

Andersen factors in setting the fee. There was no per se legal error.

Although we reject that basis for reducing the fee award, we agree with Apex that a fee award that equaled 50 per cent. of the recovery was, in fact, excessive for the pre-petition work done in this case. The multiplier of 2.3, which produced a figure of \$1,445,000 for fees, exceeds what is reasonable and necessary to compensate Fehrenbacher for the risk of representing Artoc. We agree with the Bankruptcy Court that this litigation had an uncertain prospect of success and that Artoc was a high-risk client. These facts are supported by evidence. Artoc's former counsel submitted affidavits explaining why it believed Artoc was a high-risk client, with a small chance of prevailing in this litigation. Further, the uncertainty of success in Artoc's case is also reflected in the fact that the only counsel Artoc could obtain demanded a high contingent fee. However, the risk was not so great that a 2.3 multiplier was necessary or reasonable. Therefore, we approve of a fee enhancement based on this factor, but reduce the multiplier from 2.3 to 1.2. We believe this smaller number still adequately compensates Fehrenbacher for the risk it bore in representing Artoc in this litigation and also produces an appropriate total fee.

Fehrenbacher's reconstructed time records and hourly rate schedule for each employee who worked on this matter show a total fee of \$821,675. Appellee's App. 465. We adopt this number as the base fee. Applying a lodestar multiplier of 1.2, we conclude that Artoc should be allowed \$986,010 as part of its claim for Fehrenbacher's pre-petition services. This amount satisfies the reasonable-and-necessary standard, is justified by the *Arthur Andersen* factors, and, in light of all the facts, reimburses Fehrenbacher for its pre-petition work on this case.

* Judge McMillian and Judge Bye would grant the petition for rehearing en banc. Judge McMillian dissents from the denial of the peti-

IV.

As explained above, we affirm the decision to allow Artoc's claim of \$1.7 million, plus prejudgment interest of \$1.19 million. Artoc is not estopped to recover for the wrongful setoffs. Because Artoc is the prevailing party, it is entitled to reasonable and necessary attorneys' fees. However, the fees allowed by the Bankruptcy Court did not meet this standard and were excessive. Therefore, for the reasons explained above, we reduce the allowed fees from \$1.76 million to \$1,302,860. This smaller amount is reasonable and necessary to compensate Breed, Abbot and Fehrenbacher. Accordingly, the judgment of the BAP is affirmed in part and reversed in part, and this case is remanded to the BAP with instructions to enter judgment in accordance with this opinion.



Stephen C. ORR, Appellant,

v.

WAL-MART STORES, INC., Appellee.

No. 01-2959.

United States Court of Appeals,
Eighth Circuit.

Submitted: April 19, 2002.

Filed: July 22, 2002.

Rehearing and Rehearing En Banc

Denied: Sept. 18, 2002.*

Diabetic pharmacist sued former employer, alleging violations of Americans

tion for rehearing en banc. Judge Morris Sheppard Arnold took no part in the decision in this matter.

with Disabilities Act (ADA) and Nebraska Fair Employment Practices Act (NFEPA). The United States District Court for the District of Nebraska, Lyle E. Strom, J., granted summary judgment for employer. Employee appealed. The Court of Appeals, Riley, Circuit Judge, held that: (1) pharmacist was not disabled under ADA, and (2) it would not consider, for the first time on appeal, pharmacist's argument that, in the context of insulin-dependent diabetes, eating was a major life activity.

Affirmed.

Lay, Circuit Judge, dissented and filed opinion.

1. Courts ⇐97(1)

Nebraska courts look to federal decisions in construing the Nebraska Fair Employment Practices Act (NFEPA), which is patterned after Title VII and the ADA. Neb.Rev.St. § 48-1101 et seq.; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

2. Civil Rights ⇐107(1)

Disability exists under ADA only where an impairment substantially limits a major life activity, not where it might, could, or would be substantially limiting if mitigating measures were not taken. Americans with Disabilities Act of 1990, § 3(2)(A), 42 U.S.C.A. § 12102(2)(A).

