

ADA's Direct Threat Defense

ECHAZABAL V. CHEVRON USA, INC.: CONQUERING THE FINAL FRONTIER OF PATERNALISTIC EMPLOYMENT PRACTICES

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I. INTRODUCTION

For over eighty years the federal government has taken increasingly aggressive steps to support the disabled by providing rehabilitative services and enacting legislation to reduce discriminatory practices.¹ While significant progress has been made, a series of federal appellate decisions have set back these advancements by finding that the Americans with Disabilities Act of 1990 (ADA)² permits employers to exclude otherwise qualified disabled individuals from positions solely because placement in the job would pose a risk to their *own* health or safety.³ Some courts have gone even further by placing the burden on the disabled to prove that such safety concerns do not make them unqualified for the position they seek.⁴ A recent case, *Echazabal v. Chevron, USA, Inc.*, handed down by the Court of Appeals for the Ninth Circuit

¹ See SENATE COMM. ON LABOR AND PUBLIC WELFARE, REHABILITATION ACT OF 1973, S. REP. NO. 93-318, (1973), reprinted in 1973 U.S.C.C.A.N. 2076-90 (discussing history of federal disability related legislation and purpose of 1973 Rehabilitation Act).

² 42 U.S.C. §§12101-12213 (1994).

³ See *EEOC v. Exxon Corp.*, 203 F.3d 871, 873-75 (5th Cir. 2000) (employer may use either direct threat defense or business necessity argument to prove defendant is unqualified because he poses a risk to his own safety or to the safety of others); *Rizzo v. Children's World Learning Center, Inc.*, 84 F.3d 758, 763 (5th Cir. 1996) (relying on EEOC guidelines in defining qualified individual as one who poses no threat to self or others); *Daugherty v. City of El Paso*, 56 F.3d 695, 698 (5th Cir. 1995) (holding insulin dependent bus driver not qualified as matter of law because he could injure himself or others).

⁴ See *LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832, 835-36 (11th Cir. 1998) (including self-risk as part of the analysis and requiring employee to prove he is otherwise qualified); *EEOC v. Amego, Inc.*, 110 F.3d 135, 142-44 (1st Cir. 1997) (noting the ADA and Rehabilitation Act regulations are comparable and cover health and safety concerns for the individual and others, and rejecting the EEOC's argument that the defendant bears the burden of proof); *Moses v. American Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996) (*cert. denied* 1996 U.S. Lexis 1775) (holding an employer may fire a disabled employee who cannot prove his disability does not create a direct threat to his own health or safety).

signaled a giant step toward reversing this trend by requiring employers to ignore self-risk concerns and permit the disabled to judge for themselves the relative risks of an employment opportunity without outside interference.⁵ The *Echazabal* court specifically held that an employer may not “shut disabled individuals out of jobs on the ground that, by working in the jobs at issue, they may put their own health or safety at risk.”⁶ Further, the court squarely placed the burden of proof on defendants whenever safety concerns form the basis for rejecting disabled persons.⁷ In effect, the court made clear that otherwise qualified disabled individuals had the sole discretion whether to accept any elevated self-risk that may accompany placement in certain jobs, and only when an employer proves a disabled individual poses a risk to *others* can he be excluded from employment.

This Note traces the history of the federal government’s involvement in helping the disabled participate more fully in the workplace, and puts in context the critical significance of *Echazabal* in the long march toward greater equality. A review of the early statutes, beginning after World War I, is followed by an examination of the government’s attempt to put teeth into the law by obligating government contractors in 1973 to affirmatively take certain steps to insure non-discrimination.⁸ In 1990, the government went a step further by expanding the protection of federal law to cover a greater number of employing entities, and requiring those organizations to make reasonable accommodations to insure fuller participation of the disabled.⁹

In passing the Americans with Disabilities Act of 1990, Congress specifically addressed the role that safety and health concerns should play by incorporating as an affirmative defense the concept relied on by the U.S. Supreme Court in its 1987 *Arline* decision permitting employers to

⁵ *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063 (9th Cir. 2000), *cert. filed* March 9, 2001.

⁶ *Id.* at 1072.

⁷ *Id.* at 1066, 1066 n.2 (discussing “direct threat” as an affirmative defense).

⁸ Rehabilitation Act of 1973, 29 U.S.C. §§ 701-797, §793 (1994).

⁹ Americans with Disabilities Act of 1990, 42 U.S.C. §§12101-12213 (1994).

exclude those whose condition would pose a risk to the health or safety of *others* in the workplace.¹⁰ Significantly, the legislature did not extend the exclusionary right to situations where the only risk posed was to the individual's *own* health or safety.¹¹ Regulatory interpretation, however, expanded the scope of the exclusionary right to self-risk situations.¹² Following passage of the ADA and issuance of the Equal Employment Opportunity Commission's (EEOC) regulations, appellate courts reviewing ADA claims consistently gave weight to the Agency's interpretation permitting exclusion based solely on self-risk concerns, but split on the issue of which party had the burden of proving the safety concerns were sufficient to bar employment.¹³ It was against this backdrop that the Ninth Circuit issued its decision in *Echazabal*.

Part III discusses the decision and the court's reliance on text, history and policy in formulating its position. Also explored are the dissent's arguments that Plaintiff was not qualified, the court should have shown more deference to the Agency's definition of "direct threat," and Chevron should not have been forced to hire Mr. Echazabal because his employment placed an undue ethical and legal burden on Defendant.¹⁴

¹⁰ School Bd. of Nassau County, Fl., v. Arline, 480 U.S. 273, 288 n.16 (1987).

¹¹ 42 U.S.C. §12113.

¹² 29 C.F.R. §1630.2(r) (2000).

¹³ See *Rizzo v. Children's World Learning Center, Inc.*, 84 F.3d 758, 763 (5th Cir. 1996) (relying on EEOC guidelines in defining qualified individual as one who poses no threat to self or others); *Daugherty v. City of El Paso*, 56 F.3d 695, 698 (5th Cir. 1995) (holding insulin dependent bus driver not qualified as matter of law because he could injure himself or others); *EEOC v. Exxon Corp.*, 203 F.3d 871, 875 (5th Cir. 2000) (holding employer could defend exclusion based on self risk or risk to others under either the direct threat or business necessity provision). All three cases placed the burden on the defendant. Compare *LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832, 835 (11th Cir. 1998) (including self-risk as part of the analysis, and finding plaintiff "failed to produce probative evidence that he was not a direct threat"). *Id.* at 835; *EEOC v. Amego, Inc.*, 110 F.3d 135, 144 (1st Cir. 1997) (noting the ADA and Rehabilitation Act regulations are comparable and cover health and safety concerns for the individual and others, and that "plaintiff bears the burden of showing she is a 'qualified' individual"). *Id.* at 142; *Moses v. American Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996) (holding an employer may fire a disabled employee if the disability renders the employee a direct threat to his own health or safety, and that plaintiff must prove he was not a direct threat). The three latter cases all placed the burden of proof on plaintiff.

¹⁴ *Echazabal*, 226 F.3d at 1073-74 (Trott, J., dissenting).

The Note goes on in Part IV to analyze the *Echazabal* decision by looking at the plain meaning of the ADA, its legislative history, and perhaps most importantly comparisons between treatment of the disabled and other groups who have successfully dismantled artificial barriers to employment initially justified by similar protectionist concerns. In particular the struggle of women, Hispanics and Asians is reviewed. Also explored is the reality that many occupations are inherently dangerous yet society permits non-disabled individuals to take on risky tasks each day, and in fact the economy would fail to function if a line was drawn prohibiting people from working in jobs that are statistically shown to cause greater levels of injury, disease, and death. In recognition of this reality the state has set up compensation programs to pay the costs of the inevitable harms visited upon those who willingly accept positions that lead to injury or death.

Given the history of the federal government's long and continual promotion of integrating the disabled into all aspects of the workplace; the clear and express language of the ADA; its legislative history including specific adoption of the *Arline* "risk-to-others" concept of exclusion; and the need to insure elimination of any disparate treatment of disabled workers, this Note takes the position that *Echazabal* was correctly decided, and if eventually heard on appeal should be affirmed.

II. BACKGROUND: AN EIGHTY-YEAR MARCH FROM REHABILITATION TO FULL PARTICIPATION

A. *The Early Disability Statutes: Rehabilitation and Return to Remunerative Work*

"The initial interest of the Congress in the rehabilitation needs of the disabled was centered in the returning World War I veterans."¹⁵ Shortly thereafter, the government took steps to address the industrially disabled, and on June 2, 1920, President Wilson signed into law the

¹⁵ SENATE COMM. ON LABOR AND PUBLIC WELFARE, REHABILITATION ACT OF 1973, S. REP. NO. 93-318, (1973), reprinted in 1973 U.S.C.C.A.N. 2076, 2082.

Smith-Fess Act.¹⁶ At its inception, the law offered limited services such as training, counseling and job placement for the physically handicapped.¹⁷

War again served as the inspiration for major developments in the treatment of disabled citizens. During the height of World War II, Congress, in the summer of 1943 amended the Smith Fess Act and authorized funds for medical, surgical and other physical restorative services to eliminate or reduce the level of disability in those covered by the Act.¹⁸ The 1943 amendments to the Smith-Fess Act also expanded coverage to mentally ill and mentally retarded individuals for the first time.¹⁹ Perhaps the most important development from the employment standpoint was the law's express goal of making recipients "fit to engage in a remunerative occupation."²⁰ The 1943 amendments changed the focus of government sponsored rehabilitation programs from making the most of a disabled person's limited abilities to actually reducing the level of disability through medical intervention, and then training the person to participate as fully as possible in the remunerative workforce.

Two decades later three sets of amendments further expanded the federal government's role in addressing the needs of the disabled. In 1965, amendments were passed to "expand and enlarge the public program to achieve the rehabilitation of a much larger number of handicapped individuals."²¹ Additional amendments in 1967 and 1968 continued to expand the program with a "primary purpose of providing vocational rehabilitation services to, or gainful employment for, handicapped individuals."²² From its inception in 1920 through the early 1970's, over 3 million

¹⁶ *Id.* (Smith-Fess Act, Pub. L. No. 66-236 (1920)).

¹⁷ *Id.*

¹⁸ *Id.* at 2083.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 2084.

handicapped people had been rehabilitated through government sponsored programs.²³ Although the programs provided medical and vocational rehabilitation benefits, the efforts to place rehabilitated individuals into remunerative jobs was hampered by the absence of any affirmative obligation on the part of employers to hire such individuals, and the lack of any protection from all forms of disability related employment discrimination.

B. *Expanding Employment Protection to the Disabled: Government Contractor Obligations*

In the early seventies Congress examined the need for modernizing the nation's approach to providing for the disabled and passed legislation in the form of the Rehabilitation Act of 1973.²⁴

1. *Rehabilitation Act of 1973: Adding Affirmative Action Requirements for Federal Contractors*

In passing the 1973 Act Congress emphasized, "the program [would] remain vocationally oriented,"²⁵ and made it clear that only the most severely handicapped would fall outside the boundaries of coverage by stating that:

individuals who have severe handicaps can and should have vocational goals, and that maximum effort must be expended to provide these individuals with a broad range of services to enable them to realize this potential. A new definition has, therefore been added defining certain "severe" handicaps as those which generally require "multiple services over an extended period of time." The Committee is cognizant of the fact that it may take greater effort to set up a rehabilitation program for these individuals, and it fully expects rehabilitation counselors to make this effort.²⁶

Aside from expanding the scope of those who would qualify for vocational rehabilitation services the Act added teeth to the government's attempt to increase employment of handicapped

²³ *Id.*

²⁴ Rehabilitation Act of 1973, Pub. L. No. 93-112, *reprinted in* 1973 U.S.C.C.A.N. 409 (codified at 29 U.S.C. §§ 701-797 (1994)).

²⁵ SENATE COMM. ON LABOR AND PUBLIC WELFARE, REHABILITATION ACT OF 1973, S. REP. NO. 93-318, (1973), *reprinted in* 1973 U.S.C.C.A.N. 2076, 2092.

²⁶ *Id.* at 2095.

individuals by attaching an affirmative action obligation for federal contractors to “employ and advance in employment qualified handicapped individuals as defined in section 7(6).”²⁷ For the first time employers, though limited to those doing business with the federal government, were required to take affirmative steps to employ handicapped individuals.

Importantly, and in contrast to later Acts, nothing in the 1973 Act, or in the legislative history, discussed whether the employer could take safety concerns for the individual or others into account when considering a handicapped person for employment. In addition, there were no affirmative defenses outlined in the Act expressly permitting an employer to argue that failure to place a handicapped individual based on safety concerns was protected.²⁸ The emphasis up to that point was to expand the employment of handicapped persons, even those with severe conditions, and little energy was spent on defining criteria that could legitimately be relied on to exclude those that employers had concerns about hiring.

2. *The 1974 Amendments: Expanding the Pool of Covered Persons*

A year later Congress amended the 1973 Act and expanded the definition of “handicapped individual” to “any person who (A) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (B) has a record of such impairment, or (C) is regarded as having such an impairment.”²⁹ Even though the amendment

²⁷ Rehabilitation Act of 1973, Pub. L. No. 93-112, §503(a), *reprinted in* 1973 U.S.C.C.A.N. 409, 453 (section 7(6) defines qualified handicapped individual as “any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to titles I and III of this Act.”) *Id.* at 414.

