

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

State of Minnesota, by
Dolores Fridge, Commissioner,
Department of Human Rights,

Complainant,

v.

Green Tree Financial Corporation,
Respondent.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

The above-entitled matter came on for hearing before Administrative Law Judge Bruce H. Johnson on October 28 through 31, 1997, at the Office of Administrative Hearings, 100 Washington Square - Suite 1700, Minneapolis, Minnesota. The record closed on February 9, 1998, upon receipt of the Complainant's Reply Memorandum.

Ann Hantrods, Attorney at Law, Briggs and Morgan, P.A., 2200 First National Bank Building, St. Paul, Minnesota 55101, appeared on behalf of Green Tree Financial Corporation (hereinafter "Green Tree"). Erica Jacobson, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the Minnesota Department of Human Rights (hereinafter the "Department"). Casey Streich, Attorney at Law, 4700 Norwest Center, 90 South Seventh Street, Minneapolis, Minnesota 55402-4129, appeared on behalf of the charging party, Charles Hunter (hereinafter "Mr. Hunter").

NOTICE

Pursuant to Minn. Stat. § 363.071, subd. 2 and 3 (1996), this Order is the final decision in this case. Under Minn. Stat § 363.072 (1996), the Commissioner of Human Rights or any party aggrieved by this decision may seek judicial review in accordance with Minn. Stat. §§ 14.63 to 14.69 (1996).

STATEMENT OF THE ISSUE

Whether, as Mr. Hunter's employer, Green Tree failed to make reasonable accommodation to a disability of Mr. Hunter's that was known to Green Tree in violation of Minn. Stat. § 363.03, subd. 1(6) (1996)^[1] (hereinafter sometimes the "Minnesota Human Rights Act" or "MHRA").

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Mr. Hunter is now forty-four years old. He has a two-year Associate of Arts degree from North Hennepin Community College in mid-management, marketing, and sales. He matriculated at the University of Minnesota, where he took further course work in administration and sociology. Mr. Hunter also holds a valid, but inactive, license as a real estate agent. He has maintained the continuing education credits needed to re-activate that license. (Exhibits 7 and L)

2. Mr. Hunter's experience with the financial services industry began in 1976, when he became employed by Midwest Federal Savings & Loan in an entry level savings consultant position. After holding that position for about two years, he became employed as a manager trainee for Mellon Financial Services, a consumer finance company where he became involved in all facets of managing a branch of a financial services business. He remained employed at Mellon for approximately five years, during which time he progressed from trainee, to assistant branch manager, and ultimately to branch manager, a position which he held for a little over four years. (Hearing Transcript (hereinafter "Tr."), pp. 69-71; Exhibit L)

3. In June or July of 1983, Mellon Financial Services decided to discontinue its operations in the Twin Cities metropolitan area and to close all of its branches there, and Mr. Hunter's position was eliminated. Thereafter, he was hired as office manager and real estate agent by Hunro Properties, a partnership that was involved in real estate investments, real estate sales, and farm management. (Tr. pp. 72-73; Exhibit L) Mr. Hunter's duties at Hunro consisted of accounting, customer service, real estate sales, coordinating loan investments, and buying and selling agricultural property. Mr. Hunter's father was one of Hunro Properties' partners, and in 1991 his father and one other partner passed away, causing the partnership to be dissolved. (Id.) Thereafter, another Hunro partner, Robert Gray, formed his own realty company and employed Mr. Hunter. (Id.) Mr. Hunter's duties at Robert Gray Realty consisted of buying, selling, and trading real estate and assisting customers in arranging financing, getting loans processed, and other functions relating to purchasing property. (Id.)

4. In January of 1994, Mr. Hunter left Robert Gray Realty and became employed part-time as a customer service representative for Fingerhut Corporation, a telemarketing firm. (Exhibit L) He remained employed part-time at Fingerhut until March of 1995 when he left that company to accept a position at Green Tree. (Id.)

5. Mr. Hunter is a Type I, or insulin-dependent, diabetic, having been diagnosed with that condition at the age of four. (Tr. p. 52) Since then, he has been under the care and treatment of a number of endocrinologists, physicians who specialize in the treatment of hormonal disorders, including diabetes. (Exhibit 1, pp. 4

and 6-7; Tr. p. 54) Initially, Mr. Hunter began taking one dose of insulin, by injection, per day. (Tr. p. 55) His physician later placed him on two doses of insulin per day — one at about 7:00 or 8:00 a.m. and another around 10:00 p.m. (Tr. p. 56) In the late 1980s, he was admitted as an inpatient to Metropolitan Mount Sinai Medical Center for four days of evaluation, treatment, and education relating to his diabetes. (Tr. p. 53) At that time, his physician prescribed a third dose of insulin at about 6:00 p.m. (Tr. pp. 53-54) The regimen on which Mr. Hunter has been placed requires him to test his blood sugars at least three times per day, immediately prior to taking his doses of insulin. (Tr. p. 58)

6. Insulin is a hormone which takes the energy that is in the body's blood — namely, blood sugars — and either pushes those blood sugars into the body's cells for immediate use or into fat cells, which are “energy banks,” for later use. (Tr. pp. 642-645; Exhibit 1, p. 4) Normally, the pancreas — a gland that lies behind the stomach — is constantly making the right amount of insulin to deal with fluctuating levels of blood sugars. (Id.) Diabetes is a metabolic disease that occurs when the pancreas makes no or insufficient insulin or when the body's insulin is not working properly. (Id.)

7. What physicians call “Type I diabetes” means that there a complete, or nearly complete, lack of insulin in the body. (Tr. pp. 642-645; Exhibit 1, p. 8) In the absence of insulin, excess blood sugars cannot be pushed into fat cells; blood sugar levels therefore become extremely high, resulting in serious complications and, possibly death. (Id.) “Type II diabetes” differs from Type I in that Type II diabetics may not require the use of insulin, and even if they do take insulin for better blood sugar control, their lives are not immediately threatened without it. (Exhibit 1, p. 8)

8. Blood sugar levels in persons without diabetes normally range in the 60 to 110 milligram percent range throughout the day, regardless of whether they eat or do not eat. (Tr. p. 662) Both the higher and lower blood sugar levels that can be experienced by diabetics can cause complications, with the more serious complications being associated with abnormally high blood sugar levels. (Tr. pp. 645-654; Exhibit 1, pp. 8-20) It is the complications of diabetes, and not the fluctuating blood sugar levels that produce them, which may create limitations on the activities of diabetics. (Id.) Diabetics may be affected by some or all of the complications of diabetes to varying degrees, or not at all. (Id.) Diabetic complications are frequently produced by a diabetic patient's failure to exercise optimal control over his or her fluctuating blood sugars — particularly by allowing blood sugars to remain high over extended periods of time. (Id.)

9. When diabetics have low blood sugar, or hypoglycemia, it is almost always because there is an excess amount of insulin in their systems. More specifically, the excess insulin causes an excessive amount of blood sugars to be stored in fat cells, leaving insufficient blood sugars for the body's other cells to use and metabolize in the course of the diabetic's normal physical activities. (Tr. pp. 645-646) Low blood sugar can occur either because a diabetic may have taken too much insulin for his or her current food intake and activity level or because of not eating enough food in comparison with the insulin dose taken. (Exhibit 1, pp. 12-13) Low blood sugar in a diabetic can produce symptoms of confusion, tiredness, and morning headaches. (Tr.

pp. 646-647) Those symptoms can be followed by nervousness, shakiness, sweating, and physical weakness. If untreated, low blood sugar can lead to seizure or coma. (Tr. pp. 646-647; Exhibit 1, pp. 23-24) Treating low blood sugar is normally just a matter of taking glucose pills or eating a snack that has a high glucose content. (Id.)

10. Mr. Hunter's diabetes makes him very sensitive to low blood sugar. (Exhibit 1, pp. 12-13) Another symptom of low blood sugar, which Mr. Hunter has experienced on occasions, is a flashing light across the eyes that makes it difficult to see to work for over a half hour. (Id.) This symptom occurs because not enough nutrition is getting to his eyes, and this causes the visual changes he experiences. (Id.) Mr. Hunter did not experience this particular complication or symptom of diabetes at work while he was employed by Green Tree, nor did he request Green Tree to provide him with any accommodation on its account.

11. When Type II diabetics experience high blood sugar, or hyperglycemia, it is usually because they have not taken enough insulin to metabolize or store the calories they are ingesting. (Exhibit 1, p.15) High blood sugar can also produce a number of different diabetic complications, many of which are serious and may permanently limit some of a diabetic's activities. (Tr. pp. 645-654; Exhibit 1, pp. 8-20) Those complications are normally not produced by acute episodes of high blood sugar, but rather they arise because of chronic high blood sugar levels over a period of months and years. (Exhibit 1, pp. 14-15 and 18-20; Tr. pp. 649-651) Chronic high blood sugar can be avoided through glucose control — that is, by regular blood sugar testing, by taking appropriate insulin doses, by controlling calorie intake through maintaining a specific meal plan, and by keeping one's physical activities on a relatively even level. (Exhibit 1, p. 15)

12. One complication of diabetes, which is attributable to chronic, prolonged high blood sugar, is diabetic retinopathy. That condition is a disease of the eye that occurs when chronically elevated blood sugar produce changes in the retina; if untreated, retinopathy can result in loss of vision or blindness. (Tr. pp. 648-649; Exhibit 1, pp. 8-9) In 1988 Mr. Hunter was found to have bilateral proliferative retinopathy, which is a visually threatening eye disease, and he received laser therapy in both eyes to try to treat that condition. (Exhibit 1, pp. 11-12) He was also found to have damage in the interior of his left eye with blood present in the vitreous fluid. Those conditions were treated surgically with a vitrectomy. (Id.) As the result of his bilateral diabetic retinopathies, Mr. Hunter is now legally blind in his left eye and has diabetic changes that are compromising the vision in his right eye. (Id.)