3. Civil Rights ⇐173.1

In considering diabetic employee's claim of disability under ADA, neither district court nor Court of Appeals could consider what would or could occur if employee failed to treat his diabetes or how it might develop in the future, but rather had to examine his present condition with reference to mitigating measures taken, i.e., insulin injections and diet, and actual consequences which followed. Americans

with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

4. Civil Rights ⇐107(1)

Health conditions that cause moderate limitations on major life activities do not constitute disabilities under the ADA. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

5. Civil Rights ⇐173.1

Diabetic pharmacist, who was not allowed to close store pharmacy over noon hour to eat lunch, was not disabled under ADA, absent evidence explaining how diabetes substantially affected his major life activities or duration and frequency of any limitations. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

6. Federal Courts ⇐611

Ordinarily, Court of Appeals does not consider an argument raised for the first time on appeal and considers a newly raised argument only if it is purely legal and requires no additional factual development, or if a manifest injustice would otherwise result.

7. Federal Courts ⇐614

Court of Appeals would not consider, for the first time on appeal in ADA action, employee's argument that eating was a major life activity that was substantially limited due to his diabetes, and the necessity of adhering to a strict dietary regimen substantially limited the major life activity of working. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

Anthony C. Coe, argued, Lincoln, NE (Thom K. Cope, on the brief), for appellant.

Christopher R. Hedican, argued, Omaha, NE, for appellee.

BEFORE: BOWMAN, LAY, and RILEY, Circuit Judges.

RILEY, Circuit, Judge.

Stephen Orr (Orr) filed a law suit against Wal-Mart Stores, Inc. (Wal-Mart) alleging violations of the Americans with Disabilities Act (ADA) and the Nebraska Fair Employment Practices Act (NFEPA). Concluding Orr failed to show he was disabled under either the ADA or the NFEPA, the district court¹ granted summary judgment in favor of Wal-Mart. Orr appeals. We affirm.

I. BACKGROUND

Stephen Orr is a pharmacist licensed in Nebraska, Wyoming, and South Dakota. In 1986, Orr was diagnosed with diabetes. To control his diabetes, Orr uses a glucometer to monitor his blood glucose levels, takes insulin, and eats a special diet within thirty minutes of taking insulin. During the time relevant to this lawsuit, Orr injected insulin three times each day—in early morning, at noon, and before bedtime. Orr controls his disease to the best of his ability. When his diabetes is not well controlled, he suffers from 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.

In January 1998, Orr became employed full time as a pharmacist at a Wal-Mart store in Chadron, Nebraska. This Chadron store was a single-pharmacist Wal-Mart facility, and Orr was the only pharmacist on duty during his work day. Be-

fore accepting employment, Orr informed Wal-Mart District Manager Rick Coleman (Coleman) he was an insulin-dependent diabetic. Coleman authorized Orr to take a lunch break and mid-day breaks during his ten-hour work shift. Orr understood Coleman to authorize him to take an uninterrupted lunch break, and Orr routinely closed the pharmacy for thirty minutes over the noon hour to eat lunch.

John Foss (Foss) succeeded Coleman as district manager in charge of the Chadron store. Foss informed Orr that Wal-Mart policy² required the pharmacy to remain open during store hours and instructed Orr not to close the pharmacy during his lunch break. Orr did not comply with Wal-Mart policy and continued to close the pharmacy for thirty minutes in order to take an uninterrupted lunch. On March 5, 1998, Foss issued Orr a written warning for closing the pharmacy. The written warning stated that further non-compliance would result in Orr's termination.

Orr responded in writing to the warning with his "action plan" and without mentioning his diabetes.

Per this presentation & our discussion of the issues a[t] hand. I respectfully protest this presentation & Decision-Making Day. My understanding of time off for lunch & breaks apparently was a misunderstanding of company policy as presented by Rick Coleman. My leaving the Pharmacy on 2/25 was specifically for company (Pharmacy) business to pick up a CII Rx at the Clinic.

1. The Honorable Lyle E. Strom, United States District Judge for the District of Nebraska.

2. The applicable part of the Wal-Mart Breaks/Lunch Period policy stated:

In pharmacies with one pharmacist on duty, the pharmacist cannot leave the phar-

macy area unsupervised for any regular length of time for breaks or lunch periods. Therefore, the pharmacist will take time between busy periods for a break or eating lunch in the pharmacy prescription area. (emphasis in original).