²⁸ *See* Rehabilitation Act of 1973, Pub. L. No. 93-112, *reprinted in* 1973 U.S.C.C.A.N. 409; and SENATE COMM. ON LABOR AND PUBLIC WELFARE, REHABILITATION ACT OF 1973, S. REP. NO. 93-318, (1973), *reprinted in* 1973 U.S.C.C.A.N. 2076. (neither the Act nor the legislative history reflects any discussion or codification of the safety issue, nor defenses available to employers who fail to hire or place handicapped individuals when acting out of concern for the safety or health of the handicapped individual or others in the workplace).

²⁹ Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, § 111, *reprinted in* 1974 U.S.C.C.A.N. 1862, 1865 (amending the definition of handicapped individual previously codified in section 7(6) of the Rehabilitation Act of 1973).

enlarged the pool of covered persons, safety considerations again failed to make their way into Congressional discussions.

3. *The 1978 Amendments: Safety Concerns Make Their Debut*

The first indication of any safety considerations in the hiring of handicapped individuals surfaced in 1978 during consideration of amendments to the 1973 Act. Congress sought to clarify whether alcoholics and drug abusers came within the definition of “handicapped individual.” In resolving their slightly differing positions the two houses agreed in conference that “only those active alcoholics or drug abusers who cannot perform the essential functions of a job in question or who present a danger to life and property are not covered by the employment provisions of sections 503 and 504.”³⁰ Section 2(B) of the 1978 Act codified the concept emerging from the conference committee by amending the definition of “handicapped individual” under section 7 of the 1973 Act by clarifying that the “term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of *others*.”³¹

Nowhere in the language of the 1978 amendment or the legislative history is there any mention of self-risk as a criterion for excluding an otherwise qualified person from employment. In October, 1978, at virtually the same time the 1978 Amendments were enacted, the Office of Federal Contract Compliance Programs (OFCCP), of the Department of Labor, issued Rules and Regulations covering compliance with section 503 of The Rehabilitation Act of 1973, but in

³⁰ HOUSE CONFERENCE REPORT, REHABILITATION, COMPREHENSIVE SERVICES, AND DEVELOPMENT DISABILITIES AMENDMENTS OF 1978, H. CONF. REP. NO. 95-1780, (1978), *reprinted in* 1978 U.S.C.C.A.N. 7312, 7413.

³¹ Rehabilitation Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, §2(B), *reprinted in* 1978 U.S.C.C.A.N. 92 Stat. 2955, 2984-85 (emphasis added).

doing so used less precise and more expansive language than Congress had when defining the scope of safety concerns employers could rest on to exclude disabled persons from employment.³²

4. *The 1978 Department of Labor Regulations: Ambiguity From the Start*

The Rules, issued some five years following passage of the Act, incorporated the changes made by the 1974 amendments in their definition of “handicapped individual” and further outlined that a “handicapped individual” was considered “qualified” if “capable of performing a particular job, with reasonable accommodation to his or her handicap.”³³ Lastly, the Rules stated that job qualification requirements that tended to screen out “qualified handicapped individuals” imposed a burden on the *employer* to prove that the requirements were “job related and consistent with business necessity and *the safe performance of the job*.”³⁴

It is unclear how the Department intended to apply the safe performance element, or given almost simultaneous publication, whether it had any knowledge or gave any consideration to the concept of “threats to others” adopted by Congress in enacting the 1978 amendments. What is clear though is a difference in wording existed between the Act as amended in 1978, and the Labor Department’s Rules issued that same year. This ambiguity was never cleared up even in 1986 when Congress once again amended the definition of “handicapped individual” in section 7 of the 1973 Act. While making some changes in the wording of the Act to reduce stereotypical verbiage, it failed to incorporate the broader exclusionary language that the Rules implied.³⁵

³² Affirmative Action Obligations of Contractors and Subcontractors for Handicapped Workers, 43 Fed. Reg. 49,276 (Oct. 20, 1978).

³³ *Id.* at 49,277.

³⁴ *Id.* at 49,278 (emphasis added).

³⁵ Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, §103(d), *reprinted in* 1986 U.S.C.C.A.N. 100 Stat. 1807, 1810. Act changed terminology from “handicapped individual” to “individuals with handicaps” to avoid inadvertent stereotypes that persons with handicaps are less worthy.

5. *The Judiciary Weighs in: Sorting Through the Inconsistencies*

Aside from these legislative and regulatory developments, a series of cases decided from 1979 to 1987 attempted to clarify the interpretation of “qualified handicapped individuals,” and in particular what role safe performance played in evaluating qualifications. In general, the courts found a right to consider individuals not “otherwise qualified” if they posed a threat to the health or safety of themselves or others.³⁶

In 1987 the Supreme Court in *School Board of Nassau County, FL, v. Arline*³⁷ issued a decision permitting employers to bar otherwise qualified persons from employment when they posed a risk to the health and safety of *others*. The case did not deal with the issue of self risk, but its limited scope ruling was important because Congress expressly relied on it in drafting the direct threat defense language contained in the Americans with Disabilities Act of 1990;³⁸ text that is at the very heart of the controversy in *Echazabal*.

a. *Arline*: Focusing on Risks to Others

In *Arline* the Court faced the question whether a school teacher “afflicted with tuberculosis, a contagious disease, may be considered a ‘handicapped individual’ within the

³⁶ See *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979) (community college covered by section 504 rejected deaf nursing applicant based on her failure to meet the school’s physical qualification requirement (ability to hear) which it imposed to insure patient safety. The Court upheld the decision stating “an otherwise qualified person is one who is able to meet all of a program’s requirements in spite of his handicap.” In determining whether the hearing requirement was discriminatory the Court stated that “[n]othing in the language or history of §504 reflects an intention to limit the freedom of an educational institution to require reasonable physical qualifications for admission to a clinical training program.” *Id.* at 407, 414; *Doe v. New York University*, 666 F.2d 761, 775-777 (2d. Cir. 1981) (court upheld rejection by a section 504 covered university of medical student who was self destructive and posed risk of injury to herself and others, including faculty, students, and patients. Further, it outlined a test permitting an institution to exclude an otherwise qualified handicapped individual where placement in the position would pose a significant risk of harm to the individual or others); *Mantolete v. Bolger*, 767 F.2d 1416, 1422-23 (9th Cir. 1985) (court outlined the test to be followed under section 501 when determining if an otherwise qualified handicapped individual may be excluded from a federal job based on a threat to her own safety that placement in the job may create. Plaintiff had been rejected for Postal Service job based on her history of epilepsy that Defendant claimed exposed her to greater risk of injury. The court adopts the test that where a job requirement screens out a qualified handicapped individual on the basis of possible further injury there must be a showing of a reasonable probability of substantial harm to either the individual or others that cannot be eliminated through reasonable accommodation).

³⁷ *Arline*, 480 U.S. 273, 287 n.16.

³⁸ 42 U.S.C. §12213(b).

meaning of §504 of the Act, and if so, whether such an individual is ‘otherwise qualified’ to teach elementary school.”³⁹ In considering the first issue the Court found that Arline’s hospitalization for tuberculosis in 1957 “suffice[d] to establish that she ha[d] a ‘record of . . . impairment’ within the meaning of [the Act] and [was] therefore a handicapped individual.”⁴⁰

Turning to the second question of whether Arline was “otherwise qualified” the Court focused on the aspect of her employment that made her, in the eyes of the School Board, “unqualified,” the health and safety risks her contagious disease posed to others she came in contact with. Without reaching a conclusion the Court remanded the question to the trial court and directed it to balance the goal of “protecting handicapped individuals for deprivations based on prejudice, stereotypes or unfounded fear while giving appropriate weight to such legitimate concerns of [the school board] as avoiding exposing *others* to significant health and safety risks.”⁴¹ The Court went on to explain that “[a] person who poses a significant risk of communicating an infectious disease to *others* in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk.”⁴²

In his dissent, Chief Justice Rehnquist rejected the position that discrimination on the basis of contagiousness alone triggers coverage under the Act. “The record in this case leaves no doubt that Arline was discharged because of the contagious nature of tuberculosis, and not because of any diminished physical or mental capabilities resulting from her condition.”⁴³ “[T]he central question here is whether discrimination on the basis of contagiousness constitutes

³⁹ *Arline*, 480 U.S. at 275. (Section 504 of the Act reads in pertinent part: No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. While *Arline* dealt with a section 504 claim the same definitions of “handicapped individual” and “qualified handicapped individual” applied to section 503 employment discrimination claims).

⁴⁰ *Id.* at 281.

⁴¹ *Id.* at 287 (emphasis added).

⁴² *Id.* at 287 n.16 (emphasis added).

⁴³ *Id.* at 291 (Rehnquist, J., dissenting).

[handicap] discrimination.”⁴⁴ In answering that question the Chief Justice concludes “contagiousness is not a handicap within the meaning of §504.”⁴⁵

The difference between the two sides thus centered on the threshold question of whether a person whose only “handicap” was contagiousness was even covered under the Rehabilitation Act. The Chief Justice, joined by Justice Scalia, believed such persons were not covered for failure to meet the basic definition of “handicapped.” In contrast, the majority led by Justice Brennan felt that while individuals such as Arline met the definition they were subject to ultimate rejection if their contagious condition posed a direct threat to the health and safety of *others* that could not be eliminated through reasonable accommodation, thereby making them “unqualified” for the position.

b. Post *Arline* Reaction: Congress Codifies the Court’s Decision

Shortly after the Court’s decision some members of Congress during debate over a bill designed to reverse some judicial narrowing of various discrimination laws attempted to overturn *Arline*. The plan, however, backfired and section 9 of the Civil Rights Restoration Act of 1987 actually added the *Arline* concept to sections 503 and 504 of the Rehabilitation Act of 1973.⁴⁶ The 1987 amendment expressly brought individuals with contagious diseases who were otherwise qualified to perform the job in question under the coverage of the 1973 Act, and only when “such disease or infection would constitute a direct threat to the health or safety of *other* individuals” would such persons be deemed not otherwise qualified.⁴⁷ The focus of the direct

⁴⁴ *Id.*

⁴⁵ *Id.* at 292.

⁴⁶ Civil Rights Restoration Act of 1987, P.L. 100-259, *reprinted in* 1988 U.S.C.C.A.N. 102 Stat 28, 31-32.

⁴⁷ *Id.* at 31-32 (emphasis added).

threat exception clearly was directed toward the concerns *others* may have when working with a handicapped individual, and not the threat the disease posed for the individual himself.⁴⁸

Just two years later when Congress passed the Americans with Disabilities Act the *Arline* “threat to others” concept was carried over and expanded to cover threats beyond those stemming from contagious disease.⁴⁹ Interestingly, no attempt was made to codify any of the section 501 or 504 circuit court decisions that held that a direct threat to the individual’s own health or safety could also be grounds for considering the handicapped person unqualified.

C. *Expanding the Scope of Employment Protections: The Americans with Disabilities Act of 1990*

The purpose of the ADA [was] to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life; to provide enforceable standards addressing discrimination against individuals with disabilities, and to ensure that the Federal government plays a central role in enforcing these standards on behalf of individuals with disabilities.⁵⁰

The Act expanded disability discrimination coverage to employers beyond those subject to the Federal government contractor provisions of the Rehabilitation Act of 1973.⁵¹ In doing so Congress sought to parallel many definitional and remedial aspects of the laws then on the books instead of introducing a new set of possibly conflicting standards. For instance, the ADA incorporated “many of the standards of discrimination set out in regulations implementing

⁴⁸ SENATE COMM. ON LABOR AND HUMAN RESOURCES, CIVIL RIGHTS RESTORATION ACT OF 1987, S. REP. NO. 100-64, (1988), *reprinted in* 1988 U.S.C.C.A.N. 3, 30 (the Committee notes reflect that section 504 stands for protection of handicapped individuals from discrimination based not only on the handicap itself, but from irrational fears and prejudice of others. While public health considerations such as contagion may continue to be a factor in determining whether a person is in fact qualified to perform a particular job, an individual with a contagious disease can be considered handicapped, and thus afforded the opportunity to make the case for why he or she is qualified to perform the job. If the individual constitutes a public health risk that cannot be eliminated through reasonable accommodation then the individual on that fact alone will not be considered otherwise qualified).

⁴⁹ 42 U.S.C. §§ 12101 to 12213, §12113(b).

⁵⁰ HOUSE COMM. ON EDUCATION AND LABOR, AMERICANS WITH DISABILITIES ACT OF 1990, H.R. REP. NO. 101-485 (II), (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 304.

⁵¹ 42 U.S.C. §12111(5).

section 504 of the Rehabilitation Act of 1973 . . . and the enforcement provisions under Title VII of the Civil Rights Act of 1964.”⁵²

Tracking the Rehabilitation Act, the ADA made it unlawful for employers to discriminate against “qualified individuals with a disability.” “Disability” was defined by the same three prong test utilized by the Rehabilitation Act.⁵³ In order to be considered “qualified” an individual was required “with or without reasonable accommodation, [to] perform the essential functions of the employment positions that such individual holds or desires.”⁵⁴

Aside from extending many of the Rehabilitation Act requirements to a broader range of employers, Congress specifically incorporated concepts growing out of the *Arline* decision and the 1987 amendment to the Rehabilitation Act so that otherwise qualified persons with contagious diseases, or other conditions that posed a direct threat to the safety of *others*, would be covered by the ADA, subject to subsequent disqualification from employment if the threat they posed to *others* could not be eliminated through reasonable accommodation.