13. Another complication of diabetes affecting the eyes is cataracts. Diabetics frequently have cataracts much earlier in life than people who do not have the disease because exposure of the eye's lens to high blood sugars can cause scarring and clouding. (Exhibit 1, pp. 13-14) In September of 1996, Mr. Hunter had eye surgery to remove a cataract from his left eye. (Id.)

14. Still another complication of diabetes caused by chronic high blood sugar is diabetic peripheral neuropathy. (Tr. pp. 649-650; Exhibit 1, pp. 15-16) This term

refers to damage to the nerves found in the extremities, particularly the feet and hands. Diabetics with peripheral neuropathies can experience various kinds of symptoms, including loss of sensation and numbness, as well as burning sensations and other pain. (Id.) If diabetic peripheral neuropathies are not controlled by good management of blood sugars, the skin on the feet and hands tends to become dry and cracked. (Exhibit 1, pp. 17-18) The patient then has difficulty sensing small particles that may become lodged in the skin, which, in turn, may cause infections and ulcerations. (Id.) Diabetic peripheral neuropathies can further cause nausea and vomiting because nerves in the stomach are not functioning properly, and they may also cause impotence and rapid heart beats. (Id. at 15-16) Diabetic peripheral neuropathies can also lead to a loss of balance and to a breakdown of the bones in the feet, resulting in a need for special shoes and for special appliances within shoes. (Id. at pp. 18-19) To avoid serious complications of diabetic peripheral neuropathies, diabetics should maintain optimal control of blood sugar levels, check their feet on a daily basis, and avoid going barefoot. (Id.)

15. On September 15, 1992, Mr. Hunter complained to his treating physician of numbness, and tingling and shooting pains in both feet. (Exhibit #A, p. B0026) He was diagnosed as having diabetic peripheral neuropathies. (Id. at p. B0027; Tr. p.) On February 3, 1995, Mr. Hunter presented to his treating physician with an ulcer on the bottom of the ball of his left foot, a condition that was a further complication of a diabetic peripheral neuropathy. (Tr. p. 654; Exhibit #A, p. B0036) The foot ulcer eventually healed without further complication. (Exhibit #1, Attachment 6)

16. Yet another complication of diabetes is diabetic nephropathy. (Tr. pp. 649-650; Exhibit 1, pp. 15-16) This condition consists of damage to, and malfunctions of, the kidneys caused by chronically elevated blood sugar levels produced by inadequately managed diabetes. (Tr. pp. 650-651; Exhibit 1, p. 19) Mr. Hunter has a mild nephropathy. If mild diabetic nephropathies become worse, a diabetic can develop nausea and vomiting and may require a kidney transplant or dialysis. (Exhibit 1, p. 19) To avoid more serious diabetic nephropathy, a diabetic should attempt to keep blood sugar, as well as blood pressure, as normal as possible. (Id. at 19-20) While Mr. Hunter was employed by Green Tree, he did not require or request Green Tree to provide him with any accommodation relating to his mild diabetic nephropathy.

17. Prior to 1994, Mr. Hunter had not been doing a very good job of managing his blood sugars. (Tr. pp. 663-666; Exhibit H) Shortcomings in his blood sugar management included failure to do any daily blood sugar testing, mild hypoglycemic reactions twice a week, use of alcohol at bedtime, allowing blood sugar levels to reach very high levels, and failure to have a meal plan. (Exhibit A, pp. B001-002, B0018, B0024, B0030, B0033, B0034, B0036, and B0039; Exhibit 1, pp. 43-52). In February of 1995, about a month before he began working for Green Tree, Mr. Hunter's treating physician noted that: "He has poorly controlled diabetes. He doesn't do any blood sugar testing." (Exhibit A, p. B0036; Tr. p. 671) At the time of that visit, Mr. Hunter's blood sugar level was 301, in comparison with the normal range of 60 to 110. (Id.; Tr. p.

662) From September of 1995 to May of 1997, Mr. Hunter's blood sugar management has improved but is still less effective than it could be. (Tr. pp. 663-666; Exhibit H)

18. Diabetic patients with work schedules similar to Mr. Hunter's work schedule at Green Tree are generally able to adapt their blood sugar control to their work schedules, provided there is some flexibility in the workplace in case problems arise. (Exhibit 1, pp. 36-37; Tr. pp. 689-692) If a diabetic employee's work schedule were to vary only about one hour a day or so, that employee should be able to adapt to the work schedule, particularly with advance notice of any schedule variations. (Exhibit 1, p. 43) Even diabetic patients whose work requires a great deal of foreign travel and whose activities include strenuous athletics are normally able to adapt their blood sugar control measures to their schedules. (Tr. pp. 629 and 699-700)

19. On a diabetic employee's part, adaptation of blood sugar management to one's work schedule would include such measures as bringing blood sugar testing equipment and insulin to work, as well as bringing snacks like candy and juice or glucose pills to deal with episodes of low blood sugar. (Exhibit 1, pp. 21 and 36-37; Tr. pp. 674-683 and 701-703) On the employer's part, assisting a diabetic employee in adapting his or her blood sugar management to the work schedule would include such measures as allowing them opportunities to test for blood sugar levels while on the job, to administer insulin on the job, and to take snacks, when needed. (Id.) If a diabetic knows that working late will be required, he or she should plan for it by bringing blood sugar testing equipment and insulin to work; the employer should then allow the employee time to eat at work in order to reset the diabetic balance. (Exhibit 1, p. 25; Tr. pp. 699-703) Although maintaining a consistent daily work schedule "is often very helpful" to diabetics in managing blood sugar fluctuations, it is not medically required. (Exhibit 1, p. 27-28; Tr. pp. 699-703)

20. According to Dr. Mulmed, who is Mr. Hunter's own treating physician, as well as Dr. Smith, who was Green Tree's expert medical witness, there is no reason why Mr. Hunter could not hold a full-time or 40-hour-a-week job, assuming that his job did not call for strenuous activity or did not allow him some leeway to maintain good control over his diabetes. (Exhibit 1, p. 21; Tr. pp. 689-692) Dr. Mulmed described the term "leeway" as "just a few minutes at various times during the day to check glucose, to take insulin when needed, to have a snack if his blood sugar were low." (Id.) Under normal circumstances, managing blood sugar levels on the job does not pose any particular problem for diabetics, and maintaining a consistent daily work schedule was not medically required in order for Mr. Hunter to exercise optimal management of his blood sugar levels while he was employed by Green Tree. (Id.) Specifically, the schedule accommodations which Mr. Hunter requested in his letter to Mr. Kelsey of April 4, 1995, (Exhibit 9) were not medically necessary to alleviate any limitations which Mr. Hunter's diabetes imposed on him. (Tr. pp. 689-695)

21. During the latter part of February, 1995, Mr. Hunter was still employed part-time as a sales consultant with Fingerhut Corporation but was looking for full-time employment with the assistance of Richard Gieschen, a job placement specialist employed by the State of Minnesota's State Services for the Blind office. (Tr. pp. 73-

75) Mr. Gieschen invited Mr. Hunter's attention to an organization called Pathfinders, which was an association of local employers interested in hiring qualified persons with disabilities. (Id.; Tr. pp. 514-516) Through his contacts with Pathfinders, Mr. Gieschen had come to know individuals in Green Tree's human resources office, and he asked Mr. Hunter whether he would be interested in an interview. (Id.; Tr. 396) Mr. Hunter indicated that he was interested, and an interview with Kristen Solberg, Green Tree's corporate human resources manager was arranged for February 28, 1995. (Tr. pp. 73-75; Exhibit B)

22. On February 28, 1995, Green Tree had vacancies for the positions of credit manager in both its consumer finance and home improvement divisions. (Tr. p. 454) Mr. Hunter prepared and submitted a resume (Exhibit 7) and an application for employment (Exhibit B) to Green Tree and was interviewed by Ms. Solberg for the position of credit manager in Green Tree's consumer finance division. (Tr. pp. 75-77 and 452-460)

23. Green Tree is a financial services corporation whose business consists primarily of making secured loans to consumers to enable them to purchase property and products being sold to them by the retail vendors who refer them to Green Tree for financing. (Tr. pp. 31-335 and pp. 482-483) Although its headquarters is located in St. Paul, Minnesota, Green Tree conducts its business throughout the United States and has offices in every state. (Tr. 331-333) At the times relevant to these proceedings, Green Tree's business operations were divided into six divisions, or operational business units — a manufactured housing division, a home improvement division, a retail mortgage services division, a consumer finance division, an equipment finance division, and a commercial finance division. (Id.) Each of these divisions was staffed by credit managers whose duties consisted of receiving consumer loan applications forwarded to Green Tree from retail vendors, evaluating those loan applications along with related credit information, and making decisions on whether to grant or deny the loans being requested. (Tr. pp. 498-500) Based upon their seniority and experience, credit managers had varying levels of lending authority. (Id.)

