

**Statement of Stephen C. Orr, R.Ph.
before the
Subcommittee on the Constitution
Committee on the Judiciary
U.S. House of Representatives
October 4, 2007**

Mr. Chairman and members of the Committee:

Good morning. My name is Stephen Orr and I am a licensed pharmacist from Rapid City South Dakota. Thank you for the opportunity to testify before the Committee today. It is a pleasure to be here speaking to you, Chairman Nadler, Ranking Member Franks and the other distinguished members of this Committee. I appreciate you holding this hearing on restoring the Americans with Disabilities Act (ADA) and for providing me with the opportunity to tell my story of discrimination.

I have lived with type 1 diabetes since 1986 and take excellent care of my health. Having type 1 diabetes means that I must administer insulin multiple times each day in order to survive. As a pharmacist, I provide others with information about how to manage their diabetes throughout the day – and I take that advice very seriously: treating my condition as recommended by my doctors and maintaining tight blood glucose control.

I'd like to explain a little about diabetes so that you know what I mean by "tight blood glucose control." Diabetes is a condition in which the pancreas either does not create any insulin, which is type 1 diabetes, or the body doesn't create enough insulin and/or cells are resistant to insulin, which is type 2 diabetes. Insulin is a hormone that allows glucose or sugar to move from the blood stream into the cells where it is used for energy. Thus, untreated diabetes results in too much glucose in the blood stream. High blood glucose levels, known as hyperglycemia, can be very dangerous in the short term and, in the long-term, it is high blood glucose levels that lead to the many long-term complications of diabetes including blindness, heart disease, kidney disease, and amputation. Thus, I administer insulin to myself in order to lower my blood glucose level. However, while a

normal pancreas is able to secrete just the right amount of insulin, it is much harder for a person with diabetes to maintain blood glucose level in a safe range. If I end up with too little insulin in my system I will have hyperglycemia. But, if I end up with too much insulin in my system I will experience a condition call hypoglycemia. Hypoglycemia occurs when blood glucose falls below 70 mg/dL. Low blood glucose levels can be caused by skipping or delaying a meal, more exercise or physical activity than usual, too much insulin, or not following your schedule for taking your insulin or diabetes pills. Mild or moderate hypoglycemia is pretty common for children and adults who take insulin but hypoglycemia can turn severe – leading to seizure or unconsciousness – in very little time. Severe hypoglycemia is a life-threatening condition.

In short, hypoglycemia and hyperglycemia are conditions that happen when insulin and blood glucose are out of balance. In order to manage my diabetes I need to carefully monitor my blood glucose level by self-administering a blood test numerous times a day and adjusting the amount of insulin I administer to take into account the food I eat, the exercise I get, and other factors such as illness. The reason I strive for tight blood glucose control is that research has established that is the way to avoid the devastating long-term complications of diabetes.

In 1997, a Wal-Mart district manager invited me to apply for a position as manager of the company's pharmacy in Chadron, Nebraska. It sounded like a great opportunity. At the time, I was working as a pharmacist in Rapid City, S.D., but had lived in Chadron previously and looked forward to moving the 110 miles back to the town where my grown children resided and countless other family and friends still lived. The job had a great salary and, as I was 47 years old, I expected to retire from there.

Having lived with diabetes for so long, I never imagined that my diabetes could lead to my getting fired. However, that is exactly what happened. In essence I lost my job as a result of trying to protect my health and safety even though none of that interfered with me being a good pharmacist.

At the time that I was hired by Wal-Mart, my diabetes management regimen included, among other things, three insulin injections daily, as well as half-hour lunch breaks to prevent me from suffering from hypoglycemia. Prior to being hired, I disclosed to my district manager that I had diabetes and that I would need to have a regularly scheduled, uninterrupted, lunch break to check my blood glucose level and eat. I only accepted the position after my new employer agreed to the terms by which I could take the care necessary to manage my condition. Based upon this agreement, I accepted the position and moved to Chadron.