I will from this date forward take my lunch break within the confines of the Pharmacy & maintain the opening of the Pharmacy from 9–7 AM Mon.–Fri & 9–6 on Sat during my scheduled days shift.

Orr initially abided by Wal-Mart's policy and kept the pharmacy continuously open during store hours. However, a week after receiving the written warning, Orr wrote to Foss requesting he rescind the written warning based on Orr's original understanding and agreement with Coleman. Orr stated, in part: "I had discussed with Rick Coleman during the interview process conducted at Wal-Mart in Rapid City, that I was an Insulin Dependent Diabetic. Rick Coleman agreed that I could take lunch breaks." On April 8, 1998, after receiving no response, Orr wrote to Foss again asking him to remove the written warning from Orr's personnel file. In his second letter, Orr informed Foss that, due to his adherence to Wal-Mart policy requiring the pharmacy to remain open, he was unable to eat until "much after noon, resulting in my experiencing symptoms of hypoglycemia." Orr expressed concern that not having an uninterrupted lunch break could adversely affect the control of his diabetes.

On April 17, 1998, Foss wrote to Orr and advised him that the written warning would not be rescinded. Foss said he had discussed the situation with higher management. Foss's letter informed Orr that Coleman denied ever authorizing Orr to close the pharmacy to take a lunch break. In his letter Foss also explained that Wal-Mart had always permitted Orr to control his diabetes by bringing food into the pharmacy, providing access to a refrigerator, and allowing him to eat or snack in the pharmacy.

On April 24, 1998, Orr wrote Foss and again asked him to rescind the written warning. Orr's letter relayed to Foss that

working in the pharmacy without an uninterrupted daily lunch break was adversely affecting the control of his diabetes. On May 7, 1998, Orr wrote another letter to Foss, informing him that, as a result of the no lunch break policy, Orr had incurred "several low, hypoglycemic incidents." Orr expressed his disappointment with Wal-Mart's indifference to his needs as a diabetic, and Orr informed Foss he was resuming noon lunch breaks away from the pharmacy for the maintenance of his diabetic health. Thereafter, Foss terminated Orr.

II. DISCUSSION

Orr argues the district court erred in finding he was not disabled within the meaning of the ADA. Under the ADA, a disability is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A).

[1] The disability discrimination provisions in the NFEPA are patterned after the ADA, and the statutory definitions of "disability" and "qualified individual with a disability" contained in the NFEPA are virtually identical to the definitions of the ADA. *See* Neb.Rev.Stat. Ann. § 48–1102(9) & (10); 42 U.S.C. §§ 12102(2), 12111(8). In construing the NFEPA, Nebraska courts have looked to federal decisions, because the NFEPA is patterned after Title VII and the ADA. *See, e.g., Father Flanagan's Boys' Home v. Agnew*, 256 Neb. 394, 590 N.W.2d 688, 693 (1999); *IBP, Inc. v. Sands*, 252 Neb. 573, 563 N.W.2d 353, 357–59 (1997). We therefore employ the same analysis to determine whether Orr's diabetes constitutes a disability under both the ADA and the NFEPA.

In *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999), the Supreme Court held that

the threshold inquiry whether an individual is disabled is analyzed on an individualized basis. The Court concluded that a diabetic is not *per se* disabled but must demonstrate his condition substantially limits one or more major life activities. *Id.* at 482–83, 119 S.Ct. 2139. The Court emphasized that “[a] person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently ‘substantially limits’ a major life activity.” *Id.* at 482–83, 119 S.Ct. 2139.

Orr claims his diabetes substantially affects his ability to see, speak, type, read, and walk. Orr also argues “it would not be unreasonable to expect that [his] diabetic condition *will* significantly disrupt his lifestyle.” (emphasis added). Orr also contends that if he fails to properly monitor and treat his diabetes, then he “*could* experience” adverse symptoms which “*would* . . . substantially limit [his] major life activity of working.” (emphasis added).