24. The primary business of Green Tree's consumer finance division was to make lending decisions in connection with consumer purchases of recreational vehicles and equipment. (Tr. p. 565) At the time Mr. Hunter was being interviewed for employment, Joseph Kelsey was that division's senior credit manager and was responsible for its day-to-day operations. (Tr. pp. 565-566) Mr. Kelsey had divided the division's twenty-one other credit managers into three teams — one team to consider loans for motorcycles, another for sports vehicles, and a third for boats. (Tr. pp. 477-482) One credit manager was designated as leader for each team, but those positions were not supervisory; all of the division's credit managers reported directly to Mr. Kelsey. (Id.)

25. Because a majority of consumer purchases of motorcycles, boats, and sports vehicles occurred during evening hours and on weekends, lending activity during regular weekday business hours was relatively slow, particularly during the mornings. Lending activity increased during the afternoons and into the evening hours on

weekdays. (Tr. p. 488) The busiest lending activity during the week was on Saturday. (Id.) Because of when its business activity occurred, the consumer finance division was open for business from 8:00 a.m. to 9:00 p.m. seven days a week, and some credit managers had to be on duty at all times. (Tr. pp. 574-575) Other divisions, such as the home improvement division, worked a normal eight-hour day, Monday through Friday. (Tr. p. 455)

26. Given the way in which peaks of lending activity occurred, credit managers in the consumer finance division worked on rotating schedules according to a fairly complex scheduling system. (Tr. pp. 488-490) Depending on their individual schedules, credit managers in that division might report to work on different days variously from 8:00 a.m. to 12:00 noon. (Tr. pp. 493 and 569) They were also expected to work until at least 9:00 p.m. on one week night and to work on every other Saturday and occasionally on Sunday. (Tr. p. 492)

27. Judith Glewwe, who was Mr. Kelsey's assistant, was responsible for scheduling, and she would prepare the work schedule for credit managers in advance for a six-week period. (Tr. pp. 488-495 and 568) In preparing the work schedule, Ms. Glewwe would consult with each of the division's credit managers to determine which days they would prefer to have off, which evenings they would prefer to work, etc. and would then schedule each credit manager for shifts totalling approximately 40 hours per week. (Id.) It would normally take Ms. Glewwe three to four full work days to prepare a six-week work schedule. (Id.) After the work schedule was completed, copies were given to all the credit managers, who would have at least four to six weeks' advance notice of their scheduled work days. (Id.; Tr. p. 544) If they subsequently wished to have changes made, it was their individual responsibility to trade work hours with other credit managers. (Id.)

28. Each credit manager in the consumer finance division had discretion about when to schedule his or her own lunch. (Tr. pp. 220-222, 497, 555-556, and 581) There was a lunch room with a refrigerator and vending machines on the same floor of the building, and credit managers were also permitted to eat food or meals at their desks. (Id.) Credit managers in Green Tree's consumer finance division were not required to stay at work beyond their scheduled shift in order to complete transactions, nor were they required to work overtime. (Tr. p. 545)

29. In the spring and summer when its business activity was especially busy, Green Tree contracted with a temporary employment agency to provide its consumer finance division with varying numbers of temporary full-time credit managers depending on the extent of activity. (Tr. pp. 539-543 and 570-572) The temporary credit managers were employees of the agency and not of Green Tree. (Id.) The employment agency, and not Green Tree, arranged their work schedules, and they did not normally work on weekends or nights. (Tr. p. 539-40) Temporary credit managers had no lending authority but rather processed credit applications that were likely to be denials. (Id.; Tr. pp. 501-502) There were temporary credit managers working in Green Tree's consumer finance division during the time when Mr. Hunter was employed there. (Id.;

Tr. p.479) Ms. Glewwe did not schedule the work hours of temporary credit managers. (Tr. p. 479)

30. During the course of Mr. Hunter's employment interview with Ms. Solberg on February 28, 1995, she informed him that credit managers in the consumer finance division worked rotating shifts with some evening and weekend work. (Tr. pp. 454-455; Exhibit B) She asked Mr. Hunter whether such a schedule posed any problems for him, and he responded that it did not. (Id.) He also did not indicate to Ms. Solberg that he needed either a consistent, set schedule or a set time for eating meals. (Id.; Tr. p. 458) At the time of the interview with Ms. Solberg, Green Tree also had an opening in its home improvement division, where credit managers consistently worked eight hours per day, Mondays through Fridays. (Tr. pp. 454-455) Mr. Hunter acknowledges being advised of the availability of other positions. (Tr. p. 77) At no time during that initial interview with Ms. Solberg did she ask Mr. Hunter whether he had any kind of disability or impairment, nor did Mr. Hunter volunteer any such information. (Tr. pp. 78, 205, and 401)

31. Immediately after her interview with Mr. Hunter, Ms. Solberg arranged for him to be interviewed by Mr. Kelsey, since it was Mr. Kelsey who had ultimate authority to hire credit managers for the consumer finance division. (Tr. pp. 78 and 394-395) In that second interview, Mr. Kelsey described the business of the consumer finance division and the duties of a credit manager. (Tr. pp. 78-79 and 574-578) Mr. Kelsey also explained in more detail the rotating shift schedule that credit managers worked and what kind of weekend work Mr. Hunter might expect. (Tr. pp. 80-81, 200-201 and 574-578) Mr. Hunter made no comments about the prospective work schedule during that meeting with Mr. Kelsey. (Tr. p. 81) At no time during that initial interview with Mr. Kelsey did he ask Mr. Hunter whether he had any kind of disability or impairment, nor did Mr. Hunter volunteer any such information. (Tr. pp. 203-204 and 574-578)

32. Following his interview with Mr. Hunter, Mr. Kelsey recommended that Mr. Hunter be hired as a permanent, full-time credit manager in Green Tree's consumer finance division. (Tr. pp. 578-579) On Friday of the same week in which Mr. Hunter had his interviews at Green Tree, Ms. Solberg called him by telephone and offered him that position. (Tr. pp. 83-82) At the time of the offer, Mr. Hunter told Ms. Solberg that he would be interested in accepting the position but that there were certain accommodations that he would need. (Tr. pp. 83 and 459-460; Exhibit 19) Specifically, Mr. Hunter told Ms. Solberg that he had a vision impairment that required accommodation. (Id.) He did not indicate at that time that his visual impairment was a complication of diabetes, that he had diabetes, or that his activities were limited in any other ways. (Id.) During that telephone conversation, Ms. Solberg set up a further meeting with Mr. Hunter and Mr. Gieschen to discuss the type of accommodation Mr. Hunter might need for his visual impairment. (Tr. pp. 84-88, 460-463, and 579)

33. After Ms. Solberg's call, Mr. Hunter had either one or two further meetings with her and with Mr. Kelsey, during the course of which Mr. Hunter requested that he be provided with a large computer monitor, some special scanning equipment, and some vision enhancement software. (Id.) On those occasions, Mr. Hunter did not

inform anyone in authority at Green Tree that his visual impairment was a complication of diabetes, that he had diabetes, or that his activities were limited in any other ways. (Id.; Tr. pp. 197-198) As a result of those subsequent meetings, Green Tree agreed to accommodate Mr. Hunter's visual impairment by supplying the equipment he requested. (Id.)

34. Mr. Hunter reported for work at Green Tree on March 20, 1995. (Tr. p. 93; Exhibit 21) Upon reporting for work, he first went to Green Tree's human resources office to begin the orientation process for new employees. (Tr. pp. 93-94) Mr. Hunter began his orientation with five or six other newly hired employees, including another newly hired credit manager in the consumer finance division. (Id.; Tr. pp. 549-554) The new employees were first asked to complete a number of forms relating to their employment. (Tr. pp. 94 and 444-446) One of the forms Mr. Hunter was requested to fill out was a Personal Data Form (Exhibit 8) on which he provided the following answer to the following question:

Do you have any physical condition(s) and/or work restrictions which may affect your ability to perform the job duties as explained to you? No Yes (if yes, please explain)

Visually impaired / Diabetic

35. At orientation, Mr. Hunter and the other new employees were also given a "new hire packet," which included both a flyer describing Green Tree's "In-Touch" program whose main feature was a hot line to notify persons in authority within Green Tree about any concerns that an employee might have. They also received a "New Employee Welcome Booklet." (Tr. pp. 444-446; Exhibit 16) That booklet included the following information about Green Tree's In-Touch program:

If at any time you have a question, comment, suggestion or complaint, you may call IN TOUCH at 800-835-5870 (ext. 48733). Unless you choose to identify yourself, all messages are kept confidential and anonymous and are reviewed by Green Tree's Chairman and CEO.