On January 3, 1998, I began training in the Rapid City Wal-Mart Pharmacy. By the end of the month, we held the Grand Opening of the Chadron Wal-Mart Supercenter, and the in-store pharmacy formally opened. As the only pharmacist at this location, taking a lunch meant closing the pharmacy during that time period – one of the initially agreed upon terms for my employment. However, a mere six weeks after I started work, the regional management changed. I was told by a new district manager that I could not close for lunch breaks. I was instructed that I should eat behind the pharmacy if and when things slowed down. I tried to comply with the request, but was unable to do so and safely manage my diabetes. My blood glucose readings plummeted. For example, on March 12, 1998, I had a blood glucose reading of 41 mg/dL. On this particular day, I was unable to eat until after 2pm. When I walked over to the snack bar to pick up lunch I was paged back to the pharmacy. Unfortunately, this was not a one time occurrence and for the next three months I experienced repeated dangerously low hypoglycemia on the job, including a blood glucose level of 32 mg/dL on May 6, 1998.

I spoke to my supervisor in order to explain how unhealthy it would be for me to continue the practice of skipping lunch, but he refused to consider accommodating my medical condition. In order to protect my safety, I was forced to return to my practice of taking half-hour lunches and on May 12, 1998, I was discharged. Let me be clear: when I was fired, I was told flat out that it was because I had diabetes.

After the discrimination I experienced, I brought a case against Wal-

Mart Stores, Inc. for violating my rights under the Americans with Disabilities Act. However, the U.S. District Court granted summary judgment against me and the United States Court of Appeals rejected my appeal. The appeals court said that because of Supreme Court decisions narrowing the federal law, I was not considered “disabled” under the Act—for the sole reason that my diabetes is under such good control. The appeals court agreed with my testimony that when my blood glucose level is not within a safe range I suffer from a variety of immediate complications including vision impairment, low energy, lack of concentration and mental awareness, lack of physical strength and coordination, slurred speech, difficulties typing and reading, and slowed performance. Yet, the court said that I could not rely on evidence of how I was when my blood glucose level was not within a safe range. Rather, the court said:

[N]either the district court nor we can consider what would or could occur if Orr failed to treat his diabetes or how his diabetes might develop in the future. Rather, [the Supreme Court decision in] Sutton [v. United Airlines] requires that we examine Orr’s present condition with reference to the mitigating measure taken, i.e., insulin injections and diet, and the actual consequences which followed.¹

Amazingly, the court ignored the fact that when I was working at Wal-Mart, I was prevented from properly managing my condition by my employer. That is, Wal-Mart took away the means I had to manage my disease, I became ill, and then my case was thrown out of court because the judges insisted upon viewing me as I would be if I had been allowed to properly manage my disease.

My case was dismissed and I never had a chance to try to prove that, with a very small reasonable accommodation, I would have been able to both fully perform my job *and* protect my health and safety. Ironically, as a corporate policy, Wal-Mart is now allowing the pharmacy in Chadron to be closed for a 30 minute period, although there is still only one pharmacist on duty.

I find it tremendously unfair that the same employer that fired me *because of* my diabetes could then successfully claim that I did not meet the definition of disability under the ADA. I ask that you amend

the law so that the focus of cases like mine is on whether the individual can do the job, rather than lawsuits about the private details of an individual's medical condition. I stand before you to say that, even with proper diabetes management, this disease affects me every day, every hour of my life. I must constantly try my hardest to maintain a balance between dangerously high and dangerously low blood glucose levels. Diabetes affects everything I do from eating to physical activity. The good news is that I have largely been successful in keeping myself safe and healthy. Yet, it was because I work so hard to manage my diabetes to make myself a productive employee and citizen that the court found that I didn't merit protection from discrimination.

I wish my case was unique but it is not. Mr. Charles Littleton and his mother, Darbara Littleton, had hoped to speak to you today about their experience with the ADA, but unfortunately, they were not able to make it. Their story is yet another example of a person who *wanted* to do the job and who *could* do the job with a reasonable accommodation, but who was refused an accommodation and then was not protected by the ADA. Charles and Darbara have asked me if I would submit their written testimony on their behalf, and so I ask that their testimony be made part of the record of this hearing.

Too many people have had their ADA claims dismissed because they were found by the courts not to be sufficiently disabled under the courts' misguided interpretation of the definition of disability under the ADA. Congress must restore the ADA to what it was intended to be – a comprehensive mandate to protect all Americans from discrimination based on disability.

Again, thank you for the opportunity to speak before you today.