[2,3] The Supreme Court in *Sutton* expressly ruled that “[a] ‘disability’ exists only where an impairment ‘substantially limits’ a major life activity, not where it ‘might,’ ‘could,’ or ‘would’ be substantially limiting if mitigating measures were not taken.” *Sutton*, 527 U.S. at 482, 119 S.Ct. 2139 (emphasis added). Therefore, neither 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, *Sutton* requires that we examine Orr’s present condition with reference to the mitigat-

ing measures taken, i.e., insulin injections and diet, and the actual consequences which followed. *See id.*

[4,5] In resisting summary judgment, Orr failed to present evidence explaining either how diabetes substantially affects his major life activities or the duration and frequency of any limitations. “[M]ost disabilities from which people suffer,” including diabetes, “do not have a substantial enough effect on their major life activities.” *Berg v. Norand Corp.*, 169 F.3d 1140, 1145 (8th Cir.1999) (quoting *Dalton v. Subaru-Isuzu Auto., Inc.*, 141 F.3d 667, 675 (7th Cir.1998)). Health conditions that cause moderate limitations on major life activities do not constitute disabilities under the ADA. *See Taylor v. Nimock’s Oil Co.*, 214 F.3d 957, 960 (8th Cir.2000) (heart disease); *Weber v. Strippit, Inc.*, 186 F.3d 907, 914 (8th Cir.1999) (heart disease). To hold otherwise could expand the ADA to recognize almost every working American as disabled to some degree.

Our review of the record establishes that Orr does not have an actual disability which presently and substantially limits a major life activity. He, therefore, is not disabled under the ADA or the NFPEPA.

[6,7] On appeal, Orr argues eating is a major life activity that is substantially limited due to his diabetes, and the necessity of adhering to a strict dietary regimen substantially limits the major life activity of working.³ He urges this panel to adopt the holding of a recent Seventh Circuit case that, in the context of insulin-dependent diabetes, eating constitutes a major

3. In *Sutton*, the Supreme Court assumed working is a major life activity, but questioned whether it is, noting the EEOC’s reluctance to define “major life activities” to include working and its suggestion that working be considered a “residual life activity.” *Sutton*, 527 U.S. at 492, 119 S.Ct. 2139 (citing 29 C.F.R. pt. 1630, App. § 1630.20 (1998)). More recently, the Supreme Court expressed

skepticism as to whether working can be a major life activity, but did not decide the issue. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, —, 122 S.Ct. 681, 692, 151 L.Ed.2d 615 (2002) (“Because of the conceptual difficulties inherent in the argument that working could be a major life activity, we have been hesitant to hold as much, and we need not decide this difficult question

life activity. See *Lawson v. CSX Transp., Inc.*, 245 F.3d 916, 923 (7th Cir.2001).⁴ Orr did not allege in his complaint or argue in the district court that eating is a major life activity which is substantially limited because of his diabetes.⁵ Ordinarily, we do not consider an argument raised for the first time on appeal. See *Shelton v. ContiGroup Cos.*, 285 F.3d 640, 643 (8th Cir.2002); *Berg*, 169 F.3d at 1145. We consider a newly raised argument only if it is purely legal and requires no additional factual development, or if a manifest injustice would otherwise result. *Orion Fin. Corp. of S.D. v. Amer. Foods Group, Inc.*, 281 F.3d 733, 740 (8th Cir.2002). Orr does not persuade us that either exception applies. We therefore decline to consider the argument on appeal.⁶

III. CONCLUSION

For the reasons cited above, we affirm the judgment of the district court.

LAY, Circuit Judge, dissenting.

today.”). In this circuit we have followed *Sutton* and *Toyota* in assuming, without conclusively ruling, that working constitutes a major life activity for purposes of applying the ADA. See *Duty v. Norton-Alcoa Proppants*, 293 F.3d 481, 491 n. 3 (8th Cir.2002); *Kellogg v. Union Pacific R.R.*, 233 F.3d 1083, 1087 (8th Cir.2000).

4. We note *Lawson* was first cited by the district court in a footnote within its Memorandum and Order granting summary judgment.
5. Had Orr established a prima facie case of actual disability under the ADA, Wal-Mart could have raised the threat-to-self defense. Wal-Mart could have argued that, accepting Orr’s contentions at face value, working in a single-pharmacist pharmacy, which did not provide for uninterrupted meal breaks, posed a direct threat to Orr’s health and that Wal-Mart was justified in not continuing his employment. See *Chevron U.S.A. Inc. v. Echazabal*, — U.S. —, 122 S.Ct. 2045, 153 L.Ed.2d 82 (2002).