(Exhibit 16 at p. 4) The booklet also included the following provision at p. 12:

Employees or job applicants who feel that they may have been the subject of discrimination or harassment of any type should immediately inform their supervisor or the Corporate Human Resources Department. Supervisors shall inform the Corporate Human Resources Department immediately of any such allegations.

All complaints will be investigated in a timely and confidential manner. Once a thorough investigation is completed, and in the event a violation is found, senior management of the Company will take appropriate action.

Mr. Hunter received, read, and understood the information contained in the Employee Welcome Booklet. (Exhibit C)

36. The next step in orientation for Mr. Hunter and the others in his group was to watch a video tape presentation which, among other things, emphasized the procedure for making an appeal to Green Tree's human resource office if employees had concerns or grievances that were not being adequately addressed by their immediate supervisors. (Tr. pp. 94, 516-518, and 553-554) After that, newly hired credit managers were given computer training by Green Tree's data entry division. (Tr. p. 554) Following their computer training, the two credit managers hired for the consumer finance division, including Mr. Hunter, were paired with veteran credit managers and learned by watching the latter perform their duties until they were ready to work on their own. (Tr. pp. 555 and 579)

37. On Mr. Hunter's first day of work, he discussed his prospective work schedule with Mr. Kelsey. (Tr. pp. 98-104) During the course of that conversation, Mr. Hunter indicated that he had diabetes and requested that he be given "a little more predictable schedule" to make it easier for him to manage his blood sugar levels. (Tr. p. 103.) He did not, however, tell Mr. Kelsey that his diabetes prevented him from working the hours that he was being assigned to work, and Mr. Kelsey took Mr. Hunter's request to be for a scheduling preference. (Tr. p. 211) Mr. Kelsey indicated that Mr. Hunter should discuss that with Ms. Glewwe, who did the scheduling for the division. (Tr. p. 104) At no time during that conversation or on any other occasion, did Mr. Kelsey tell Mr. Hunter that he would be expected to stay late and work overtime during busy times. Mr. Hunter subsequently conferred with Ms. Glewwe and told her that because of his diabetes he preferred to have his work schedule start and end at the same times each day, 9:00 a.m. and 6:00 p.m., respectively, rather than having the variable starting and ending times the other credit managers had. (Tr. pp. 106-110; 505, and 509) Ms. Glewwe indicated to Mr. Hunter that she would be able schedule him for consistent daily work hours of 9:00 a.m. to 6:00 p.m. (*Id.*) Mr. Hunter did not indicate to Ms. Glewwe that he could not work nights or that he had any kind of special requirements for weekend work. (Tr. pp. 504-505)

38. During the fifteen days Hunter worked for Green Tree, his normal work schedule was 9:00 a.m. to 6:00 p.m. (Tr. p. 107) On one occasion, his team leader asked him to stay late in order to reduce a backlog of work. (Tr. pp. 116-118) Although he was not required to work overtime, Mr. Hunter believed that he was obliged to accommodate his team leader on that occasion, and he did not leave work until after 7:00 p.m. (*Id.*) Since Mr. Hunter had brought neither a glucose test kit nor insulin to work with him that day, he was not able to take his second dose of insulin until 8:00 p.m., rather than at about 6:30 p.m. when he would normally return home from work. (Tr. pp. 118-119) But taking his second dose of insulin late did not cause a blood sugar management problem for Mr. Hunter on that particular occasion. (*Id.*)

39. On a second occasion, Mr. Hunter's team leader informed him, again without advance notice, that everyone, including team leaders, would be staying late for a while. (Tr. p. 119-120) On that occasion, Mr. Hunter left work at between 6:30 and

6:45 p.m., and his second insulin dose was delayed by 30 to 45 minutes. (Id.) Again, taking his second dose of insulin late on that day did not cause a blood sugar management problem for Mr. Hunter. (Id.) Mr. Hunter never indicated to his team leader, to Mr. Kelsey or to anyone else in authority at Green Tree that staying late at his team leader's request was creating a blood sugar management problem for him.

40. One morning near the end of his second week of employment, Mr. Hunter had selected a 1:00 p.m. lunch break. (Tr. pp. 120-121) Shortly before his scheduled lunch break, Mr. Hunter began to experience symptoms of low blood sugar — namely, confusion, disorientation, and sweating. (Id.) Mr. Hunter went to Mr. Kelsey and stated that he “was feeling low” and needed to go to lunch right away, rather than at his scheduled time. (Id.) By “feeling low,” Mr. Hunter meant that he was experiencing low blood sugar. (Id.) Mr. Kelsey, however, did not understand that Mr. Hunter meant he was experiencing low blood sugar on the job. (Tr. pp. 217 and 582-584) In any event, on that day, Mr. Hunter did not go to lunch right away but rather ate some candy at his desk in order to raise his blood sugar, after which he later ate lunch. (Tr. pp. 125-127) Mr. Kelsey did not indicate to Mr. Hunter on that day, or on any other day, that he would have to wait to complete a loan transaction before going to lunch. (Tr. pp. 582-584)

41. Believing that he had ingested too many calories on the occasion described in Finding No. 40, Mr. Hunter tested his blood sugar level when he returned home that evening, and the test indicated a blood sugar level of 459, more than four times higher than normal. (Tr. p. 122) That afternoon and evening he experienced shooting pains in his legs, which continued for a month and then went away. (Tr. pp. 129-130 and 135) The shooting pains he experienced were not causally connected with the high blood sugar level he experienced on that particular day because a single, acute episode of high blood sugar does not affect a peripheral neuropathy. (Tr. pp. 692-693) Nor was his leg pain causally connected with his working late on two occasions or with any other aspects of his work schedule during the two weeks he was employed by Green Tree. (Tr. p. 694) That particular kind of diabetic complication is only influenced by chronic high blood sugar levels over a period of years. (Id.)

42. During the fifteen days Mr. Hunter worked for Green Tree, he occasionally experienced blurred vision on the job, both in the early morning and in the late afternoon. (Tr. pp. 135-135) Mr. Hunter attributed his blurred vision in the early morning to a normal delay in the insulin from his regular 8:00 a.m. injection becoming effective. (Id.) He attributed his blurred vision in the late afternoon to higher blood sugar levels later in the day. (Id.) But visual changes, such as blurred vision, are caused by low, and not by high, blood sugar levels. (Exhibit 1, pp. 12-13)

43. During the weekend after Mr. Hunter's second week of employment with Green Tree, he contacted Messrs. Ziegler and Gieschen from State Services for the Blind, and informed them that his work schedule at Green Tree was causing problems for his management of his diabetes. (Tr. pp. 144-146) They suggested that he put his concerns and his proposed solution in writing for Green Tree. (Id.)

44. On Tuesday, April 4, 1995, Mr. Hunter addressed and hand delivered a letter to Mr. Kelsey with the following contents:

I am submitting the following letter in the hope that something can be worked out to allow me to become better equipped to handle my position with Greentree at the best and most productive level.

I have been an insulin-dependent diabetic since age four. Diabetes is a very serious disease wrought with many consequences such as kidney disease, blindness and loss of limbs to name a few. The only proven way to limit or prevent these complications is by strict control of blood sugars. This is done by a systematic combination of insulin injections, nutrition and exercise. I have consulted at length with my physician and other experts in the field to come up with an effective routine for healthy living. As this applies to employment and Greentree and what is expected out of an employee such as myself, I have so far experienced barriers that I feel need to be addressed.

My routine involves three injections per day, 8:00 a.m., 6:00 p.m. and 10:00 p.m. The closer I maintain this schedule the better equipped I am to handle the current and following days (sic) demands on me. Visually the only problem I have been experiencing is toward the end of the day as my evening regiment (sic) approaches. My evening routine is crucial both in the timing and the flexibility to make adjustments for close control of blood sugars. Taking into consideration my health requirements and overall efficiency on my part I request the following to be considered:

A Monday through Friday schedule with hours being 9:00 A.M. to 5:30 P.M. A 5:30 limit on my day would allow me to meet all my evening requirement (sic) and ensure a productive start to the following day. To meet daily and hourly requirements I propose 1/2 hour lunch and/or elimination of 15 minute breaks.

Weekend schedule is also a concern. It is important that I have as many two-day respites for my eyes as possible. I suggest one Saturday and Sunday combination per month, due to the requirement I mentioned earlier. I do feel a 6:00 P.M. close could be handled on this limited basis.

Again I make these requests in the hope that this will be a workable solution for both Greentree and myself so that I can become the most effective employee possible. I look forward to discussing these issues with you at your convenience.

45. After handing Mr. Kelsey the letter (Exhibit 9), Mr. Hunter asked him to read it. (Tr. p. 159) After reading the letter, Mr. Kelsey informed Mr. Hunter that he could talk to Ms. Glewwe about whether it was possible for him to work from 9:00 a.m.

to 5:30 p.m. on week days and that they would accommodate those preferences as much as possible. (Tr. p. 589) But Mr. Kelsey indicated that it would not be possible for Green Tree to schedule Mr. Hunter for only one Saturday per month, since that was the consumer finance division's busiest day. (Id.) Upon receiving Mr. Kelsey's response, Mr. Hunter stated that he would therefore be forced to resign and go back to his prior position at Fingerhut. (Id.; Tr. p. 163) During Mr. Hunter's lunch hour later that day, he called the human resources offices at Fingerhut Corporation to determine whether he could go back there to work in his former position as a customer service representative beginning on the following Monday. (Tr. p. 166) Upon being informed that positions were available at Fingerhut on both the morning and evening shifts, Mr. Hunter selected the morning shift. (Id.)