Specifically Congress codified this concept as an affirmative defense in sections 12113(a) and (b) of the ADA. Section 12113(a) borrows a portion of the language from the Department of Labor’s 1978 Rules governing enforcement of the Rehabilitation Act:

[i]t may be a defense to a charge of discrimination . . . that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been show to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation.⁵⁵

⁵² HOUSE COMM. ON EDUCATION AND LABOR, AMERICANS WITH DISABILITIES ACT OF 1990, H.R. REP. NO. 101-485 (II), (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 304.

⁵³ 42 U.S.C. § 12102(2).

⁵⁴ 42 U.S.C. § 12111(8).

⁵⁵ 42 U.S.C. § 12113(a).

This section, however, expressly excluded part of the 1978 Rule that provided “safe performance of the job” as an additional reason beyond “job-relatedness” and “business necessity” that an employer could rely on to justify a disqualifying standard or criteria.⁵⁶

Instead, Congress in the very next section, 12113(b), replaced the “safe performance of the job” standard with a narrower one requiring an employer to show the individual will “pose a *direct threat to the health or safety of other individuals in the workplace.*”⁵⁷ In addition to directing the safety concerns toward others, Congress went on to specify that an exacting test must be met for a “direct threat” to be found. “The standard to be used in determining whether there is a direct threat is whether the person poses a significant risk to the safety of others, or to property, not a speculative or remote risk, and that no reasonable accommodation is available that can remove the risk.”⁵⁸

Congress’ intent to incorporate the *Arline* concept in both whose safety must be considered and the standard to be applied is clear.

In order to determine whether an individual poses a direct threat to the health or safety of other individuals in the workplace, the Committee intends to use the same standard as articulated by the Supreme Court in *School Board of Nassau County v. Arline*. In *Arline*, the court held that a “person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk” An amendment defining “direct threat” was adopted by the Committee in Section 101(8). Direct threat is defined as a “significant risk to the health or safety of others that cannot be eliminated with reasonable accommodation.” This definition was added to clarify that the direct threat standard is a codification of the analysis in *Arline*.⁵⁹

⁵⁶ Affirmative Action Obligations of Contractors and Subcontractors for Handicapped Workers, 43 Fed. Reg. 49,276, 49,278 (Oct. 20, 1978).

⁵⁷ 42 U.S.C. § 12113(b) (emphasis added).

⁵⁸ HOUSE COMM. ON EDUCATION AND LABOR AMERICANS WITH DISABILITIES ACT OF 1990, H.R. REP. NO. 101-485 (II), (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 338.

⁵⁹ *Id.* at 468.

During debate the Senate bill which limited the defense to threats from contagious diseases was amended by a House measure, ultimately passed by both houses, that extended the direct threat defense to *any* condition that imposed a significant risk to the health or safety of others.⁶⁰

While the affirmative defense “clearly spell[s] out the right of the employer to take action to protect the rights of its employees and other individuals in the workplace,”⁶¹ the history also reveals that Congress felt it “critical that paternalistic concerns for the disabled person’s *own* safety *not* be used to disqualify an otherwise qualified applicant. As noted, these requirements are incorporated in the legislation in sections 102(b)(1)(5)(6).”⁶² Neither the text of the Act nor the legislative history indicates any attempt to permit discrimination against qualified individuals with a disability simply because placement in the job may pose a direct threat to their *own* health or safety.

1. *The EEOC’s ADA Rules: Regulatory Ambiguity Begins Anew*

On July 26, 1991 the Equal Employment Opportunity Commission issued its final rules on compliance with the Americans with Disabilities Act.⁶³ Although the law limited the direct threat defense to those threats that “pose a direct threat to the health or safety of *other individuals* in the workplace,”⁶⁴ the EEOC’s rules expanded the definition of a “direct threat” to those that pose a significant risk of substantial harm to the health or safety of the *individual or others*.⁶⁵ They did so even though many disability rights groups expressed concern that the EEOC’s expansion of the exclusionary rule to cover self-risk situations would result in fewer employment

⁶⁰ HOUSE CONFERENCE REPORT, AMERICANS WITH DISABILITIES ACT OF 1990, H.R. REP. NO. 101-596, (1990), reprinted in 1990 U.S.C.C.A.N. 267, 569.

⁶¹ *Id.*

⁶² HOUSE COMM. ON EDUCATION AND LABOR AMERICANS WITH DISABILITIES ACT OF 1990, H.R. REP. NO. 101-485 (II), (1990), reprinted in 1990 U.S.C.C.A.N. 267, 354. (codified at 42 U.S.C. §12112(b)(6) requiring job relatedness and business necessity for a qualification standard) (emphasis added).

⁶³ Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,726 (Jul. 26, 1991).

⁶⁴ 42 U.S.C. § 12113(b) (emphasis added).

⁶⁵ Equal Employment Opportunity for Individuals with Disabilities, 29 C.F.R. §1630.2(r) (2000).

opportunities by allowing paternalistic employers to make decisions based on their belief of what was in the best interests of the disabled person.⁶⁶

Given the final rules, employers are left with a multi-step process in making employment decisions. First they need to determine if the individual satisfies the prerequisites for the position based on criteria such as appropriate educational background, employment experience, skills, and licenses (equivalent to “otherwise qualified” in the Rehabilitation Act case law). Where the basic criteria are met the employer must then determine whether the person can perform the essential functions of the position, with or without reasonable accommodation.⁶⁷ Where a reasonable accommodation will not eliminate the risk posed to a person’s own health or safety, or to that of others, the person may be rejected as “unqualified.”⁶⁸ The Rules thus effectively expanded the scope of the affirmative defense to permit exclusion of “otherwise qualified” persons based on the threat to their *own* health and safety as opposed to the Act’s limited exclusion based on a threat to *others*.⁶⁹

2. Integrating the Rehabilitation Act with the ADA: Who’s on First

In October, 1992, the Rehabilitation Act Amendments of 1992 were enacted.⁷⁰ A primary purpose of the legislation was to “ensure that the precepts and values embedded in the Americans with Disabilities Act [were] reflected in the Rehabilitation Act of 1973.”⁷¹ To accomplish this purpose the standards applied under the ADA were to be used in making employment discrimination determinations under section 503 of the Rehabilitation Act, and the

⁶⁶ Equal Employment Opportunity for Individuals with Disabilities 56 Fed. Reg. 35,726, 35,730 at §1630.2(r) section by section analysis (Jul. 26, 1991).

⁶⁷ Equal Employment Opportunity for Individuals with Disabilities at 29 C.F.R. §1630.2(m) Appendix to Part 1630-Interpretive Guidance on Title I of the Americans with Disabilities Act (2000).

⁶⁸ *Id.* at §1630.2(r) Appendix to Part 1630-Interpretive Guidance on Title I of the Americans with Disabilities Act.

⁶⁹ *Id.* at § 1630.15(2).

⁷⁰ REHABILITATION ACT AMENDMENTS OF 1992, P.L. 102-569, *reprinted in* 1992 U.S.C.C.A.N. 106 STAT. 4344.

⁷¹ SENATE COMM. ON LABOR AND HUMAN RESOURCES, REHABILITATION ACT AMENDMENTS OF 1992, S. REP. NO. 102-357, (1992), *reprinted in* 1992 U.S.C.C.A.N. 3712, 3713.

Rules regulating the Rehabilitation Act were to be made consistent with those governing the ADA.⁷² Responding to its statutory obligation the Department of Labor (OFCCP) issued a final rule on May 1, 1996, revising the 1978 regulations governing the Rehabilitation Act of 1973 to make them consistent with the ADA's.⁷³ In reconciling the scope of the "direct threat" defense, the OFCCP, like the EEOC before them, dismissed the concerns of disability rights groups and adopted the EEOC's approach by including self-risk as a permissible ground for exercising the defense.⁷⁴ In reaching its decision it applied a somewhat circuitous logic by claiming the definition it adopted was "identical to the parallel definition contained in EEOC's ADA regulations that in turn [were] based on the case law interpreting the Rehabilitation Act."⁷⁵ Thus, it appears the ADA regulations are actually based on pre ADA judicial interpretations of sections 501 and 504 of the Rehabilitation Act that Congress specifically failed to incorporate into the ADA, instead of the plain language of the ADA itself. Thereafter, the OFCCP in adopting the "ADA" regulations brought those interpretations full circle to once again apply to the Rehabilitation Act. Were the text of the ADA and judicial interpretations of the Rehabilitation Act in synchronicity no harm would logically result from the agencies' approach, but where significant differences exist, such as in the application of the direct threat defense to self risk, no such claim can be made. This unmoored bit of regulatory language, recognizing a right to exclude based on self-risk, has been the source of support for several early interpretations of the ADA's direct threat defense provision, even in the face of clear statutory language to the contrary.

⁷² *Id.* at 3783. (codified at 29 U.S.C. 793(d)-(e)).

⁷³ Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities, 61 Fed. Reg. 19,336 (May 1, 1996).

⁷⁴ *Id.* at §60-741.2(y) section by section analysis of comments and revisions.

⁷⁵ *Id.*

3. *Judicial Interpretations of “Qualification Standards” and “Direct Threat:” What a Difference a Circuit Makes*

Beginning in the mid 1990s, following passage of the ADA and issuance of the regulations, a number of courts grappled with the issues of which party carried the burden of proving a plaintiff posed a “direct threat,” and whether the threat was limited to health and safety concerns for others, or included self-risk as well. Courts split dramatically on these two issues. Some suggested that the plaintiff carried the burden of proving he was *not* a direct threat, and that the direct threat encompassed self-risk. Others held that while defendants had the burden to prove a direct threat, concern for the individual’s own health and safety was enough to trigger a successful defense. A third group held that the defendant carried the burden and further the direct threat was limited to concerns for the health and safety of others.

a. The Plaintiff Burden/Self-Risk Cases: A Double Whammy for the Disabled

The Court of Appeals for the Eleventh Circuit led the way in interpreting the ADA in a manner furthest from the express language of the Act. In *Moses v. American Nonwovens* the court concluded that the term “direct threat” under the ADA included instances where only the individual’s personal safety was at risk, and that the *employee* bore the burden of proving he was qualified for the job given his threatening condition.⁷⁶ In *Moses*, plaintiff was fired after being diagnosed with epilepsy, and the court in rejecting his appeal from a grant of a motion for summary judgment in favor of defendant stated “an employer may fire a disabled employee if the disability renders the employee a ‘direct threat’ to his own health or safety.”⁷⁷ In discussing the burden of proof the court noted “[t]he employee retains at all times the burden of persuading the jury either that he was not a direct threat or that reasonable accommodations were

⁷⁶ *Moses*, 97 F. 3d 446, 447.

⁷⁷ *Id.* at 447.

available.”⁷⁸ Given its reading of the law, and the trial court’s factual finding that plaintiff would have been required to work around moving equipment, and that his epilepsy was not well controlled, the court concluded that plaintiff failed to prove that placement in the job would not have exposed him to significant risk, or that any risk could have been eliminated through reasonable accommodation.⁷⁹

Two years later in *LaChance v. Duffy’s Draft House, Inc.*,⁸⁰ the Eleventh Circuit reinforced the notion that “[t]he employee retains at all times the burden of persuading the jury either that he was not a direct threat or that reasonable accommodations were available.” In that case, Plaintiff LaChance, a line cook in a restaurant kitchen containing potentially dangerous equipment, suffered on the job epileptic seizures and was fired after some three months of employment. He filed suit under the ADA and the district court granted defendant’s motion for summary judgment finding plaintiff not a “qualified individual” under the Act because “he could not perform the essential functions of the job without threat of harm to himself or others.”⁸¹ The circuit court in deciding the issue “whether LaChance produced evidence from which a reasonable jury could conclude that he was not a direct threat” affirmed the action of the lower court by stating that “LaChance failed to produce probative evidence that he was not a direct threat.”⁸² While the circuit court concentrated on the threat LaChance posed to others it implied the analysis also reaches self risk by noting “LaChance admits that if he had continued working at Duffy’s, he would have had seizures on the job which would have posed a risk of harm to himself and others.”⁸³

⁷⁸ *Id.*

⁷⁹ *Id.* at 447-48.

⁸⁰ *LaChance*, 146 F.3d at 836.

⁸¹ *Id.* at 834.

⁸² *Id.* at 835.

⁸³ *Id.*

While the Eleventh Circuit's interpretation of the scope of the direct threat defense mirrored the EEOC's, the Agency clearly believed the court was incorrect in placing the burden on plaintiffs as evidenced by the Agency's position in a Court of Appeals for the First Circuit case decided some six months after *Moses, EEOC v. Amego, Inc.*⁸⁴ In *Amego* the EEOC argued:

whenever an issue of threats to the safety or health of others is involved in a Title I case, it must be analyzed under the "direct threat" provisions of §12113(b) as an affirmative defense ... [thus it contended] the district court erred in considering the matter of whether [plaintiff] posed a threat to the safety of Amego's clients as a matter of "qualification," on which the plaintiff bears the burden.⁸⁵

Further, the EEOC pointed out that a significant difference existed between the Rehabilitation Act and the ADA in the definition of "qualified individual." The former, through regulatory interpretation, included an up front requirement that to be "qualified" an individual not "endange[r] the health and safety of the individual or others," while the latter only imposed the requirement as part of its defense section.⁸⁶ Although the First Circuit acknowledged "the rub is that the language about 'qualification standards' under Title I appears in a section of the statute entitled 'defenses'" it too rejected the EEOC's position.⁸⁷ In affirming the district court's grant of defendant's motion for summary judgment, the circuit court made it clear that a plaintiff has the burden of proving he does not pose a significant risk and is therefore qualified. In reaching its decision the court drew on *Arline* by noting "*Arline* considered [the direct threat] issue to be part of the 'qualification' analysis under §504 as to which plaintiff bears the burden."⁸⁸

Currently, the First and Eleventh Circuits place the burden on the *plaintiff* to prove, as part of meeting the qualification standards, that he does not pose a direct threat to either his *own or*

⁸⁴ *Amego*, 110 F.3d at 142.