I respectfully dissent.

Based upon the evidence in this particular case, I think the court errs in holding that the claimant, Stephen C. Orr, was not disabled as a matter of law within the meaning of the Americans with Disabilities Act of 1990(ADA). The court refuses to consider Orr’s contention that he was substantially limited in the major life activities of working and eating because the Seventh Circuit decision upon which he relies, *Lawson v. CSX Transp., Inc.*, 245 F.3d 916 (7th Cir.2001), is first cited in a footnote in the district court’s decision. I know of no precedent in this or any other circuit that says a party must cite a particular case in the district court in order to rely upon it on appeal.

The majority opinion cites *Shelton v. ContiGroup Cos.*, 285 F.3d 640 (8th Cir. 2002), and *Berg v. Norand Corp.*, 169 F.3d 1140 (8th Cir.1999), to support its refusal to entertain Orr’s argument. The court’s

6. Even if the limitations on Orr’s ability to eat can be tied to his ability to work, they cannot salvage his claim under the ADA. “When the major life activity under consideration is that of working, the statutory phrase ‘substantially limits’ requires, at a minimum, that plaintiffs allege they are unable to work in a broad range of jobs.” *Sutton*, 527 U.S. at 491, 119 S.Ct. 2139. See also 29 C.F.R pt. 1630.2(j)(3)(i), App. § 1630.2(j) (2000). The record reveals only that Orr’s diabetic condition occasionally produced symptoms which moderately impaired his performance as a pharmacist in a single-pharmacist-on-duty retail store. In contrast to the diabetic plaintiff in *Lawson*, Orr consistently performed the essential functions of a pharmacist before, during, and after his employment with Wal-Mart. Because Orr’s diabetes, as portrayed by the record in this case, at most, only moderately limits his ability to perform a particular specialized job or a narrow range of retail pharmacist jobs, his diabetic condition does not place substantial limitations on his ability to work.

reliance on these cases is misplaced. In *Berg*, we refused to allow a plaintiff to claim for the first time on appeal that her employer *perceived* her as disabled. *Berg*, 169 F.3d at 1145. Under the ADA, “being regarded” as disabled—as opposed to actually being disabled—is a separate and distinct basis for liability. Compare 42 U.S.C. § 12102(2)(A) with § 12102(2)(C). Here, however, Orr’s argument has consistently been that he suffered from “a physical . . . impairment that substantially limits one or more of [his] major life activities.” 42 U.S.C. § 12102(2)(A). While it is generally true that courts “do not consider arguments first raised on appeal,” *Shelton*, 285 F.3d at 643, this does not preclude us from considering Orr’s use of *Lawson* to support his argument that he suffers from a disability affecting one or more of life’s major activities.

The majority faults Orr for not raising the issue of “eating” as a limitation on one of his life’s major activities before the district court. In all due respect, this is a myopic treatment of the record before the district court. Orr’s entire case turned on the refusal of his employer to allow Orr to follow a dietary regimen. Orr’s argument focused on eating but eating is inextricably related to “working.”⁷ As the district court acknowledged, plaintiff claimed that he was substantially limited in his ability to work. This claim, however, was obviously based upon Orr’s ability to control his regulated diet and insulin injections. Thus, eating at defined times is directly related to his ability to work. Orr’s whole complaint as well as the evidentiary record relates to Wal-Mart’s refusal to allow Orr to eat during a lunch break. To suggest eating was not raised in the district court

slights the entire evidentiary record. Orr’s claim before the district court is that if he is not allowed to follow his dietary regimen, he becomes completely disabled.