46. In a later conversation on Tuesday, April 4, 1995, Mr. Kelsey asked Mr. Hunter whether he would be ending his employment with Green Tree at the end of that business day or whether he could work until the close of business on Friday. (Tr. p. 164) Mr. Hunter replied that he would be willing to work through Friday but that he was not willing to work his scheduled evening shift from 6:00 to 9:00 p.m. on Thursday. (Id.) Mr. Kelsey indicated that it would not be necessary for Mr. Hunter to work the Thursday evening shift. (Id.) At no time on or after April 4, 1995, did anyone at Green Tree ask Mr. Hunter for medical documentation to support his accommodation request. (Tr. p. 171) At no time on or after April 4, 1995, did Mr. Hunter submit a complaint under Green Tree's In-Touch program or a complaint to the human services office concerning what he considered to be Mr. Kelsey's refusal to consider Mr. Hunter's work schedule proposal.

47. On April 5, 1995, Mr. Kelsey prepared a "Separation Checklist" indicating that Mr. Hunter had resigned his position as a credit manager with Green Tree's consumer finance division effective as of April 7, 1995, and gave it to Mr. Hunter for his review and signature. (Tr. p. 612; Exhibit 17) After Mr. Hunter signed the form, Mr. Kelsey forwarded it to the human resources office for processing. (Tr. p. 612)

48. Sometime after leaving Green Tree, Mr. Hunter called Ms. Solberg and asked her whether the company had any part-time credit manager positions available. (Tr. 169-170) Ms. Solberg indicated that Green Tree did not hire credit managers on a part time basis. (Id.) After that telephone call, Mr. Hunter had no further communications with Green Tree.

49. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

50. Any Finding of Fact more properly termed a Conclusion is hereby adopted as such.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge has jurisdiction to consider the issues raised in this proceeding pursuant to Minn. Stat. § 363.071, subds. 1 and 2, and § 14.50.

2. Proper notice of the hearing was timely given, and all relevant substantive and procedural requirements of pertinent statutes and rules have been fulfilled.

3. At the times relevant to this proceeding, Green Tree was an “employer,” as defined in Minn. Stat. § 363.01, subd. 17, and Mr. Hunter was an “employee,” as defined in Minn. Stat. § 363.01, subd. 16.

4. Under Minn. Stat. § 363.03, subd. 1(6), it is an unfair and unlawful employment practice for an employer not to make reasonable accommodation to the known disability of a qualified disabled person unless the employer can demonstrate that the accommodation would impose an undue hardship on it.

5. At the times relevant to this proceeding, Mr. Hunter had a medical condition known as Type I diabetes and was a qualified disabled person within the meaning of Minn. Stat. § 363.03, subd. 1(6).

6. In order to have a right to reasonable accommodation under Minn. Stat. § 363.03, subd. 1(6), Mr. Hunter was required to show that the particular aspect or complication of diabetes for which he was seeking accommodation limited one or more of his major life activities. Schluter v. Industrial Coils, Inc., 928 F. Supp. 1437, 1447 (W.D. Wis. 1996). Blood sugars that fluctuated to abnormally high and low levels was the aspect or complication of diabetes for which Mr. Hunter was seeking accommodation. In determining whether that particular complication of diabetes limited one or more of Mr. Hunter’s major life activities, any blood sugar management mitigating measures that may have been available to him should not be taken into account. Doane v. City of Omaha, 115 F.3d 624, 627 (8th Cir. 1997); 29 C.F.R. pt. 1630, app. § 1630.2(j).

7. Mr. Hunter established by a preponderance of the evidence that his fluctuating blood sugar levels, without taking mitigating measures into account, limited one or more of his major life activities.

8. An employer’s obligation under Minn. Stat. § 363.03, subd. 1(6) to make reasonable accommodations extends only to “known” disabilities. This requirement means that in order for the employer of a diabetic employee to be obligated to make reasonable accommodation for that disease, the employee must first notify the employer of the particular limitations produced by that disease for which accommodation is being requested. Taylor v. Principal Financial Group, 93 F.3d 155, 164 (5th Cir. 1996), cert. denied, 117 S. Ct. 586 (1996).

9. Mr. Hunter failed to notify Green Tree of any limitations on his activities that were caused by his diabetes, including any limitations produced by the complication of diabetes — i.e., fluctuating blood sugar levels — for which accommodation was being sought.

10. Mr. Hunter's history of poor management of his diabetes did not bar him from asserting a claim of failure to make reasonable accommodation under Minn. Stat. § 363.03, subd. 1(6).

11. An employer's obligation under Minn. Stat. § 363.03, subd. 1(6) to make accommodation extends only to "reasonable" accommodations. Accommodations which are not medically necessary to assist a disabled employee in overcoming limitations caused by his or her disability are not reasonable. Miller v. National Casualty Company, 61 F.3d 627, 629-630 (8th Cir. 1995); McAdams v. United Parcel Service, Inc., 30 F.3d 1027 (8th Cir. 1994).

12. The schedule accommodations requested of Green Tree by Mr. Hunter on April 4, 1995, were not medically necessary to assist him in overcoming any limitations which his diabetes imposed on him. Those requested accommodations were therefore not "reasonable" within the meaning of Minn. Stat. § 363.03, subd. 1(6).

13. Employers and disabled employees are both responsible under the MHRA for engaging in good faith in an interactive process to determine an appropriate accommodation for a disability-related limitation. Beck v. University of Wisconsin Board of Regents, 75 F.3d 1130, 1135 (7th Cir. 1996); 29 C.F.R. pt. 1630, app. A disabled employee who is responsible for a breakdown in that interactive process is not entitled to the accommodation he or she requested. Id.

14. Mr. Hunter was responsible for the breakdown of the interactive process to determine which, if any, of the schedule accommodations he proposed to Green Tree on April 4, 1995, were appropriate.

15. Mr. Hunter failed to establish by a preponderance of the evidence that Green Tree failed to make reasonable accommodation to a known disability of Mr. Hunter's in violation of Minn. Stat. § 363.03, subd. 1(6).

16. Any Conclusion more properly termed a Finding is hereby adopted as such.

17. These Conclusions are made for the reasons set forth in the Memorandum which follows and which is hereby incorporated by reference herein.

Based on the foregoing Conclusions, IT IS HEREBY ORDERED:

The charges of the charging party and Complaint of the Department are DISMISSED with prejudice.

Dated: This _____ day of March, 1998.

BRUCE H. JOHNSON
Administrative Law Judge

Reported: Court reported (Pat Carl & Associates); four volumes

MEMORANDUM

I. Procedural Background and Contentions of the Parties

This proceeding was initiated by a Complaint and Notice of and Order for Hearing filed by the Department on March 31, 1997, pursuant to Minn. Stat. § 363.06, subd. 4(3). The Department alleges that Green Tree violated Minn. Stat. § 363.01, subd. 1(6), by failing to make reasonable accommodation to the known disability of Mr. Hunter, a qualified disabled person, without demonstrating that the accommodation would impose an “undue hardship” on Green Tree. On April 23, 1997, Green Tree filed an Answer which, in substance, denied any violations of the MHRA in its dealings with Mr. Hunter. The issues being thus joined, the parties filed cross motions for summary disposition. Those motions were heard on August 26, 1997. By Order entered on September 19, 1997, the Administrative Law Judge denied Green Tree’s motion for summary disposition but granted the Department’s motion, in part, on the issue of whether during the time he was employed by Green Tree, Mr. Hunter was a person with a disability within the meaning of the MHRA. In the Memorandum that accompanied that Order, the Administrative Law Judge explained that it was uncontroverted that Mr. Hunter “has diabetes and that his diabetes has materially limited at least one major life activity. Specifically, Hunter’s diabetes has caused retinopathy which materially limits Hunter’s ability to see. The ability to see is a major life activity.” (Order and Memorandum of September 19, 1997, at p. 7)

This matter came on for a hearing on the merits from October 28 through 31, 1997, and is now before the Administrative Law Judge for a final decision pursuant to Minn. Stat. § 363.071. The thrust of Mr. Hunter’s argument on the merits is that he has established having at least one major complication of diabetes — i.e., retinopathy — that limits his ability to see, a major life activity. Accordingly, Mr. Hunter contends Green Tree was obliged by the MHRA to provide him with a different work schedule as an accommodation for a different aspect or complication of diabetes — i.e., fluctuating blood sugar levels — without his having to establish for Green Tree or for the Administrative Law Judge that this latter aspect of the disease actually limited any major life activity or that the requested accommodation was medically necessary. Put another way, it is Mr. Hunter’s position that by informing Green Tree that he had diabetes, he became entitled to accommodation for any aspect or complication of that disease even though the aspect or complication for which he was seeking accommodation may not itself have limited any of his major life activities.