⁸⁵ *Id.*

⁸⁶ *Id.* at 144.

⁸⁷ *Id.* at 142.

⁸⁸ *Id.* 143.

anyone else's health or safety.⁸⁹ By doing so these courts have effectively elevated the absence of any threat to an essential job function with which employees must prove they can comport.

b. The Defendant Burden/Self-Risk Cases: Half a Loaf is Better than None

Taking a somewhat different approach was the Court of Appeals for the Fifth Circuit that in a series of cases outlined the concept that while a direct threat could be one that posed a danger to either the individual or others, the *defendant* bore the burden of proving the existence of the threat. In *Daugherty v City of El Paso*,⁹⁰ the court provided some guidance on the scope of the definition of "direct threat." In that case the parties agreed that plaintiff, a city bus driver who was diagnosed as an insulin dependent diabetic and thereby barred under federal Department of Transportation regulations from driving a bus, was unqualified.⁹¹ Plaintiff, however, argued that the City's failure to seek a permissible Department of Transportation waiver amounted to a failure to reasonably accommodate his disability. Based on its previous rulings under the Rehabilitation Act the court rejected the failure to accommodate claim finding it would amount to unreasonable accommodation because

as a matter of law [] a driver with insulin-dependent diabetes is not otherwise qualified because his medical condition presents a genuine substantial risk that he could injure himself or others ... [and] this holding likewise compels us to hold that under the ADA Daugherty is not "a qualified individual with a disability" for the position of bus driver⁹²

The court never reached the issue of burden because it ruled as a matter of law that plaintiff was unqualified because he posed a risk of injury to both himself and others.

⁸⁹ See *Amego*, 110 F.3d at 143-44 and *Moses* 97 F.3d at 447.

⁹⁰ *Daugherty*, 56 F.3d 695.

⁹¹ *Id.* at 697.

⁹² *Id.* at 698.

One year later the court reaffirmed that self-risk was a disqualifying criterion and went on to provide guidance on the burden issue. In *Rizzo v. Children's World Learning Center, Inc.*,⁹³ the court, in reversing a grant of defendant's summary judgment motion in a case involving a school van driver with a hearing disability, relied on the EEOC's regulatory guidelines to include self-risk in the analysis of "direct threat," but made it clear that "[a]s with all affirmative defenses, the employer bears the burden of proving that the employee is a direct threat."⁹⁴

In a recent refinement to the affirmative defense interpretation, the court in *EEOC v. Exxon Corporation* recognized a right of employers to defend discriminatory behavior based on safety concerns under either the traditional "direct threat" defense, or under the "business necessity" defense.⁹⁵ In response to the Exxon Valdez incident that resulted in billions of dollars of environmental damage, Exxon developed a qualification standard that any employee who had undergone treatment for substance abuse was barred from certain safety-sensitive, little-supervised positions.⁹⁶ The EEOC argued that the "only defense available under the ADA when an employer imposes a safety qualification standard is for the employer to prove that the individual poses a 'direct threat'"⁹⁷ The appeals court overturned the district court's grant of partial summary judgment for the EEOC, and instead held "an employer need not proceed under the direct threat provision of §12113(b) [where an employer has developed a safety standard applicable to all employees] but rather may defend the standard as a business necessity [under §12113(a)]"⁹⁸ Distinguishing the application of the two theories in defending an action, the court points out that "the direct threat test applies in cases in which an employer responds to an

⁹³ *Rizzo*, 84 F.3d 758.

⁹⁴ *Id.* at 762-64 (emphasis added).

⁹⁵ *EEOC v. Exxon Corp.*, 203 F.3d 871, 875 (5th Cir. 2000).

⁹⁶ *Id.* at 872.

⁹⁷ *Id.*

⁹⁸ *Id.* at 875.

individual employee’s supposed risk that is not addressed by an existing qualification standard . . . In contrast, business necessity addresses whether the qualification standard can be justified as an “across-the-board requirement.”⁹⁹ While permitting an employer to treat a safety requirement in a general as opposed to an individualized manner, the court retained the burden on the *defendant* and articulated that “direct threat and business necessity do not present hurdles that comparatively are inevitably higher or lower but rather require difference types of proof. . . . Either way, the proofs will ensure that the risks are real and not the product of stereotypical assumptions.”¹⁰⁰

In a departure from their colleagues, the Court of Appeals for the Ninth Circuit interpreted the ADA in a fashion most in line with its text and legislative history.

c. The Defendant Burden/Risk-to-Others Cases: Giving the Disabled a Fighting Chance

Although a district court had previously ruled that the direct threat defense did *not* apply to self-risk situations,¹⁰¹ the Ninth Circuit was the first and only federal appeals court to hold that the *defendant* bears the burden of proving a direct threat, and the threat posed must exclusively be to the health and safety of *others*, however, it took two steps to get there. First, in *Nunes v. Wal-Mart Stores, Inc.*, the court held that an employer has the burden of proof in “direct threat”

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ In *Kohnke v. Delta Airlines, Inc.*, 932 F. Supp 1110 (D.C. N. IL. 1996), a federal district court in the seventh circuit in ruling on a jury instruction motion whether the “direct threat” defense applied to threats of self injury as well as injury to others, held that the “ADA clearly and unambiguously refers to ‘a direct threat to the health or safety of other individuals in the workplace [and] [i]f the EEOC’s interpretation were accepted, it would render entirely meaningless the phrase of ‘other individuals.’” *Id.* at 1111-12. While the *Kohnke* court relied on the “clear and unambiguous” language of the ADA, it also noted that the legislative history indicated an intent to incorporate *Arline*, 480 U.S. 273 (1987), thereby suggesting the purpose of the direct threat language was to extend “the standard to a disabled person harming himself as opposed to other individuals.” *Id.* at 1112. In dicta, however, the court left open the question whether self-injury may bar an employee under another section of the ADA. “Although potential harm to a disabled person himself is not contemplated in the narrow ‘direct threat’ language of [§§ 12113(b) and 12111(3)], such potential harm may still be relevant to the broader language of [§§ 12112(b)(6) and 12113(a).” *Id.* at 1113.

cases.¹⁰² In *Nunes*, a sales associate who was terminated after a series of fainting episodes at work filed, *inter alia*, an ADA suit. In reversing the district court’s grant of summary judgment for the defendant, the appeals court stated that the question of whether Nunes posed “a direct threat to the health or safety of other individuals in the workplace ... is an affirmative defense [that] Wal-Mart bears the burden of proving.”¹⁰³ The opinion went on to specifically note the split between the EEOC regulations and the language of the Act itself, as well as judicial differences on whether the “direct threat” defense applied to self-injury, but expressly declined to rule on the issue, because the question of self-injury “was not addressed in the district court and has not been properly presented in this appeal.”¹⁰⁴

It was the Ninth Circuit’s second step, a holding in *Echazabal*,¹⁰⁵ where the court became the first to unconditionally interpret the “direct threat” defense as applying exclusively to threats posed to *others*, which significantly distinguishes it from other jurisdictions.

III. *ECHAZABAL*: A RADICAL DEPARTURE TOWARD A SENSIBLE INTERPRETATION

A. *Legitimate Concern or Big Brotherism?*

In May, 2000, the Court of Appeals for the Ninth Circuit became the first federal appellate court to reject an employer’s attempt to use the direct threat defense to bar a disabled person’s employment based solely on concerns for that individual’s health and safety.

On this appeal, the principal question we consider is whether the “direct threat” defense available to employers under the Americans with Disabilities Act applies to employees, or prospective employees, who pose a direct threat to their own health or safety, but not to the health or safety of other persons in the workplace. We conclude that it does not.¹⁰⁶

¹⁰² *Nunes v. Wal-Mart Stores, Inc.* 164 F.3d 1243, 1247 (9th Cir. 1999).

¹⁰³ *Id.* at 1247.

¹⁰⁴ *Id.* at 1247, n.1 (discussing *Kohnke v. Delta Airlines*, 932 F. Supp. 1110, 1111 (N.D. Ill. 1996) and *Moses v. American Nonwovens, Inc.* 97 F.3d 446, 447 (11th Cir. 1996)).

¹⁰⁵ *Echazabal*, 226 F.3d at 1064.

¹⁰⁶ *Id.*

The Plaintiff, Mario Echazabal, worked as an employee of various maintenance contractors at Defendant Chevron's oil refinery in El Segundo, California, from 1972 until 1996, on an almost continuous basis.¹⁰⁷ During that entire period he worked primarily in the coker unit of the refinery and in 1992 applied to work directly for Chevron at the same coker unit location.¹⁰⁸ After determining that he was qualified for the job, Chevron extended an offer of employment contingent on passing a physical examination. The exam revealed that Mr. Echazabal's liver was releasing certain enzymes at a higher than normal level, and based on their concern that continued exposure to the solvents and chemicals present in the coker unit would further damage his liver, Chevron rescinded its job offer.¹⁰⁹ Plaintiff continued to work for contractor Defendant Irwin Industries, Inc., at the same refinery, including in the same coker unit, following rejection by Chevron.¹¹⁰ Mr. Echazabal consulted with his physicians following Chevron's refusal to hire him and none of his doctors advised him to stop working at the refinery.¹¹¹ Three years later, in 1995, Plaintiff again applied to Chevron for a position in the coker unit, and the company again offered him a job contingent on a medical examination.¹¹² Once again Chevron rescinded its job offer following the exam based on an elevated risk of liver damage, but also required Irwin to immediately remove Plaintiff from the refinery, or place him in a job where he would not be exposed to solvents and chemicals.¹¹³ Defendant Irwin, responding to Chevron's request, no longer permitted Plaintiff to work at the refinery.¹¹⁴ As a result, Mr. Echazabal filed a complaint with the Equal Employment Opportunity Commission.¹¹⁵

¹⁰⁷ *Id.* at 1065.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

B. *Procedural History*

Subsequent to his EEOC filing, Plaintiff filed a complaint in California state court that alleged in part that both Chevron and Irwin had discriminated against him on the basis of disability in violation of the Americans with Disabilities Act.¹¹⁶ Chevron removed the action to federal court where the district court granted Chevron's motion for summary judgment on all of Mr. Echazabal's claims. The court, however, denied Irwin's motion for summary judgment, but stayed the proceedings between Plaintiff and Irwin. It then certified its grant of Chevron's summary judgment motion for appeal.¹¹⁷ On appeal, Chevron defended its decision to not hire Plaintiff on the ground that it reasonably concluded that Mr. Echazabal would pose a direct threat to his own health if he worked at the refinery, and under the ADA's direct threat defense its refusal under such circumstances was protected.¹¹⁸

C. *A Plain Meaning Interpretation of the Act and its Legislative History*

The court first dealt with the scope of the "direct threat" defense provision of the ADA. In deciding "whether the provision permits employers to refuse to hire an applicant on the ground that the individual, while posing no threat to the health or safety of other individuals in the workplace, poses a direct threat to his own health or safety" noted several other appellate decisions that concluded that the provision did apply to such situations.¹¹⁹ In rejecting the

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1065-66 (the defenses section of the ADA reads in relevant part (a) In general-it may be a defense to a charge of discrimination that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation; (b) Qualification standards-the term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace). *Id.* at 1066 n.2. ¹¹⁹ *Id.* at 1066 (court cites *Lachance v. Duffy's Draft House, Inc.*, 146 F.3d 832 (11th Cir. 1998); *EEOC v. Amego, Inc.*, 110 F.3d 135 (1st Cir. 1997); *Daugherty v. City of El Paso*, 56 F.3d 695 (5th Cir. 1995) which all touched on the issue in dicta; and *Moses v. American Nonwovens, Inc.*, 97 F.3d 447 (11th Cir. 1996) which held the defense encompasses such threats, but provided no guidance because it gave no explanation for its holding).

position taken by other courts, the *Echazabal* court turned first to the language of the Act itself, and found it dispositive.¹²⁰

On its face, the [direct threat] provision does not include direct threats to the health or safety of the disabled individual himself ... [and] the obvious reading of the direct threat defense as not including threats to oneself is supported by the definitional section of Title I, which states that the term “direct threat” means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation. The fact that the statute consistently defines the direct threat defense to include only threats to others eliminates any possibility that Congress committed a drafting error when it omitted from the defense threats to the disabled individual himself.¹²¹

The court specifically rejected Chevron’s argument that the plain meaning should be ignored because it is contrary to the EEOC’s regulations.¹²² The court explained, “if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress ... [a]ccordingly, we reject the EEOC’s contrary interpretation.”¹²³

The court also rejected Chevron’s second argument; that requiring it to hire individuals who posed a risk to their own health or safety would expose the company to tort liability. Initially the court found the question not properly before it because Chevron failed earlier to raise the argument of added costs from tort liability, but it took the opportunity to state that

in *Johnson Controls*, the Supreme Court strongly suggested that state tort law would be preempted to the extent that it interfered with federal antidiscrimination law ... [t]herefore, given that the ADA prohibits employers from refusing to hire individuals solely on the ground that their health and safety may be threatened by the job, state tort laws would likely be preempted if it interfered with this requirement.¹²⁴

¹²⁰ *Id.* at 1066.