In *Lawson*, the Seventh Circuit discussed eating as one of life’s major activities, but did so in terms of Lawson’s ability to work: “Mr. Lawson’s diabetes has limited substantially his ability to work in a broad class of jobs We believe that a jury could conclude, from this evidence, that Mr. Lawson can show that a record exists indicating that his diabetes has limited substantially his ability to work.” 245 F.3d at 926–27. The court reasoned that the plaintiff “must always concern himself with the availability of food, the timing of when he eats, and the type and quantity of food he eats.” *Id.* at 924. Because the ADA “addresses substantial limitations on major life activities, not utter inabilities,” *Bragdon v. Abbott*, 524 U.S. 624, 641, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998) (cited in *Lawson*, 245 F.3d at 924), the Seventh Circuit went on to hold that “[t]he district court failed to consider the extent of the restrictions imposed by Mr. Lawson’s treatment regimen and the consequences of noncompliance with that regimen.” *Lawson*, 245 F.3d at 924. As explained in his brief, Orr has experienced “seizures, deteriorated vision, slurred speech, frequent urination, lack of concentration, awareness, coordination, strength, and consciousness, all of which can, and frequently does [sic], result in hospitalization.” These allegations are not what “could” happen, but are evidentiary proofs of what has happened when Orr is not allowed to follow a rigid discipline of eating at a scheduled time. This is verified through the record by Orr’s deposition and

7. The majority suggests that under *Sutton*, the Supreme Court has not yet decided whether working is one of life’s major activities. It is much too late in the day in this circuit to hold that working may not be one of the major life activities under the ADA. See *Fjellestad v. Piz-*

za Hut of America, Inc., 188 F.3d 944, 954–55 (8th Cir.1999); *Helfter v. United Parcel Service*, 115 F.3d 613, 617 (8th Cir.1997). Such dicta is a poor crutch to deny Orr, or any other ADA litigant, his day in court.

medical reports. I respectfully submit that we should follow Judge Ripple's reasoning in *Lawson*, and hold Orr's eating and working are fundamental, major life activities that are substantially limited due to his diabetes. A distinguished panel of Judge Cudahy and Judge Easterbrook joined Judge Ripple, and I find it unreasonable to ignore our sister circuit simply because of the mistaken belief that plaintiff's counsel failed to raise that argument in the district court.⁸ Furthermore, our review should be based on the full evidentiary record before us, not limited to cited cases.

Orr also testified that when he was hired by Wal-Mart, he told them of his disability and Wal-Mart agreed that they would accommodate his eating habit at noon. The district court noted that this fact was denied by Wal-Mart, but held it was not material to the issue at hand. I respectfully disagree. I think these claims set forth genuine issues of material fact relating to the questions of disability and reasonable accommodation. See *Fjellestad v. Pizza Hut of America, Inc.*, 188 F.3d 944, 949-50 (8th Cir.1999). These claims should therefore be submitted to the trier of fact.⁹

In conclusion, I submit that this is not an appropriate case for summary judgment by the court.

On this basis, I respectfully dissent.



8. We note *Lawson* was decided barely two weeks before Orr's response to the defendant's motion for summary judgment was filed. It does not, therefore, seem so unusual for that decision to be cited for the first time in the district court's Memorandum and Order granting summary judgment, issued some four months later.

Edward V. LAWRENCE; Dennis Kirksey, Plaintiffs/Appellees,

v.

Michael BOWERSOX; Gloria Gourley; Donna McCondichie; Carl McCory, C.O. II; Defendants/Appellants,

James W. Lawrence, individually and in his official capacity as a Corrections Officer and member of the Emergency Squad at the Potosi Correctional Center; Billy Nipper, individually and in his official capacity as a Corrections Officer and a member of the Emergency Squad at the Farmington Correctional Center; Defendants,

Thomas Hays, individually and in his official capacity as a Corrections Officer and member of the Emergency Squad at the Farmington Correctional Center; Defendant/Appellant,

Arthur Holms, individually and in his official capacity as a Corrections Officer and member of the Emergency Squad at the Farmington Correctional Center; Alton Thompson, individually and in his official capacity as a Corrections Officer and member of the Emergency Squad at the Farmington Correctional Center, Defendants.

9. There is additional proof that Wal-Mart has now changed its policy and allows an uninterrupted lunch break at its single-pharmacist store in Chadron. This relates to the claim that Wal-Mart refused to make a reasonable accommodation and is further proof of a pretextual reason for Orr's discharge. These proofs address factual issues appropriate for a jury's resolution.