Green Tree has asserted a number of defenses. Its first contention is that mitigating measures, such as treatment or medications, should be taken into account when determining whether a disability exists under the MHRA. It argues that since Mr. Hunter’s diabetes in its controlled state does not materially limit any major life activity, he should not be considered disabled for purposes of the MHRA. Green Tree next contends that since fluctuating blood sugars is the actual impairment for which Mr. Hunter is seeking accommodation, his claim must fail because he has failed to show that particular impairment, or aspect of diabetes, involves a substantial limitation on a

major life activity. A third contention is that Mr. Hunter's history of poor management of his diabetes prevents him from claiming disability discrimination. Green Tree also argues that it is not liable under the MHRA because the evidence did not establish that the schedule accommodations Mr. Hunter was seeking were medically required to enable him to control his blood sugars adequately. A fifth argument is that Green Tree was not obliged to engage in interactive discussion about accommodation because Mr. Hunter failed to provide it with sufficient information to enable Green Tree to determine what, if any, accommodations were necessary. Finally, Green Tree contends that if it was obliged to engage in an interactive discussion with Mr. Hunter regarding accommodation, it was Mr. Hunter, and not Green Tree, who was responsible for the breakdown of that interactive process.

II. Mr. Hunter Was Disabled Within The Meaning Of The MHRA

This matter is governed by the Minnesota Human Rights Act, which provides that it is an unfair employment practice for an employer not to make reasonable accommodation to the known disability of a qualified disabled person unless the employer can demonstrate that the accommodation would impose an "undue hardship" on the business or agency. Minn. Stat. § 363.03, subd. 1(6). The Act defines disability as:

Any condition or characteristic that renders a person a disabled person. A disabled person is any person who (1) has a physical, sensory, or mental impairment which materially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment.

Minn. Stat. § 363.01, subd. 13. In construing the Minnesota Human Rights Act, Minnesota's appellate courts often look to similar federal legislation and case law, such as Title VII of the federal Civil Rights Act, the Americans with Disabilities Act (hereinafter "ADA") and the federal Rehabilitation Act. Johnson v. Piper Jaffray, Inc., 530 N.W.2d 790, 801 (Minn. 1995); Fahey v. Avnet, Inc., 525 N.W.2d 568, 572 (Minn. App. 1995). Although federal precedent is not controlling, it is instructive.

Diabetes, which is the disease process at issue here, is not a per se disability. Sigurdson, supra, 532 N.W.2d at 229; Schluter v. Industrial Coils, Inc., 928 F. Supp. 1437, 1447 (W.D. Wis. 1996). Whether a disease process, such as diabetes, or any of its attendant symptoms or complications materially limits a major life activity is determined by the facts on a case-by-case basis. State by Cooper v. Hennepin County, 441 N.W.2d 106, 110 (Minn. 1989), citing 45 C.F.R. § 84.3(j)(2)(ii).

The medical evidence established here that diabetes is a complex metabolic disorder that produces a number of complications which may limit some of a diabetic's major life activities in various ways and to varying degrees. The underlying mechanism of the disease is a deficiency of the hormone insulin, whose relative or complete absence causes the body's blood sugar levels to become abnormally high. On the

other hand, treating a diabetic with insulin may sometimes cause blood sugars to become abnormally low. It is the symptoms and complications that arise from abnormally high and low blood sugar levels that may, in some cases, limit a diabetic's major life activities and, therefore, bring into play an employer's obligation to accommodate under Minn. Stat. § 363.03, subd. 1(6). To complicate matters, not all diabetics require insulin to control their blood sugar levels. Some are able to control the course of their disease adequately with diet and exercise regimens. Even among those diabetics who are insulin dependent, symptoms and complications of the disease vary widely. The many different kinds and degrees of diabetic complications may affect the major life activities of diabetics in different ways or not at all.

Green Tree's argument that Mr. Hunter does not have the status of a person with a disability under the MHRA is based primarily on the recent case of Wilking v. County of Ramsey, 983 F. Supp. 848 (D. Minn. 1997) There, the employment of a probationary employee in a county mental health clinic was terminated when she was not offered permanent employment at the end of her probationary period. The employee argued that she suffered from depression, that her depression qualified as a "disability" or "impairment" under the ADA and also under the MHRA, and that termination of her employment represented prohibited disability discrimination. It was undisputed that her depression was controllable with medication. The court ruled that "the beneficial effects of Wilking's medication" could be considered in determining whether she was disabled.^[2] Finding that the plaintiff's depression was controllable with medication, the court held that she was therefore not disabled within the meaning of the ADA and MHRA. Id. at 854.

The facts of this case established that Mr. Hunter's diabetes can be managed through measures designed to reduce abnormal fluctuations in his blood sugar levels. However, unlike the clinical depression considered by the court in Wilking, the evidence here also established that diabetes is not a disease that can be eliminated or even completely controlled through the management of blood sugar levels. Even with relatively good blood sugar management, permanent diabetic complications, such as retinopathy, peripheral neuropathy, and nephropathy, can still occur and produce limitations on major life activities. Unlike the situation in Wilking, there was evidence here that Mr. Hunter's diabetes, although subject to management,^[3] resulted in the complication of retinopathy which, in turn, substantially limited the major life activity of seeing. Because his diabetes has produced a retinopathy which renders Mr. Hunter legally blind in one eye, he is, at a minimum, a person with a disability in that respect within the meaning of the MHRA. But evidence in the hearing record also established incontrovertibly that Green Tree fully accommodated any limitations on major life activities that Mr. Hunter had as the result of his diabetic retinopathy. The further question that arises here is whether the MHRA requires Green Tree to accommodate another aspect or complication of Mr. Hunter's disease — namely, managing fluctuating blood sugar levels — without a further showing by Mr. Hunter that his fluctuating blood sugars substantially limit a major life activity.^[4]

The Administrative Law Judge is persuaded that in order for Mr. Hunter to bring the right to reasonable accommodation under the MHRA into play, he must make a showing that the particular aspect or complication of diabetes for which he was seeking accommodation limits some major life activity and that his showing that some other complication of the disease, for which accommodation was not being sought or had already been made, limited a major life activity is insufficient to afford him a right to accommodation. Schluter, supra, 928 F. Supp. at 1447. But this conclusion revives the issue raised in Wilking – namely, whether Mr. Hunter’s blood sugar levels should be considered in their controlled or uncontrolled state in determining whether they limit any major life activity. Notwithstanding Wilking, the Eighth Circuit Court of Appeals appears to have held that mitigating measures should not be taken into account in determining whether a disability materially limits a major life activity. Doane v. City of Omaha, 115 F.3d 624, 627 (8th Cir. 1997). This is in accord both with the EEOC’s interpretive guidelines (29 C.F.R. pt. 1630, App. § 1630.2(j)) and with the common sense “position that the use of a prosthetic aid or medication does not eliminate the underlying disability although it may, as a practical matter, reduce or even eliminate its effects.” Gilday v. Melcosta County, 124 F.3d 760, 763 n. 3 (6th Cir. 1997), quoting Fallarco v. Richardson, 965 F. Supp. 87, 93 (D.D.C. 1997). Although the medical evidence here established that only two diabetic complications — i.e., retinopathy and cataracts — have actually limited any of Mr. Hunter’s major life activities to date, it also established that without control measures, his blood sugar levels would soon become abnormally high and produce more serious retinopathy, cataracts, peripheral neuropathies, nephropathy, and even death. In Mr. Hunter’s case, fluctuating blood sugar levels are “part of the underlying disability and hence a condition that the employer must reasonably accommodate,” so long as the other criteria of the MHRA are met. Vande Zande v. Wisconsin Dept. of Administration, 44 F.3d 538, 544 (7th Cir. 1995).

IV. Mr. Hunter Did Not Provide Green Tree With Sufficient Knowledge of His Disability and Its Limitations

An employer’s obligation under Minn. Stat. § 363.03, subd. 1(6) (1997 Supp.) to make reasonable accommodations extends only to “known” disabilities, with Minn. Stat. § 363.01, subd. 13, defining disability as “a physical, sensory, or mental impairment which materially limits one or more major life activities.” In other words, it was the legislature’s intent that in order to be entitled to reasonable accommodation, employees with disabilities need to provide their employers with knowledge not only of the existence of their disabilities but also of the limitations on the employee’s activities that those disabilities actually produce. In construing the ADA, the Fifth Circuit Court of Appeals observed:

For purposes of proving ADA discrimination, it is important to distinguish between an employer’s knowledge of an employee’s disability versus an employer’s knowledge of any limitations experienced by the employee as a result of that disability. This

distinction is important because the ADA requires employers to reasonably accommodate limitations, not disabilities.

Taylor v. Principal Financial Group, 93 F.3d 155, 164 (5th Cir. 1996), cert. denied, 117 S. Ct. 586 (1996). The pertinent provisions of the MHRA are identical to those in the ADA. As a practical matter, it is particularly important for a diabetic employee seeking an accommodation to notify an employer of the particular limitations caused by his or her disease for which accommodation is being sought, since, as noted above, diabetes is a very complex disorder whose complications and symptoms vary widely among individual diabetics.