¹²¹ *Id.* at 1066-67 (emphasis added).

¹²² *Id.* at 1069.

¹²³ *Id.*

¹²⁴ *Id.* at 1070.

Moreover, the court noted that Defendant's concern over an award of damages reflected a fear that hiring a disabled individual would cost more than hiring a person without disabilities, but stated the extra cost does not provide an affirmative defense to a discriminatory refusal to hire a disabled individual.¹²⁵

Aside from making the "direct threat" and tort liability arguments, Chevron also relied on the theory that it properly rejected Plaintiff because the risk to his liver made him not "otherwise qualified" to perform the job at issue. The court agreed that the ADA does not require employers to hire individuals who are not "otherwise qualified," however, in reviewing Chevron's argument the court rejected the company's assertion that "performing the work at the coker unit *without posing a threat to one's own health or safety* is an 'essential function' of the coker unit job."¹²⁶

The court went on to elaborate that:

an employer may not turn every condition of employment which it elects to adopt into a job function, let alone an essential job function, merely by including it in a job description. Job functions are those acts or actions that constitute a part of the performance of the job. "The job" at the coker unit is to extract usable petroleum products from the crude oil that remains after other refining processes ... [by] various actions that help keep the coker unit running [and that] Chevron does nothing more than add a prohibited condition to these actual job functions when it asserts that the job functions at the coker unit consist of performing the actions that help keep the unit running without posing a risk to oneself ... Chevron's reading of "essential functions" would, by definitional slight-of-hand, circumvent Congress's decision to exclude a paternalistic risk-to-self defense in circumstances in which an employee's disability does not prevent him from performing the requisite work.¹²⁷

Having found that an employer may not impose a no risk-to-self requirement as an essential function based on the language of the ADA, the court also rejected Chevron's theory that it

¹²⁵ *Id.*

¹²⁶ *Id.* Under the ADA the term "qualified individual with a disability" means "[a]n individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." The term is synonymous with "otherwise qualified" which was often used in Rehabilitation Act decisions.

¹²⁷ *Id.* at 1071.

should conclude that a personal safety requirement is a valid qualification standard because such a conclusion was supported by case law implementing the Rehabilitation Act.¹²⁸ The court explained that:

Mantolete relied on a Rehabilitation Act regulation that defined a “qualified handicapped person” as an individual who, among other things, is able to “perform the essential functions of the position in question without endangering the health and safety of *the individual* or others.” The Rehabilitation Act did not provide a statutory definition of the term “qualified handicapped person.” Thus, the court deemed the regulations controlling. In contrast to the Rehabilitation Act, the ADA contains a statutory definition of the term “qualified individual with a disability,” which is the ADA's equivalent of the Rehabilitation Act’s “qualified handicapped person.” The statutory definition in the ADA does not mention threats to the health or safety of the individual or others. Rather, it requires only that the individual be able, with or without reasonable accommodation, to “perform the essential functions of the employment position that such individual holds or desires.” Obviously, the ADA's statutory definition of the term “qualified individual with a disability” supersedes the Rehabilitation Act’s regulatory definition of the analogous term.¹²⁹

In rejecting any comparison to its former interpretations under the Rehabilitation Act the court held “that the risk that Echazabal's employment might pose to his own health does not affect the question whether he is a ‘qualified individual with a disability.’”¹³⁰

In the face of such clear statutory language the court does not rely on the legislative history of the ADA, but nevertheless traces it to lend support to its conclusion.

The term “direct threat” is used hundreds of times throughout the ADA’s legislative history ... Not once is the term accompanied by a reference to threats to the disabled person himself. In addition, ... [the committee reports] explain that the direct threat provision is intended to codify the Supreme Court’s holding in *School Board of Nassau County v. Arline*, a case that defines “the term ‘direct threat’ [to] mean [] a significant risk to the health or safety of others that cannot be eliminated by reasonable

¹²⁸ *Id.* at 1071 n.10 (Chevron cites an earlier Ninth Circuit Rehabilitation Act case that concluded that a disabled individual is not a “qualified handicapped person” if employment would pose “a reasonable probability of substantial harm” to the individual. *Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985)).

¹²⁹ *Id.* at 1071-72, n.10.

¹³⁰ *Id.* at 1072.

accommodation” ... While the House Judiciary Report notes that the ADA extends the *Arline* standard “to all individuals with disabilities, and not simply to those with contagious diseases or infections,” ... it says nothing about extending the standard to cover a disabled person whose employment would be harmful to himself, as opposed to other individuals.¹³¹

In addition to text and legislative history, the court looked at the trend in judicial interpretation of employment discrimination statutes and the judiciary’s general reluctance to endorse paternalistic employment policies. “Given Congress’s [sic] decision in the Title VII context to allow all individuals to decide for themselves whether to put their own health and safety at risk, it should come as no surprise that it would enact legislation allowing the same freedom of choice to disabled individuals.”¹³² The court concluded that:

the ADA's direct threat defense means what it says: it permits employers to impose a requirement that their employees not pose a significant risk to the health or safety of other individuals in the workplace. It does not permit employers to shut disabled individuals out of jobs on the ground that, by working in the jobs at issue, they may put their own health or safety at risk. Conscious of the history of paternalistic rules that have often excluded disabled individuals from the workplace, Congress concluded that disabled persons should be afforded the opportunity to decide for themselves what risks to undertake ... [therefore we reverse] the district court's grant of summary judgment to Chevron.¹³³

¹³¹ *Id.* at 1067-68. The court also relies on a statement by Senator Kennedy, a co-sponsor of the bill: “It is important, however, that the ADA specifically refers to health and safety threats to others. Under the ADA, employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person’s health. For example, an employer could not use as an excuse for not hiring a person with HIV disease the claim that the employer was simply ‘protecting the individual’ from opportunistic diseases to which the individual might be exposed.” *Id.*

¹³² *Id.* at 1068-69 (citing *Dothard v. Rawlinson*, 433 U.S. 321 (1977) and *International Union, United Auto. Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.* 499 U.S. 187 (1991) where concerns for the health or safety of the women performing the job were insufficient to bar their employment).

¹³³ *Id.* at 1072. In addition to reversing the lower court’s ruling on the ADA claim the court noted that the lower court had also ruled favorably for Chevron on the Rehabilitation Act and FEHA claims because it treated the substantive standards for liability under all three statutes as identical. The appeals court noted that the lower court’s application of the same standard for all three laws may well be correct, and thus suggested that its reversal as to the ADA claim may well require reversal with respect to the Rehabilitation Act claim and possibly the state FEHA claim. It also reversed the district court’s judgment that Echazabal's claim for punitive damages is moot. *Id.* at 1072, n.12.

D. *Another View: Protecting the Disabled from Themselves*

An alternative position, in the form of a dissent by Judge Trott, suggests that Plaintiff should not prevail for several reasons: he is not “otherwise qualified” for the work he seeks, Chevron is entitled to assert the “direct threat defense” to lawfully exclude him, and hiring Mr. Echazabal would place an “undue ethical and legal burden,” including potential tort exposure, on Defendant. Turning first to the not “otherwise qualified” argument, Judge Trott expresses a practical concern that placing Plaintiff in the job “most probably will endanger his life [and questions how he can] claim he can perform the essential functions of the position he seeks when precisely because of his disability those functions may kill him. To ignore this reality is bizarre.”¹³⁴

The second strand of the dissent’s argument centers on Chevron’s right to assert the “direct threat” defense outlined in the EEOC’s implementing regulations which define “a ‘direct threat’ to mean ‘a significant risk of substantial harm to the health or safety of *the individual* or others that cannot be reduced by reasonable accommodation’”¹³⁵ Finding the EEOC’s position “rationale” and “humane,” Judge Trott believes the majority has failed to acknowledge the proper deference owed to the Agency in interpreting the ADA by instead substituting its own judgment that Mr. Echazabal is qualified for this work.¹³⁶

The dissent also makes the observation that the ADA specifically provides a defense to employers who can demonstrate that an accommodation constitutes an “undue hardship,” and that “it would be an undue hardship to require an employer to place an employee in a life-threatening situation. Such a rule would require employers knowingly to endanger workers. The

¹³⁴ *Id.* at 1073-74 (Trott, J., dissenting).

¹³⁵ *Id.* at 1074 (emphasis added).

¹³⁶ *Id.*

legal peril involved is obvious, and [as] a simple human to human matter, such a moral burden is unconscionable.”¹³⁷ In further developing his position Judge Trott dismisses any paternalism argument by calling attention to numerous state and federal statutes and rules designed by representative governments to protect workers from harm. “Long ago we rejected the idea that workers toil at their own peril in the workplace. ‘Paternalism’ here is just an abstract out-of-place label of no analytical help.”¹³⁸ He goes on to point out that in many jurisdictions it is a crime to knowingly subject workers to life-endangering conditions, therefore, by permitting Plaintiff to work in an environment where he is exposed to life threatening conditions the majority is effectively repealing the protective laws and giving *less* protection to workers known to be in danger than they afford to those who are not.¹³⁹

Finally, in addressing the tort liability issue, he rejects the majority’s position that hiring persons into jobs that pose a threat to their own health or safety will not potentially trigger state tort liability. Suggesting that:

conflicting responsibilities under different labor laws will be solved down the long, expensive, and unpredictable litigation road by the doctrine of implied preemption seems highly pernicious in this context, and a thin reed at best ... Congress [did not] intend to nullify state and federal workplace safety laws and render them impotent to protect workers in identifiable harms way... anti-paternalism [does not] trump basic safety. This entire construct makes a house of cards look secure.¹⁴⁰

In sum, the dissent argues that by considering Plaintiff “otherwise qualified,” and by not permitting Chevron to assert the “direct threat” defense, nor consider it an “undue burden” to hire a person whose placement in the job will lead to serious health consequences or death

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* (noting California law expressly forbids an employer from putting an employee in harm’s way while Arizona makes it a felony to fail to provide a safe workplace).

¹⁴⁰ *Id.* at 1074-75.

the majority's holding leads to absurd results: a steelworker who develops vertigo can keep his job constructing high rise buildings; a power saw operator with narcolepsy or epilepsy must be allowed to operate his saw; and a person allergic to bees is entitled to be hired as a beekeeper. The possible examples of this Pickwickian ruling are endless. I doubt that Congress intended such a result when it enacted laws to protect persons with disabilities.¹⁴¹

IV. IN SUPPORT OF ECHAZABAL: PROTECTING MASOCHISTS OR RECOGNIZING THE DISABLED'S RIGHT OF SELF-DETERMINATION IN EMPLOYMENT DECISIONS?

The key issue raised in *Echazabal* is whether the ADA permits an employer to deny a job to an otherwise qualified disabled individual based solely on the employer's concern for that person's own health or safety. In answering that question the Court of Appeals for the Ninth Circuit became the first federal appeals court to hold that employers cannot bar an otherwise qualified individual from employment simply because of self-risk concerns. The court's position, however, directly conflicts with the EEOC's interpretive guidelines,¹⁴² as well as an Eleventh Circuit holding in *Moses*,¹⁴³ and dicta in several other federal appellate level decisions.¹⁴⁴ In addition, Judge Trott in his dissent in *Echazabal* makes several arguments why employers should be permitted to exclude individuals from taking jobs that pose a threat to their own well-being.¹⁴⁵ Neither the plain language of the Act, its legislative history, or policy considerations, however, supports those in opposition to the *Echazabal* court's holding.

A. *The ADA's Text—A Clear Expression of a Narrowly Tailored Defense*

The ADA provides an integrated framework for looking at the rights and obligations of employers in determining qualification standards for a position, and legitimate grounds for rejecting those deemed unqualified. An employer has wide latitude in establishing the “essential

¹⁴¹ *Id.* at 1074.

¹⁴² 29 C.F.R. §1630.2(r) 2000.

¹⁴³ *Moses*, 97 F.3d at 447.

¹⁴⁴ *LaChance*, 146 F.3d at 835-36; *Amego*, 110 F.3d at 142-44; *Rizzo*, 84 F.3d at 763; *Daugherty*, 56 F.3d at 698.

¹⁴⁵ *Echazabal*, 226 F.3d at 1073-75 (Trott, J., dissenting).

functions” of a job.¹⁴⁶ An employee is considered “qualified” if he can perform the “essential functions,” with or without “reasonable accommodation.”¹⁴⁷ Accommodations become unreasonable if they impose an “undue hardship” on the employer; an action requiring significant difficulty or expense.¹⁴⁸ However, it is unlawful for an employer to use

qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be *job-related* for the position in question and is consistent with *business necessity*.¹⁴⁹

The defense section goes on to specifically address the proper role legitimate, job related safety concerns may play in disqualifying otherwise qualified individuals and makes it clear such disqualifications are permitted only when a direct threat to the health and safety of *others* in the workplace is involved.¹⁵⁰ While the text permits a singular exclusion entitling an employer to deny employment to otherwise qualified individuals when they pose a direct threat to the health or safety of *others*, which cannot be eliminated through reasonable accommodation, it fails to contain any reference to self-risk. Therefore, the position taken by other jurisdictions, that otherwise qualified persons can be rejected for employment simply because of heightened self-risk concerns, is unsupportable.¹⁵¹

1. *Self-Risk is Not Part of the Qualification Analysis*

¹⁴⁶ 42 U.S.C. §12111(8).

¹⁴⁷ *Id.*

¹⁴⁸ 42 U.S.C. §12111 (10).

¹⁴⁹ 42 U.S.C. § 12112(b)(6) (emphasis added).

