transportation (“DOT”) are a complete defense to liability here, that the plaintiff

cannot maintain a discrimination claim because he unable to perform the essential functions of the job in question, either with or without reasonable accommodation, and that the plaintiff's claim must fail because the record shows that the defendant's unfavorable personnel decision was not made because of the plaintiff's alleged disability.⁴

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion for summary judgment

⁴ However, in the event it is of assistance to the court, I note my disagreement with the defendant's assertion that its compliance with the DOT's regulations, which preclude an insulin-dependent diabetic from driving a commercial vehicle in interstate commerce, is an absolute defense to ADA liability here. For that proposition, the defendant relies upon *Campbell v. Federal Express Corp.*, 918 F. Supp. 912 (D.Md. 1996), and 29 C.F.R. App. § 1630.15(e).

Campbell is distinguishable. At issue there was a dispute over the strength and mobility requirements in the DOT regulations themselves, and whether they constituted essential functions of the job in question; the court resolved the latter question in favor of the defendant and determined that the former issue was better decided by the DOT than by a jury sitting in federal court. *Campbell*, 918 F. Supp. at 919-20. Here, unlike in *Campbell*, the plaintiff has no dispute with the regulations themselves; his argument is that the defendant could reasonably accommodate him by tailoring his job responsibilities so that it would not be necessary for him to receive DOT certification.

The cited regulation is guidance from the EEOC that an employer may "offer . . . as a defense" to ADA liability the requirement that it comply with other federal laws and regulations that may be in conflict with the applicable requirement under the ADA. 29 C.F.R. App. § 1630.15(e). However, the regulation goes on to state that such a defense "may be rebutted by a showing of pretext, or by showing that the Federal standard did not require the discriminatory action, or that there was a nonexclusionary means to comply with the standard that would not conflict [with ADA requirements]." *Id.* Assuming that such a defense would be available to the defendant here, the plaintiff has made it a genuine issue of disputed fact by coming forth with evidence that the work of a cover mechanic does not necessarily involve driving the defendant's vehicles when packages traveling in interstate commerce are aboard.

Each side has sought to resolve the issue of reasonable accommodation in its favor by offering competing advisory letters from the same official of the Federal Highway Administration. In an effort to deter both parties from pursuing an unfruitful line of inquiry yet further, I would observe that the plaintiff is incorrect in suggesting that the court must accord any deference to such informal opinions offered by attorneys employed by a federal agency. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (no deference due "agency counsel's interpretation of a statute where the agency itself has articulated no position on the question").

be GRANTED.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this ____ day of May, 1997.

*David M. Cohen
United States Magistrate Judge*