Mr. Hunter suggests that it was Green Tree's responsibility under the MHRA to inquire about any limitations on Mr. Hunter's activities his diabetes may have caused. But placing that responsibility on the employer is clearly not in accord with federal law. In Taylor, supra, 93 F.3d at 164, the Fifth Circuit Court of Appeals observed:

As noted by the Equal Employment Opportunity Commission ("E.E.O.C.") in its interpretive guide to the ADA, "[s]ome impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors. 29 C.F.R. 1630.2(j), App. (1995) Thus, while a given disability may limit one employee (and therefore necessitate a reasonable accommodation), it may not limit another. For this reason, the ADA does not require an employer to assume that an employee with a disability suffers from a limitation. In fact, better public policy dictates the opposite presumption: that disabled employees are not limited in their abilities to adequately perform their jobs.^[5]

An employer is not required to "assume that an employee with a disability suffers from a limitation. Amato v. St. Luke's Episcopal Hospital, ___ F. Supp. ___, 1997 WL 755584, at 8 (S.D. Tex. Aug. 25, 1997) (citing Taylor, supra.) In fact, the medical evidence established here that such assumptions are particularly perilous when the disability is diabetes because of the wide variations that the course of that disease takes in individual diabetics. The Administrative Law Judge concludes that the MHRA, like the ADA, requires a disabled employee to inform an employer of the limitations of his or her disabling disease or impairment for which accommodation is being sought.

Here, Mr. Hunter never informed Green Tree of any limitations that his diabetes imposed on any of his major life activities. The evidence established that during meetings that were conducted before he started work, Mr. Hunter informed Green Tree that he had eye problems that materially limited his ability to see. Moreover, on the day he was hired, Mr. Hunter informed Green Tree of his diabetes by referring to it on his personal data form (Exhibit 8) and by discussing it with Ms. Glewwe. But he never unequivocally informed anyone at Green Tree that his sight impairment or any other limitation of his activities was connected with his diabetes.^[6] As further evidence of

limitation, Mr. Hunter argues that while on the job at Green Tree, he experienced some health problems that were related to his diabetes. But the medical evidence did not support the existence of any causal connection between his work schedule or work environment at Green Tree and those diabetic problems.^[7] To the contrary, the medical evidence established that because there were features of the work environment at Green Tree that already served to make it easier for him to self-manage his disease, Mr. Hunter was able to manage the diabetic symptoms and complications that he did experience on the job without any special accommodations from his employer. More important, Mr. Hunter never informed anyone in authority at Green Tree about any of those occurrences while he was employed there. Finally, although Mr. Hunter's letter of April 4, 1995, indicated that he had diabetes, it did not specifically refer to any limitations that his diabetes imposed on any of his activities. It only made a vague reference that he was requesting a schedule change after "[t]aking into consideration my health requirements and overall efficiency." (Exhibit 9) This was insufficient notice to his employer of any actual limitations on his activities. In short, Mr. Hunter never identified for Green Tree the diabetic limitations he was asking to be accommodated.

V. Mr. Hunter's History of Poor Management of His Diabetes Does Not Prevent Him from Claiming Disability Discrimination

There is evidence in the record that Mr. Hunter did a less than optimal job in managing his diabetes, at least until May of 1997. In fact, one of his treating physicians characterized the way in which he managed his diabetes as "poor" as recently as February of 1995. (Exhibit A, p. B0036) Green Tree contends that Mr. Hunter's poor management of his disease prevents him from asserting a claim under the MHRA. As authority, it cites Siefken v. Village of Arlington Heights, 65 F.3d 664 (7th Cir. 1997) and Van Stan v. Fancy Colours & Co., 125 F.3d 563 (7th Cir. 1997), both interpreting the ADA. But the Administrative Law Judge concludes that both of those cases are inapposite, and he can neither find other authority to support Green Tree's contention nor anything else to suggest the legislature intended the reasonable accommodations of the MHRA to incorporate the concept of fault as a defense. Siefken, supra, is not persuasive authority because the plaintiff there was not seeking an accommodation on the job but rather an opportunity to return to a job for which he had been found to be unfit upon representations that he would do a better job of managing his diabetes in the future. Van Stan, supra, is also unpersuasive authority because it did not really address the merits of the issue but only the issue of whether the employer would be permitted to introduce evidence at trial that illegal drug use by the plaintiff interfered with the efficacy of his medication. Even if Mr. Hunter's apparent mismanagement of his disease were to be considered a viable defense, there was no medical evidence here that established to a reasonable degree of medical certainty that the diabetic complications Mr. Hunter has experienced would not have occurred if he had managed his diabetes optimally.

VI. Mr. Hunter's Requested Accommodations Were Not Reasonable Because They Were Not Medically Necessary

In order for an employer to be obliged by the MHRA to provide an accommodation requested by a disabled employee, that accommodation must be “reasonable.” Minn. Stat. § 363.03, subd. 1(6). The concept of reasonableness incorporates a requirement of medical necessity. Before an employer must make a requested accommodation, the employer must have knowledge that a physical or mental limitation exists and that an accommodation is medically necessary to assist the employee in overcoming that limitation. See Miller v. National Casualty Company, 61 F.3d 627, 629-630 (8th Cir. 1995) (holding that medical necessity is embraced in the concept of “reasonable,” as that term is used in the federal ADA); see also McAdams v. United Parcel Service, Inc., 30 F.3d 1027 (8th Cir. 1994) (indicating that the term “reasonable,” as used in Minnesota’s MHRA, also requires a showing by a disabled employee of medical necessity).

At the hearing, Mr. Hunter tendered the sworn testimony of Dr. Mulmed and Green Tree tendered that of Dr. Smith, both endocrinologists who specialized in treating patients with diabetes. The testimony that both gave was largely in accord. Both testified that a diabetic whose disease was comparable to Mr. Hunter’s in terms of severity and complications could be expected to work the schedule that Green Tree assigned to Mr. Hunter provided there is some flexibility in the workplace to enable the diabetic to deal with problems that arise. (Exhibit 1, pp. 36-37; Tr. pp. 689-692) Workplace accommodations that both physicians suggested might be medically necessary included opportunities and the flexibility to test glucose levels and to take insulin while on the job, a cool place to store one’s insulin, a place to keep vending machines with glucose-rich snack foods, and the flexibility to take snacks and meal breaks when needed. (Exhibit 1, pp. 21 and 36-37; Tr. pp. 674-683 and 701-703) One additional workplace accommodation suggested by Dr. Mulmed was advance notice of having to work late.^[8] But that was the one potential workplace schedule problem for which Mr. Hunter never requested any accommodation.^[9]

Dr. Smith testified that the schedule accommodations that Mr. Hunter requested on April 4, 1995, were medically unnecessary in order for him to adapt management of his diabetes to the work schedule Green Tree had assigned to him. (Tr. pp. 689-695) Dr. Mulmed’s opinion on the same subject was equivocal, at best, and was insufficient to establish medical necessity. He testified that maintaining a consistent daily work schedule “is often times very helpful” to diabetics in managing blood sugar fluctuations. (Exhibit 1, p. 21) The only other evidence in the record relating to the medical necessity of Mr. Hunter’s requested accommodations is a letter from Howard D. Gilbert, M.D., to Mr. Hunter dated September 15, 1996. (Exhibit 10) As was the case with Dr. Mulmed, Dr. Gilbert did not indicate that a five-day work week was medically necessary to manage Mr. Hunter’s eye problems, only “helpful.” (Id.)

The evidence also suggests that Mr. Hunter himself considered the schedule accommodations he requested as a convenience rather than as medically necessary to accommodate limitations caused by his diabetes. Although his letter to Mr. Kelsey states that he had “consulted at length with my physician and other experts in the field

to come up with an effective routine for health living,” (Exhibit 9) that statement was misleading, at best. The evidence established that he never discussed his proposed accommodations with his treating physician and that his contacts with other diabetes experts before submitting the letter, if those contacts did occur, were superficial. (Tr. pp. 140-144) He did not become a patient of Dr. Mulmed until September of 1995, about five months after he left Green Tree and about the same time he elicited Dr. Gilbert’s letter opinion. In short, at the time Mr. Hunter made his request for schedule accommodations, he had no medical basis for requesting them. Also, as previously discussed, the accommodations he requested were unrelated to the diabetic complications that he himself believed were job-related — i.e., symptoms experienced after working overtime.

The material facts in this case are similar to those in the recent case of Bergeron v. Northwest Publications, Inc., Civ. No. 3-94-1124, 1996 WL 210789 (D. Minn. Jan. 12, 1996). There, a diabetic plaintiff was assigned to a work shift of 10:00 a.m. to 5:00 p.m. When daylight savings time occurred, his hours shifted to 11:00 a.m. to 6:00 p.m. The plaintiff, among other things, made a claim under the ADA that his employer failed to provide him with reasonable accommodation by not changing his work shift back to 10:00 a.m. to 5:00 p.m. As here, there was evidence from the plaintiff’s treating physician that he “would have a better chance to control his blood sugar adequately if he were able to establish stable routines for diet, medication, exercise, and sleep. I would suggest that he be assigned to regular hours of daytime shift work for these reasons.” Id. at p. 2. The U. S. Magistrate found that such evidence fell short of establishing medical necessity for the requested accommodation and denied relief under the ADA.