¹⁵⁰ 42 U.S.C. §12113(b).

¹⁵¹ Beyond the scope of this Note is also the consideration that advances in genetic technology make it possible to uncover pre-symptomatic disorders thereby complicating the determination whether a condition will impose a “direct threat” to the individual or others. See Amanda J. Wong, *Distinguishing Speculative and Substantial Risk in the Presymptomatic Job Applicant: Interpreting the Interpretation of the Americans With Disabilities Act Direct Threat Defense*, 47 UCLA L. REV. 1135 (2000). Also, given the complex issues surrounding medical decisions have led some to question whether the courts are even equipped to deal with making direct threat evaluations and instead suggest a tri-partite medical review board should fulfill that role. For a complete discussion of the issue see Jeffery A. Van Detta, “*Typhoid Mary*” Meets the ADA: A Case Study of the “Direct Threat” Standard Under the Americans With Disabilities Act, 22 HARV. J.L.& PUB. POL’Y 849 (1999).

“The term ‘qualified individual with a disability’ means an individual with a disability who, with or without reasonable accommodation can perform the essential functions of the employment position that such individual holds or desires.”¹⁵² “Essential functions” are defined by the EEOC as “fundamental job duties of the employment position.”¹⁵³ For instance, a duty may be essential because “the reason the position exists is to perform that function,” or “the function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.”¹⁵⁴ The examples provided in the regulations make clear that “essential functions” are the “things” an employer requires an employee in the job to accomplish and are not methods of performing the work, nor minimum safety requirements of the job. This interpretation of the ADA is consistent with the Supreme Court’s teaching in *Johnson Controls* where in the Title VII context it rejected an interpretation of the word “qualification” in the phrase “bona fide occupational qualification,” as including a safety requirement, and stated the term is limited to the “qualifications that affect an employee’s ability to do the job.”¹⁵⁵ In further distinguishing safety concerns from job qualifications the Court went on to quote Seventh Circuit Judge Easterbrook’s dissenting opinion from that court’s decision in the case below. “[I]t is a word play to say that ‘the job’ at Johnson [Controls] is to make batteries without risk to fetuses in the same way ‘the job’ at Western airlines is to fly planes without crashing.”¹⁵⁶

The ADA makes it clear an employer may only raise safety as a legitimate bar to employment when placement of a disabled person in the job would pose a threat to the well

¹⁵² 42 U.S.C. §12111(8).

¹⁵³ 29 C.F.R. §1630.2(n) 2000.

¹⁵⁴ *Id.* at §1630.2(n)(2)(i), (iii).

¹⁵⁵ *International Union, United Auto. Aerospace & Agric. Implement Workers of Am., UAW, v Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991).

¹⁵⁶ *Id.* at 207. (quoting *Johnson Controls* 886 F.2d 871, 913 (7th Cir. 1989) (Easterbrook, J., dissenting)).

being of *others*.¹⁵⁷ Any other use of safety concerns to conclude a person is not qualified is not contemplated by the Act. It is therefore an impermissible stretch to conclude as Judge Trott did in *Echazabal* that:

Mr. Echazabal simply is not “otherwise qualified” for the work he seeks. Why? Because the job most probably will endanger his life [therefore] I do not understand how we can claim he can perform the essential functions of the position he seeks when precisely because of his disability, those functions may kill him.¹⁵⁸

The issue is not whether the risk is justifiable, or one that an outsider would find acceptable, but whether the risk itself makes Mr. Echazabal unqualified for the position because he would endanger others. As he performed the exact work at issue for over twenty years, and there is nothing in the record to indicate he posed a threat to others, and was twice offered the position by Chevron, it cannot be said that Mr. Echazabal was “unqualified” as that term is defined by the Act.

2. Moral Dilemma is Not a Component of Undue Burden

The term “undue burden” means an action requiring significant difficulty or expense, when considered in light of the factors set forth [as follows:] ... (i) the nature and cost of the accommodation ... (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation ... (iii) the overall financial resources of the covered entity and ... (iv) the fiscal relationship of the facility or facilities in question to the covered entity.¹⁵⁹

The definition implies that “undue burden” goes to financial ability to provide a reasonable accommodation to the disabled individual. This interpretation is reinforced by the EEOC’s regulations that discuss financial considerations, and make no reference to other forms of concern that may amount to undue hardship.¹⁶⁰ Where an employer can prove that the making of

¹⁵⁷ 42 U.S.C. §12113(b).

¹⁵⁸ *Echazabal*, 226 F.3d at 1073-74 (Trott, J. dissenting).

¹⁵⁹ 42 U.S.C. §12111(10)(A)-(B).

¹⁶⁰ 29 C.F.R. §1630.2(p) 2000.

a reasonable accommodation “would impose an undue hardship on the operation of the business” no accommodation need be made.¹⁶¹ The only “accommodation” Mr. Echazabal requested was to be permitted to work in a job he was qualified to perform, and had in fact performed for over two decades. Judge Trott’s opinion that “it would be an undue hardship to require an employer to place an employee in a life-threatening situation” because such a rule “would require employers knowingly to endanger workers” and thereby expose them to “legal peril” and unconscionable “moral burden” misses the mark.¹⁶² Placing an individual in harm’s way may cause some angst, but economics, not ethics must underpin any “undue burden” claim. Unless the placement causes considerable financial strain the Act does not permit employers to assuage their consciences by denying employment to those willing to take elevated risks. In this case Chevron suffered no immediate financial strain by employing Mr. Echazabal as it gained a fully qualified person to perform necessary work. While it may incur costs in the future should Mr. Echazabal become ill, given its considerable corporate financial resources and the limiting influence of workers’ compensation coverage it can hardly be said that such potential future costs would impose an “undue hardship” on Chevron.

3. *Relying on the EEOC’s Regulations-Skating on Thin Ice*

Both the court in *Moses* and Judge Trott in his dissent in *Echazabal* rely heavily on the EEOC’s regulations in interpreting the scope of the “direct threat” defense. The *Moses* court built its holding around the EEOC’s interpretation that “[a]n employer may fire a disabled employee if the disability renders the employee a ‘direct threat’ to his own health or safety.”¹⁶³ Judge Trott in supporting Chevron’s analysis of their rights under the “direct threat” defense states “[t]he EEOC’s implementing regulations, authorized by Congress, defines a ‘direct threat’

¹⁶¹ 42 U.S.C. §12112(5)(A).

¹⁶² *Echazabal*, 226 F.3d at 1074 (Trott, J. dissenting).

¹⁶³ *Moses*, 97 F.3d at 447.

to mean ‘a significant risk of substantial harm to the health or safety of *the individual* or others that cannot be reduced by reasonable accommodation.’¹⁶⁴ While decisions that rely on regulatory interpretation may be justified in the absence of clear language, the language regarding the scope of the direct threat defense could not be clearer. As pointed out by the majority in *Echazabal*, “[u]nder Chevron, ‘if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.’”¹⁶⁵ The court went on to conclude “the intent of Congress is clear: the language of the direct threat defense plainly expresses Congress’s [sic] intent to include within the scope of a §12113 defense only threats to other individuals in the workplace [and a]ccordingly, we reject the EEOC’s contrary interpretation.”¹⁶⁶ Additional caution before relying on the regulations may also be warranted based on the Agency’s refusal to respond to the court’s offer to submit a brief on why its position differed from the plain language of the text.¹⁶⁷

It is reasonable to conclude, as the *Echazabal* court did, that had Congress wanted to include self-risk as a permissible reason for excluding an “otherwise qualified” individual they simply

¹⁶⁴ *Echazabal*, 226 F.3d at 1074 (Trott, J. dissenting).

¹⁶⁵ *Id.* at 1069 (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

¹⁶⁶ *Id.* In addition, reliance on regulatory interpretation should be measured. The United States Supreme Court in June, 1999, delivered an opinion that rejected the EEOC’s interpretation of another section of the Act, *Sutton v United Airlines*, 527 U.S. 471 (1999). In rejecting the agency’s position that employers had to consider whether applicants and employees were disabled, *without* reference to any mitigating factors that may serve to correct their condition, the Court held “the determination of whether an individual is disabled should be made *with* reference to measures that mitigate the individual’s impairment, including, in this instance, eyeglasses and contact lenses.” *Id.* at 475. It concluded that “respondent is correct that the approach adopted by the agency guidelines—that persons are to be evaluated in their hypothetical uncorrected state—is an impermissible interpretation.” *Id.* at 482. While the Court disagreed with the Agency, the holding should not be interpreted as an outright rejection of all of the agency’s ADA interpretations especially because the Court in dicta specifically highlighted that no agency “has been given the authority to issue regulations implementing the generally applicable provisions of the ADA ... which fall outside Titles I-V. Most notably, no agency has been delegated authority to interpret the term ‘disability,’” *Id.* at 479. Left unsettled was the question of what level of deference the Court would apply to the EEOC’s interpretation of the employment discrimination subchapter, including the interpretation of “qualification standard” and “direct threat,” areas where the Court suggested the agency had clear statutory authority to draft regulations. *Id.* at 478. While some level of deference would be expected, it is clear that the Court in *Sutton* was not concerned with rejecting “eight of the nine Federal Courts of Appeals to address the issue, and ... all three of the Executive agencies that have issued regulations or interpretive bulletins construing the statute.” *Id.* at 495-96 (Stevens J., dissenting).

¹⁶⁷ *Echazabal*, 226 F.3d at 1066, n.3.

could have incorporated the concept into either the “direct threat,” “qualified individual with a disability,” or “undue hardship” sections.¹⁶⁸ Having failed to do so, the EEOC by broadening the exclusionary right to include self-risk has greatly exceeded its authority. As stated by the *Kohnke* court, giving the “direct threat” defense language the interpretation urged by the EEOC would “render entirely meaningless the phrase ‘of other individuals’ ... [and s]uch an interpretation must be rejected in light of the general rule that ‘a court should not construe a statute in a way that makes words or phrases meaningless, redundant, or superfluous.’”¹⁶⁹

4. *Additional Textual Support*

In reading the Act as a whole, other sections add further support to the view that self-risk is not a legitimate criterion for disqualification. For instance, the findings and purpose section highlights the need to eradicate “overprotective rules and policies.”¹⁷⁰ Adding a requirement that an otherwise qualified employee may be rejected based on a fear of injury is just the sort of overprotective policy one would think Congress was keen in eliminating.

Also, the Act limits the scope of an employer’s medical inquiry to those that are “job-related and consistent with business necessity,” and for the sole purpose of determining “the ability of an employee to perform job-related functions.”¹⁷¹ It goes on to protect the confidentiality of the results of any inquiry, but specifically permits “first aid and safety personnel [to] be informed, when appropriate, if the disability might require emergency treatment.”¹⁷² Together these sections suggest that the medical inquiry must be narrowly tailored to determine whether the individual’s disability prevents him from performing the essential functions, with a further

¹⁶⁸ 42 U.S.C. §12111(3), (8), (10) and §12113(b) (sections fail to include self risk as a basis for disqualification or imposition of an undue hardship).

¹⁶⁹ *Kohnke*, 932 F. Supp at 1111-12 (quoting *Welsh v Boy Scouts of Am.*, 993 F.2d 1267, 1272 (7th Cir. 1993)).

¹⁷⁰ 42 U.S.C. §12101(5).

¹⁷¹ 42 U.S.C. §12112(d)(4)(A) and (B).

¹⁷² 42 U.S.C. §12112(d)(3)(B)(ii).

recognition that in cases where they can be performed, albeit with a heightened self-risk, medical personnel may be informed of the employee's condition so that they can provide appropriate and timely medical assistance. By its very nature the Act's recognition that the disabled may face risks requiring emergency medical treatment while at work reinforces the position that excluding them based on that risk is inappropriate.

The *Echazabal* court perhaps best summarizes why its position is correct when it states:

On its face, the provision does not include direct threats to the health or safety of the disabled individual himself ... The fact that the statute consistently defines the direct threat defense to include only threats to others eliminates any possibility that Congress committed a drafting error when it omitted from the defense threats to the disabled individual himself. For these reasons, we conclude that the language of the direct threat defense plainly does not include threats to the disabled individual himself.¹⁷³

In sum, the express language of the Act only permits an employer to assert a defense on behalf of other persons in the workplace who may have legitimate concerns about their own health or safety without denying an otherwise qualified person employment simply because placement in the job poses a risk to that individual's own health or safety.