VII. It Was Mr. Hunter, Not Green Tree, Who Was Responsible For The Breakdown of the Interactive Process of Accommodation.

“An employee’s request for reasonable accommodation requires a great deal of communication between the employee and employer.” Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281, 1285 (7th Cir. 1996). The federal regulations implementing the ADA “envision an interactive process that requires participation of both parties”:

[T]he employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability.”

Beck v. University of Wisconsin Board of Regents, 75 F.3d 1130, 1135 (7th Cir. 1996) (quoting 29 C.F.R. pt. 1630, app.) The Court in Beck went on to consider some of the issues raised when a breakdown of that interactive process occurred:

Neither the ADA nor the regulations assign responsibility for when the interactive process fails.

* * *

Rather, courts should look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary. A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith. In essence, courts should attempt to isolate the cause of the breakdown and then assign responsibility.

Id.

Here, the parties agree that on Tuesday, April 4, 1995, Mr. Hunter hand delivered to Mr. Kelsey a letter in which Mr. Hunter requested that his work hours be changed to a Monday through Friday schedule with hours from 9:00 a.m. to 5:00 p.m., with either a one-half hour lunch or no 15 minute breaks during the day. He also requested that he only work one Saturday-Sunday combination per month. Mr. Hunter asked Mr. Kelsey to read the letter right away, which Mr. Kelsey did while Mr. Hunter watched him. There was a conflict in the evidence over what happened next Mr. Hunter testified that Mr. Kelsey then spontaneously shook his head in a negative gesture and said, “[N]o, I don’t see any way we can do this, it’s just not fair to the other credit managers,” and that he repeated statements to that effect during further discussion. (Tr. pp. 159-163) Mr. Hunter testified that he then told Mr. Kelsey that he would be forced to resign, that Mr. Kelsey appeared to take that to mean Mr. Hunter was resigning then and there, and that Mr. Kelsey responded, “[W]ell, maybe that would be for the best.” (Id.) Mr. Hunter was quite clear in indicating that Mr. Kelsey made no counter-proposal. (Id.) On the other hand, Mr. Kelsey denied making the statements Mr. Hunter attributed to him. (Tr. pp. 601-608) It was his testimony that after reading Mr. Hunter’s letter, he responded that Green Tree would try to accommodate Mr. Hunter’s request to change his weekday schedule as much as possible and that he should talk to Ms. Glewwe about changing those hours but that he would have to work every other Saturday. (Tr. p. 589) Mr. Kelsey testified that Mr. Hunter stated that was unacceptable and that if Green Tree could not accommodate his request, he would have to leave and go back to his old job. (Tr. p. 590) Mr. Kelsey testified that he then asked Mr. Hunter if he was terminating his employment with Green Tree, that Mr. Hunter said that is what he would have to do, and that Mr. Kelsey indicated Mr. Hunter would have to make his own decision on that. (Tr. p. 591)

Simply stated, if one accepts Mr. Hunter’s version of the facts, it was Mr. Kelsey who was responsible for the breakdown of any interactive discussion of Mr. Hunter’s request for accommodation. On the other hand, if one accepts Mr. Kelsey’s account, he did make a counter-offer to Mr. Hunter’s proposal, which Mr. Hunter rejected and then discontinued any further interactive discussion. The Administrative Law Judge finds that Mr. Kelsey’s version of events is more plausible than Mr. Hunter’s when viewed in

the light of the other evidence, and it is Mr. Kelsey's version that forms the basis of his Findings of Fact and Conclusions.^[10] As the court noted in Beck v. University of Wisconsin Board of Regents, 75 F.3d 1130, 1137 (7th Cir. 1996), "where, as here, the employer does not obstruct the process, but instead makes reasonable efforts both to communicate with the employee and provide accommodations based on the information it possessed, . . . liability simply does not follow." Mr. Kelsey made an effort to keep the dialogue going by making a counter-proposal. In short, it is Mr. Hunter who must bear responsibility for the breakdown of the interactive process.

B.H.J.

^[1] Unless otherwise specified hereafter, citations to Minnesota Statutes refer to the 1996 edition of the same.

^[2] There is a conflict among the federal circuit courts of appeals as to whether mitigating measures, such as treatment or medications, should be taken into account in determining whether a person has a disability or impairment for purposes of the ADA. For a discussion of that, see Wilking, *supra*, 983 F.Supp. at 853-854. That question, as it relates to the MHRA, has not been decided by Minnesota's appellate courts.

^[3] The significance, if any, of evidence that established that Mr. Hunter had done a poor job of managing his blood sugar levels until recently will be discussed separately below.

^[4] Mr. Hunter's position — that evidence that his retinopathy substantially limits his seeing is sufficient to support any further request to accommodate his diabetes — appears to be based on a statement of the Minnesota Supreme Court in Sigurdson v. Carl Bolander & Sons, Co., 532 N.W.2d 225, 228 (Minn. 1995) that "[t]here is no dispute that diabetes is an impairment." But since the Supreme Court held there was no material impairment limiting any major life activity in that particular case, as required by Minn. Stat. § 363.01, subd. 13(1), it was unnecessary to address any of the subtleties and complexities of diabetes. The medical evidence produced here established that diabetes itself is an "impairment" only in the sense that it has the potential to produce limitations on a diabetic's activities through its various complications and that it is the complications of diabetes, and not the underlying disease process itself, which actually can produce limitations on major life activities.

^[5] In fact, other provisions of the federal ADA may arguably have made it unlawful for Green Tree to have inquired about the extent and seriousness of Mr. Hunter's disability. 42 U.S.C. § 12112(d)(4) provides:

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability unless such examination or inquiry is shown to be job-related and consistent with business necessity. [Emphasis supplied.]

^[6] The statement Mr. Hunter made on Exhibit 8 could easily have been interpreted as meaning he had both a visual impairment and diabetes as two separate and unrelated conditions that could have affected his ability to work.

^[7] Mr. Hunter testified to one incident where he experienced symptoms of low blood sugar in the job and then overcompensated in glucose intake with both candy and a subsequent lunch, which raised his blood sugar level abnormally high. He later experienced symptoms of peripheral neuropathy in both legs. Dr. Smith testified that there was no causal connection between the blood sugar fluctuations and the peripheral neuropathy symptoms. (Tr. pp. 692-693) Dr. Mulmed's opinion of a causal connection was equivocal at best. (Exhibit 1, pp. 21-27) The fact that Mr. Hunter never related the low blood sugar incident to anyone at Green Tree while he was there at least suggests a conclusion on his part that the incident was in no way related to his work hours or work environment. (Tr. 224-225) He also testified that he had to work late on two occasions, causing him to take his early evening insulin dose late. (Findings of Fact Nos. 38 and 39) But in neither case did he present any evidence that working late and taking his insulin dose late had caused his blood sugar level to fluctuate abnormally, and there was no medical evidence of a causal connection between those incidents and any diabetic symptoms and complications Mr. Hunter may have experienced.

^[8] Basically, Drs. Mulmed and Smith had a slight difference of opinion relating to a diabetic employee's responsibility for bringing glucose testing equipment and insulin to work. Dr. Smith believed that insulin-dependent, diabetic employees should bring those items with them to work at all times in order to be prepared for contingencies during the work day. On the other hand, Dr. Mulmed suggested that a diabetic should only bring those items to work if he or she received advance notice of having to work late.

^[9] The clear weight of the evidence established that consumer finance division credit managers were not required to work overtime beyond their normal quitting times (Finding of Fact No. 28) and that team leaders had no supervisory role in the organization or authority to override that policy. (Finding of Fact No. 24) If Mr. Hunter did feel obliged to accede to his team leader's request to stay late on two occasions, it is not an issue that he raised with his team leader or his supervisor, Mr. Kelsey (Finding of Fact No. 39), and it was not a matter of sufficient concern to Mr. Hunter to prompt him to request a schedule accommodation for that. (Exhibit 9)

^[10] For example, a statement by Mr. Kelsey that Mr. Hunter should talk to Ms. Glewwe about arranging a 9:00 a.m. to 5:30 p.m. weekly schedule would be consistent with Ms. Glewwe's earlier decision to accommodate Mr. Hunter by giving him a consistent 9:00 a.m. to 6:00 p.m. weekly shift, rather than the rotating shifts worked by other credit managers. (Finding of Fact No. 37) On the other hand, the fact that Mr. Hunter subsequently called Fingerhut during lunch that day and arranged to get his old job back, before he had taken steps to formally resign his position at Green Tree, implies a fairly unequivocal intent on the part of Mr. Hunter not to engage in any further dialogue about accommodation. This conclusion is strengthened by the fact that Mr. Hunter did not seek recourse from Mr. Kelsey's decision even though Mr. Hunter knew, or should have known, that further recourse was available from Green Tree's human resources office. (Findings of Fact Nos. 35 and 36)