B. The Legislative History-Ignoring it Won't Make it Go Away

While the text of the ADA makes it clear that the "direct threat" defense is limited to situations where a risk to others is involved, the legislative history while not required for clarification, provides additional support that the express language was not drafted in error. In fact both courts that found the "direct threat" limited to safety concerns for others spent some time discussing the legislative history in order to give added weight to their holdings. In *Kohnke* the court stated "[b]ecause the 'direct threat' language in the ADA is clear and unambiguous,

¹⁷³ *Echazabal*, 226 F.3d at 1066-67.

there is no need to consult the legislative history of the ADA.”¹⁷⁴ It went on however, to review the history and found it “provides little support for the EEOC's view that a ‘direct threat’ includes a threat to the plaintiff himself.”¹⁷⁵ It also noted that the House Judiciary Committee report explained “that the ‘direct threat’ language in the ADA codifie[d] the Supreme Court's holding in [*Arline*] ... [and extended] the standard “to all individuals with disabilities, and not simply to those with contagious diseases or infections,” [but failed to extend the standard] ‘to a disabled person harming himself as opposed to other individuals.’”¹⁷⁶ An indication that this was a conscious decision by the Congress is the fact that the “House Judiciary Report mentions threat or risk ‘to other individuals’ or ‘to others’ nine times, without once mentioning threat or risk to the disabled person himself. [A] pattern that is apparent throughout the legislative history of the ADA.”¹⁷⁷

Completeness, not compulsion led the *Echazabal* court to similarly discuss the ADA’s legislative history. “Although we need not rely on it, the legislative history of the ADA also supports the conclusion that the direct threat provision does not include threats to oneself. The term ‘direct threat’ is used hundreds of times throughout the ADA's legislative history ... [and] in nearly every instance in which the term appears, it is accompanied by a reference to the threat to ‘others’ or to ‘other individuals in the workplace.’ Not once is the term accompanied by a reference to threats to the disabled person himself.”¹⁷⁸

It too explained that the language of the ADA was a codification of the Supreme Court’s ruling in *Arline*, “a case that defines the term ‘direct threat’ [to] mean [] a significant risk to the

¹⁷⁴ Kohnke, 932 F. Supp at 1112.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Echazabal*, 226 F.3d at 1067.

health or safety of others that cannot be eliminated by reasonable accommodation.”¹⁷⁹ The court finds particularly persuasive a statement made by Senator Kennedy, a co-sponsor of the ADA, in support of its reading of the statute:

The ADA provides that a valid qualification standard is that a person not pose a direct threat to the health or safety of other individuals in the workplace — that is, to other coworkers or customers It is important, however, that the ADA specifically refers to health and safety threats to others. Under the ADA, employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health. For example, an employer could not use as an excuse for not hiring a person with HIV disease the claim that the employer was simply “protecting the individual” from opportunistic diseases to which the individual might be exposed. That is a concern that should rightfully be dealt with by the individual, in consultation with his or her private physician.¹⁸⁰

Interestingly, neither the *Moses* court nor Judge Trott in his dissent in *Echazabal* discusses the legislative history thereby leaving a strong presumption that it fails to support their positions. The clear language of the Act coupled with the overwhelming articulation of purpose spread throughout the Congressional record leaves no doubt the proper application of the “direct threat” defense. Adding to the support of the *Echazabal* court’s interpretation are strong policy arguments that bolster its position.

C. *Policy Considerations-A Need to Bring Disability Related Employment Practices in Line With Those Governing Other Groups*

Aside from the sound textual and historical justifications for supporting the *Echazabal* court’s decision it is time to treat the disabled similarly to other groups and permit them to intelligently accept the elevated level of risk that leads to fuller participation in the workforce. Other groups including women, Hispanics and Asians have already overcome protectionist barriers to employment. Judicial decisions in gender and national origin cases have led to the

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 1067-68.

individual replacing the state or employer as the ultimate decision maker on matters impacting self-health and safety. Just as doors have opened for these other groups, it is time for the disabled to be treated with the same level of respect when making difficult personal decisions.

1. *Gender-Protecting the Little Women*

Perhaps more than any other group women have historically been boxed out of better paying jobs based on discriminatory practices justified in the name of protectionism. Only recently have many barriers based on sex finally been broken. For example, protective laws and policies once thought of as valid and rationale to protect women such as lifting restrictions, maximum hour laws, height/weight requirements, as well as absolute bars to jobs involving reproductive dangers or military combat, have all been struck down as artificial and discriminatory hurdles preventing otherwise qualified women from performing jobs of their choice, even when placement in such jobs posed added health risks.

1. *Lifting Restrictions*

Prior to passage of the Civil Rights Act of 1964 (CRA) it was common for states to have protective legislation that set limits on the amount women were permitted to lift in the workplace. For instance the Georgia Commissioner of Labor promulgated a rule pursuant to Georgia Code that provided: “Lifting. For women and minors, not over 30 pounds. Less depending on physical condition of women or minors.”¹⁸¹ When the CRA was passed it prohibited discrimination on the basis of sex, except where gender was “a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or

¹⁸¹ Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 232-33 (5th Cir. 1969).

enterprise.”¹⁸² Following passage of the Civil Rights Act states continued to enforce their state protection laws under the theory that the lifting restrictions preventing women from heavier forms of work fell under the CRA’s bona fide occupational qualification exception.¹⁸³ They were wrong. Successful challenges to these state laws paved the way for women to participate in a fuller range of positions based on their ability to do the job while abolishing stereotypical concepts that some risks were just too great for women to accept. For instance, in *Weeks v. Southern Bell*¹⁸⁴ the local telephone company, relying on that state’s protective law, denied a Georgia woman a switchman’s position that required lifting over thirty pounds. After being sued under the CRA, the company admitted it rejected the plaintiff on the basis of her sex alone, but defended its position by claiming “a bona fide occupational qualification [is] created whenever reasonable state protective legislation prevented women from occupying certain positions.”¹⁸⁵ It further justified its disqualification of Mrs. Weeks based on the fact that a switchman is “call[ed] out 24 hours a day and is, in fact, called out at all hours and is sometimes required to work alone during late night hours, including the period from midnight to 6 a.m.”¹⁸⁶ In rejecting the company’s position the court found “Mrs. Weeks was denied the switchman’s job because she was a woman, not because she lacked any qualifications as an individual.”¹⁸⁷ It went on to state that:

Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous,

¹⁸² The Civil Rights Act of 1964, Title VII, 42 U.S.C. §2000e (section 2000e-2(a) prohibited gender based discrimination while section 2000e-2(e) provides for an exception where a bona fide occupational qualification exists).

¹⁸³ *Weeks*, 408 F.2d at 233.

¹⁸⁴ *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 230-32 (5th Cir. 1969).

¹⁸⁵ *Id.* at 232.

¹⁸⁶ *Id.* at 234.

¹⁸⁷ *Id.* at 231.

dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing.¹⁸⁸

Just as Title VII opened the door for women to weigh the risks and make personal occupational decisions the ADA should be interpreted to allow the disabled similar leeway.

2. *Maximum Hours of Work*

In a similar vein, prior to passage of the CRA states often had maximum hours of work laws limiting the number of hours women could work in a given week, thereby limiting their employment opportunities. For instance, several years after *Weeks* Southern Bell again found itself a defendant caught in the conflict between state and federal laws. The company denied a Louisiana woman a promotion to a job requiring more than forty-eight hours per week of work on the basis of that state's maximum hours law which read, "[n]o female shall be employed in any telephone or telegraph company, for more than eight hours in any one day and not more than forty-eight hours or six days in any consecutive seven day period."¹⁸⁹ The woman brought suit under Title VII and the court struck down the state law:

the treadworn assertion of the state that "there are differences between the sexes ... sociological, physiological and biological ... which justify rational generic classification," and that a prohibition on women working in excess of eight hours a day or forty-eight hours a week is such a rational generic classification. We join with the courts across the nation in condemning such "stereotyped classifications" as failing to constitute a bona fide occupational qualification and hence as unlawful employment practices in violation of Title VII.¹⁹⁰

3. *Fetal Protection Policies*

¹⁸⁸ *Id.* at 236. *See also* *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 714 (7th Cir. 1969) (striking down a collectively bargained provision limiting women to jobs requiring lifting of less than thirty-five pounds because the provision violated the Civil Rights Act of 1964).

¹⁸⁹ *LeBlanc v. Southern Bell Tel. & Tel. Co.*, 333 F.Supp 602, 606 (E.D. LA. 1971).

¹⁹⁰ *Id.* at 608-09.

In 1991 the U.S. Supreme Court held fetal protection policies that prohibit women of child bearing age from working in positions potentially harmful to their fetuses were a form of sex discrimination in violation of the Civil Rights Act of 1964.¹⁹¹ In *Johnson Controls* the company instituted a policy that prevented women capable of bearing children from being placed in jobs involving lead exposure.¹⁹² In rejecting the Company's bona fide occupational qualification defense the Court stated "our cases have stressed that discrimination on the basis of sex because of safety concerns is allowed only in narrow circumstances," and went on to discuss previous cases where concern for the safety of the individual was not a permissible ground for discrimination.¹⁹³ It further narrowed the scope of the defense so that it only applied in instances where the "third parties potentially impacted were indispensable to the particular business at issue."¹⁹⁴

The Court summarized its position by noting:

[u]nless pregnant employees differ from others "in their ability or inability to work," they must be "treated the same" as other employees "for all employment-related purposes." This language clearly sets forth Congress'

¹⁹¹ *Johnson Controls*, 499 U.S. at 211.

¹⁹² *Id.* at 191-92.

¹⁹³ *Id.* at 202 (discussing *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977) where the Court found an employer's policy of hiring all male guards in contact areas of maximum-security male penitentiaries permissible because more was at stake than the "individual woman's decision to weigh and accept the risks of employment," but indicated that danger to a woman herself, absent the danger to others did not justify discrimination. In upholding the BFOQ defense the Court noted the employment of a female guard in male penitentiaries where sex offenders were spread throughout the prison population would create real risks of safety to others if violence broke out because of the female guard's presence. In addition, the Court noted some courts have approved airlines' layoffs of pregnant flight attendants at different points during the first five months of pregnancy on the ground that the employer's policy was necessary to ensure the safety of passengers. (citing *Harriss v. Pan American World Airways, Inc.*, 649 F.2d 670 (CA9 1980), *Burwell v. Eastern Air Lines, Inc.*, 633 F. 2d 361 (CA4 1980), *cert. denied*, 450 U.S. 965 (1981), and *Condit v. United Air Lines, Inc.*, 558 F. 2d 1176 (CA4 1977), *cert. denied*, 435 U.S. 934 (1978)).

¹⁹⁴ *Id.* at 203-04 (noting that in *Dothard* 433 U.S. at 333 and *Western Air Lines, Inc., v. Criswell*, 472 U.S. 400, 413 (1985), the third parties potentially impacted were indispensable to the particular business at issue. "In *Dothard*, the third parties were the inmates; in *Criswell*, the third parties were the passengers on the plane. We stressed that in order to qualify as a BFOQ, a job qualification must relate to the 'essence,' *Dothard*, 433 U.S., at 333 (emphasis deleted), or to the 'central mission of the employer's business,' *Criswell*, 472 U.S. at 413 ... Third-party safety considerations properly entered into the BFOQ analysis in *Dothard* and *Criswell* because they went to the core of the employee's job performance. Moreover, that performance involved the central purpose of the enterprise ... No one can disregard the possibility of injury to future children; the BFOQ, however, is not so broad that it transforms this deep social concern into an essential aspect of battery making.").

remedy for discrimination on the basis of pregnancy and potential pregnancy. Women who are either pregnant or potentially pregnant must be treated like others “similar in their ability . . . to work.” In other words, women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job.¹⁹⁵

Thus, under *Johnson Controls* not only is exclusion of women from the workplace based on risks they may incur an impermissible use of a safety based BFOQ defense, when the defense is employed under Title VII its application is severely limited to safety concerns for third parties central to the normal operation of the particular business.

The ADA’s defense is similar in nature as a “qualification standard” that screens out disabled individuals must be “job related and consistent with business necessity,” and is limited to those instances where an individual may pose a direct threat to the health or safety of *others in the workplace*.¹⁹⁶ Beyond the industrial setting, the courts have also recognized that women may not be excluded from many military combat roles simply because of special gender related risks they may face in times of war.

4. *Women in combat*

Until the 1970s, the military did not feel compelled to justify its position that women were not allowed to fill combat (as opposed to combat support) billets. In the 1970s, with the women’s movement as a motivating factor, the armed services and Congress finally set forth their rationale for the combat exclusion. Congress’ rationale, one which the Supreme Court found permissible in *Rostker v. Goldberg*, was that women were not eligible for combat positions because of concerns such as “the unknown effects of integrating the sexes in fighting units,” the nation’s response to the sight of women coming home in body bags from a war, and the possibility that women taken prisoner would be raped.¹⁹⁷

¹⁹⁵ *Id.* at 204 (relying on the Pregnancy in Discrimination Act’s amendment to Title VII, 42 U.S.C. §2000e(k).

¹⁹⁶ 42 U.S.C. 12113 (a)-(b).

¹⁹⁷ Michael J. Frevola, *Damn the Torpedoes, Full Speed Ahead: The Argument for Total Sex Integration in the Armed Services*, 28 CONN. L. REV. 621, 624-25 (1996) (citing *Rostker v. Goldberg*, 453 U.S.57 (1981)).

While women were technically not found in combat roles because of such concerns in reality “American women have participated in combat since the American Revolution.”¹⁹⁸ It was not, however, until the early 1990’s in Operation Desert Storm that “women in substantial numbers were exposed to combat in a less than accidental fashion, including: piloting or crewing aircraft that flew over enemy territory, manning forward supply positions (some located in Iraq itself), and serving on ships within striking range of Iraqi aircraft and missiles.”¹⁹⁹ An outgrowth of the successful role of women in the Gulf War resulted in the “repeal or modification of several of the congressionally-mandated combat exclusion statutes and policies in 1991, 1993, and 1994.”²⁰⁰ While some ground troop limitations remain, women today are fully engaged in air and naval front line combat roles,²⁰¹ and even where they serve in combat support positions “the unquestionable fact [is] that the nature of modern combat has blurred the boundary between front line and rear echelon troops” thus the dangers facing women are comparable to those men face.²⁰²

This reality was brought home in the recent incident involving the USS Cole in which two female crewmembers were among the seventeen killed in a terrorist attack on the vessel. The two were “the first female sailors to die in a ‘hostile’ action since the Navy allowed women aboard combat ships.”²⁰³ While the nation grieved the loss of all those killed,

¹⁹⁸ *Id.* at 623.

¹⁹⁹ *Id.* at 625.

²⁰⁰ *Id.* at 626. The net effect of these changes permitted women to fly combat missions, serve on naval vessels considered combatants, and fill between 10,000 to 15,000 combat billets previously closed to them because of the defense department’s “risk rule.”

²⁰¹ Thomas E. Ricks and Steve Vogel, *Killed in Action: Is Gender an Issue?; Lack of Specific Outcry over Cole Women’s Deaths Splits Experts*, *The Washington Post*, October 23, 2000 at A03 (“Over 92 percent of military career fields are open to women, including virtually all combat jobs in the Navy and Air Force, except in Special Operations and aboard submarines. In the Army, women fly attack helicopters, but are still barred from most ground combat roles in the infantry, artillery, armor and combat engineer branches.”).

²⁰² Michael J. Frevola, *Damn the Torpedoes, Full Speed Ahead: The Argument for Total Sex Integration in the Armed Services*, 28 CONN. L. REV. 621, 627 (1996).

²⁰³ Doug Hanchett, *Mideast Crisis; Tragedy May Renew Questions About U.S. Women in Combat*, *The Boston Herald*, October 14, 2000, at 3.

the country appears to have taken [the two women's deaths] pretty much in stride ... [as] the large, and growing, role of women in the military is now widely accepted ... [leading some to say] the American public has gotten used to women being killed in the line of duty, not only in the military, but as police officers.²⁰⁴

This incident involving women in perhaps the ultimate hazardous occupation marks a nearly complete transition from society treating women in a protectionist manner to acknowledgment that individuals of both genders are entitled to make life threatening, self-risk decisions in selecting careers.

B. *National Origin- Workplace Diversity Hastens the Demise of Archaic Protections*

Artificial barriers that originally barred women from certain positions on the assumption that they would be unable to safely perform the duties eventually served to also bar other groups from employment. As the number of Asians and Hispanics in the workforce increased these same qualification standards adversely impacted their employability. For instance, height and weight requirements were long used as a proxy for ability to perform certain physically taxing jobs, with employers often adding self-injury concerns as a rationale for the standard. These requirements led to the screening out of not only women, but also Asians and Hispanics, and led the EEOC and courts to find that such practices violated Title VII.

“The direct and obvious effect of minimum height or weight requirements is ... to disproportionately exclude significant numbers of women, Hispanics and certain Asians from consideration for employment.”²⁰⁵ Accordingly, the EEOC stated that where the “employer [wants] to retain the requirements [it] must show that they constitute a business necessity without which the business could not safely and efficiently be performed.”²⁰⁶ Where business necessity

²⁰⁴ Thomas E. Ricks and Steve Vogel, *Killed in Action: Is Gender an Issue?; Lack of Specific Outcry over Cole Women's Deaths Splits Experts*, *The Washington Post*, October 23, 2000 at A03.

²⁰⁵ EEOC Compliance Manual Vol II, §621.1(b)(2) Issued 3/83, Number 915.

²⁰⁶ *Id.* at § 621.2(a).

could not be proven courts have struck down such barriers. For instance, the U.S. District Court for the Northern District of California granted injunctive relief in a case where plaintiffs claimed that a five foot six inch minimum height requirement for police applicants discriminated against Asians, Latins and females.²⁰⁷ Although the department argued that height would reduce “assaultive conduct” and the “number of injuries sustained by officers while in the performance of their duties,” the court rejected the alleged concerns citing “insufficient” evidence.²⁰⁸ Likewise, a Maryland District Court, in a case involving sex discrimination, found the Baltimore Police Department’s minimum height requirement “excluded from consideration for employment 95 percent of the female population between the ages of 18 and 79 and only 32 percent of the male population of the same age ... [and] given the disparate effect of the height requirement on men and women, plaintiffs have demonstrated a prima facie case of sex discrimination under Title VII.”²⁰⁹ After rejecting the department’s arguments for the height requirement based in part on “concern about [female officer’s] personal safety” and dangers inherent in police work requiring physical stature,²¹⁰ the court found for the plaintiffs.²¹¹ Although the case’s emphasis was on gender, requirements based on a size/personal risk rationale would presumably also fail when applied to any group adversely impacted, including Hispanics and Asians.

While federal legislation and judicial action combined to dismantle protective practices that deprived women and members of certain national origin groups opportunities the ADA was seen as a way to eliminate the same kinds of barriers faced by the disabled, and at the time of its passage it was said that:

²⁰⁷ *Officers for Justice v. Civil Service Comm. of San Francisco*, 395 F. Supp. 378, 380-81 (D.C. N.D. CA 1975).

²⁰⁸ *Id.* at 380-81.

²⁰⁹ *Vanguard Justice Society, Inc. v. Hughes*, 471 F. Supp 670, 710 (DC MD 1979).

²¹⁰ *Id.* at 711 n.77, 712-13.

²¹¹ *Id.* at 717.

[t]he Americans with Disabilities Act completes the circle begun in 1973 with respect to persons with disabilities by extending to them the same civil rights protections provided to women and minorities beginning in 1964 ... [by providing] a comprehensive piece of civil rights legislation which promises a new future: a future of inclusion and integration, and the end of exclusion and segregation.²¹²

More than ten years have passed since that statement was made and it is time that the courts respect Congress' intent to extend to the disabled the full scope of civil rights presently guaranteed women and minorities. Judge Trott in his dissent may be correct that some horrors may occur if individuals are permitted to take certain jobs that pose a higher risk of self-harm, but this ignores the reality that society routinely permits large numbers of adults to engage in inherently dangerous occupations each and every day. Arguably it is riskier to allow "a steelworker who develops vertigo [to] keep his job constructing high rise buildings; a power saw operator with narcolepsy or epilepsy [to] operate his saw; and a person allergic to bees [to] be hired as a beekeeper,"²¹³ but taken to its extreme, that any person who may be exposed to "significant risk of substantial harm" should be barred from placement in the job, would effectively bar everyone from certain critical but hazardous jobs, and impair society's ability to carry out essential functions. Given society's wholesale acceptance of entire classes of heightened risk the disabled should not be singled out and denied the same right to determine what constitutes an acceptable level of risk given their personal needs.

C. *Injury and Cost Concerns-Why Single Out the Disabled*

1. *Society's Acceptance of Inherently Dangerous Work*

²¹² HOUSE JUDICIARY COMM., REHABILITATION ACT OF 1973, H. REP. NO. 101-485(III), (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 449.

²¹³ Echazabal, 226 F.3d at 1074 (Trott J., dissenting).

In 1970 Congress passed the Occupational Safety and Health Act in an effort to protect employees from injury in the workplace.²¹⁴ Even after some thirty years of extensive regulatory oversight some seven million private sector workers were injured or became ill on the job in 1998.²¹⁵ Of this number over two million people, equal to two percent of the workforce, suffered a condition serious enough to lose time from work.²¹⁶ While a test requiring a risk free environment is unrealistic, if society just banned people from working in jobs where the risk was at least two and one-half times the norm (250% greater risk) it would be deprived of milk, beef, pork, coal, iron, steel, aluminum, wood products, toilets, and commercial air transportation, among other necessities of a modern society.²¹⁷ Even if society draws the line at death instead of injury, in order to eliminate the over 6,000 workplace deaths a year it better be prepared to prohibit employment in virtually every sector of the economy, including governmental services such as police, fire, correctional, educational and public highway construction.²¹⁸

2. State and Federal Second Injury Funds-State Recognition of Inherent Hazards

Instead of prohibiting members of society from engaging in these occupations society has instead spread the risk by adopting workers' compensation systems to cover the costs associated with the inevitable injury and death that work produces. The disabled, if injured on the job, are also covered by these state programs, and individual employers in most states are no worse off when a work related injury is an outgrowth of a pre-existing condition. So called "second injury funds" serve to cap individual employer exposure thereby removing the argument that

²¹⁴ Occupational Safety and Health Act of 1970, 29 U.S.C. §§553, 651-78 (1994).

²¹⁵ U.S. Department of Labor, Bureau of Labor Statistics, January 2000 Table 1-Incident Rates of Nonfatal Occupational Injuries and Illnesses by Industry and Selected Case types, 1998) *at* <http://www.osha.gov/oshstats/work.html>.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ U.S. Department of Labor, Bureau of Labor Statistics, Census of Fatal Occupational Injuries, Table A-1-Fatal Occupational Injuries by Industry and Event or Exposure, 1999, *at* <http://www.osha.gov/oshstats/work.html>.

employment of the disabled will lead to unfair economic losses to those who hire them. In fact one of the early stated purposes of state second injury funds, decades before the passage of the ADA, was to encourage the hiring of disabled employees by cushioning or fully absorbing the cost of a subsequent injury or disease based on a pre-existing condition.²¹⁹

In addition, Congress adopted a similar concept in passing the Longshoremen's and Harbor Workers' Compensation Act.²²⁰ The U.S. Supreme Court in interpreting section 8(f)(1) of that Act, which reads:

if an employee receive(s) an injury which of itself would only cause permanent partial disability but which, *combined with a previous disability* does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury: Provided, *however* ... the employee shall be paid the remainder out of the special fund established in section 44,²²¹

found “a major purpose() of the second injury fund [was to prevent] employer discrimination against handicap workers.”²²² Further, in relying on an interpretation of a New York statute that served as a model for the federal Act the court specifically rejected a claim that the prior injury had to be of an industrial nature, thereby extending coverage to all handicapped persons meeting the definition and not just those previously injured on the job.²²³

²¹⁹ See e.g., *Special Indemnity Fund of Oklahoma v. Wade*, 189 P.2d 609, 610, 612 (OK 1948) (noting the Special Indemnity Fund Act was intended to relieve against the inability of many otherwise employables who suffered previous impairments to obtain work in industry covered by the Worker's Compensation law by charging only the marginal increase in permanent partial disability to the employer with the Fund absorbing the amount attributable to the prior condition); *Balash v. Harper* 70 A.2d 747, 749 (NJ SC 1950) (noting the intent of New Jersey's "One Percent Fund" is to relieve the employer of the undue burden of a prior disability with which the disability arising in his employ has no causative connection); *California v. Industrial Accident Commission*, 306 P.2d 64, 68-69 (Dist CT of Appeal, First District, Div 2 Calf 1957) (explaining the legislative policy behind California's Subsequent Injuries Fund was to encourage the employment of physically handicapped persons, and in particular those with visible handicaps who employers may otherwise have discriminated against); and *Izzo v. Meriden-Wallingford Hospital* 676 A.2d 857, 859 n.2. (Conn. SC 1996) (discussing Connecticut's Second Injury Fund which permits an employer who receives a valid acknowledgment of a pre existing condition from an employee the right to transfer the full cost, as opposed to only the marginal cost, of any subsequent injury).

²²⁰ 33 U.S.C. §§901-50 (1994).

²²¹ *Lawson v. Suwannee Fruit & Steamship Co.*, 336 U.S. 198, 200 (1948).

²²² *Id.* at 201.

²²³ *Id.* at 205.

V. CONCLUSION

The text of the ADA, its legislative history, particularly Congress' clearly articulated intent to graft the *Arline* concept of "risk-to-others" into the defense section of the Act, and important policy considerations all support the *Echazabal* decision. The court was right when it held denial of employment to "otherwise qualified" disabled individuals is only permissible when their presence would pose a significant risk to the health or safety of *others* in the workplace. Further, it correctly ruled that when safety is cited as the rationale for exclusion the employer bears the burden of proving any "direct threat" claimed.

Courts that have relied on the EEOC's regulations to support their position that self-risk is included in the definition of "direct threat" have failed to give sufficient weight to the express language of the Act and its history. The Agency's interpretation of the ADA as permitting exclusion based on self-risk is perhaps well meaning, but it stems from an ill-founded attempt to recycle a regulatory scheme erected under the Rehabilitation Act, but ignored by Congress in passing the modern Act. While deference is due an oversight agency, it should be limited to those instances where the agency is filling in gaps created by ambiguous language. No such ambiguity exists in the affirmative defense section of the ADA.

With regard to burden, courts that have required plaintiffs to prove they are "qualified" by showing they can perform the job without injuring themselves or others have mistakenly treated safety as an "essential function" of the job. Under the Act, the use of safety concerns as an exclusionary device is severely limited. There is no requirement that a plaintiff prove he can safely perform the job. Safety can only serve as a justifiable rationale for rejection when an employer in defending his actions can show that an "otherwise qualified" individual, one who can perform all the essential functions of the job, would pose a threat to the well-being of others

that cannot be eliminated through reasonable accommodation. Safety concerns therefore may only be raised after the plaintiff's ability to perform the essential functions of the job have been established, and not as an ingredient of establishing them.

In addition, barriers in the name of protectionism that in the past limited employment opportunities for other groups have uniformly fallen when the weak logic behind them was exposed to judicial review. The reality is that workers face a wide spectrum of risks each day when leaving their homes to earn a living. We do not tell the soldier, police officer, or miner who all face higher risks of injury or death to stay home because they may get injured. The disabled should be treated no differently when they make decisions to take some elevated level of risk to secure a job that best meets their overall needs. Society must assume the disabled are no more masochistic than those without disabilities, and are therefore able to make intelligent decisions about the trade-offs for themselves and their families when accepting positions that expose them to risk. It is time to end the hypocrisy and allow the disabled to take jobs where they are clearly qualified, instead of denying them the opportunity based on self righteous concerns for their safety.

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