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Deborah Leigh Bender

ECHAZABAL V. CHEVRON: A DIRECT THREAT TO EMPLOYERS IN THE NINTH CIRCUIT

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Abstract: Although Congress enacted the Americans with Disabilities Act (ADA) in part to protect disabled individuals from paternalism, the ADA permits employers to adopt a requirement that individuals not pose a direct threat to others in the workplace. The Equal Employment Opportunity Commission (EEOC) has determined that this direct threat defense also protects an employer who discharges or refuses to hire individuals who pose a direct threat to their *own* health or safety in the workplace. In *Echazabal v. Chevron*, the Ninth Circuit struck down the EEOC interpretation of direct threat on the ground that it was paternalistic and inconsistent with the purpose of the ADA. This Note argues that the EEOC interpretation was reasonable and consistent with the language and underlying purpose of the direct threat defense. This Note concludes that the Ninth Circuit's rule will force employers to choose between violating the ADA and knowingly hiring individuals who are at a substantial risk of injury or death in the workplace.

In the Ninth Circuit, a construction company no longer has the right to prevent a construction worker with vertigo from working atop a 50-story high-rise.[1] Yet that same construction company is also bound by state safety guidelines that hold the company criminally liable if that employee tumbles to the ground.[2] This employer is stuck between a rock and a hard place because of the recent decision in *Echazabal v. Chevron USA, Inc.*[3] In *Echazabal*, the Ninth Circuit held that the Americans with Disabilities Act (ADA)[4] prevents employers from considering the health or safety of a disabled individual when deciding whether that individual is qualified for a job.[5] According to the *Echazabal* court, the ADA sanctions the use of safety-based qualification standards only to prevent direct threats to others in the workplace.[6] Thus, the Ninth Circuit concluded that the direct threat defense only includes threats to others.[7]

1. This scenario is similar to the hypothetical posed by Chevron's attorneys in their petition for rehearing en banc. Appellee's Petition for Rehearing with Suggestion for Rehearing En Banc at 13, Echazabal v. Chevron USA, Inc., 226 F.3d 1063 (9th Cir. 2000) (No. 98-55551).

2. *See infra* Section III.

3. 226 F.3d 1063 (9th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3619 (U.S. Mar. 9, 2001) (No. 00-1406).

4. 42 U.S.C. §§ 12,101–213 (1994).

5. *Echazabal*, 226 F.3d at 1067–68.

6. *Id.*

7. *Id.*

The Equal Employment Opportunity Commission (EEOC) regulations, however, expressly state that an employer may also invoke the direct threat defense when the safety of the disabled individual is at risk.[8] Congress gave the EEOC an express grant of authority to issue and enforce regulations implementing the ADA, including this expanded definition of "direct threat."[9] Despite the fact that two other Circuits had accepted the EEOC's definition,[10] and despite precedent in the Ninth Circuit establishing an employer's right to use qualification standards ensuring safe job performance,[11] the Ninth Circuit summarily rejected the EEOC interpretation of direct threat.[12] The *Echazabal* court concluded that the "plain language" of the statute referred to direct threats to others, not threats to the disabled individual.[13] Moreover, on looking at the legislative history of the ADA, the court determined that congressional intent to prevent paternalism in the workplace precluded an interpretation of the ADA that allowed an employer to make hiring and firing decisions based upon the safety of the disabled individual.[14]

This Note argues that the *Echazabal* court should have deferred to the EEOC regulations that define the direct threat defense to include a substantial risk to the health and safety of the disabled individual in the workplace. Part I of this Note explains the purpose and scope of Title I of the ADA and examines the direct threat defense. Part II explores the regulations and case law that developed under the ADA's predecessor, the Rehabilitation Act.[15] Part III focuses on California's workplace safety laws that hold employers criminally liable for knowingly subjecting their employees to harm. Part IV illustrates the process that a court must go through before it can reject the kind of agency regulation at issue in *Echazabal*. Part V outlines the facts, procedural history, holding, and rationale of *Echazabal*. Finally, Part VI argues that the *Echazabal* court

8. 29 C.F.R. § 1630.15(2) (2000).

9. 42 U.S.C. § 12,116.

10. *See* LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 835 (11th Cir. 1998); Moses v. Am. Nonwovens, Inc., 97 F.3d 446, 447 (11th Cir. 1996); Daugherty v. City of El Paso, 56 F.3d 695, 698 (5th Cir. 1995).

11. *See* Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1984); Bentevegna v. United States Dep't of Labor, 694 F.2d 619 (9th Cir. 1982).

12. Echazabal v. Chevron USA, Inc., 226 F.3d 1063, 1067–68 (9th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3619 (U.S. Mar. 9, 2001) (No. 00-1406).

13. *Id.* at 1067.

14. *Id.* at 1067–68.

15. 29 U.S.C. §§ 701–96 (1994 & Supp. 2000).

erred in determining that the EEOC interpretation of direct threat was inconsistent with the text and purpose of the ADA. As a result, *Echazabal* has forced employers to choose between subjecting at-risk individuals to harm and violating the ADA.

I. TITLE I OF THE ADA PRESERVES AN EMPLOYER'S RIGHT TO SCREEN FOR QUALIFIED EMPLOYEES

Title I of the ADA prohibits employers from discriminating against disabled individuals. The ADA strikes a balance between the legitimate interest of disabled individuals in obtaining employment and the employers' legitimate interest in maintaining a safe workplace.[16] The text of the Act reflects Congress's intent to prevent the paternalistic exclusion of disabled individuals from the workplace. Even so, the ADA allows employers to adopt certain qualification standards that tend to exclude disabled individuals from the workplace. Employers may adopt any standard that is job-related and consistent with business necessity, and they may also adopt a specific standard requiring employees not to pose a direct threat to others in the workplace. Although the text of the ADA mentions only direct threats to "others," EEOC regulations state that the direct threat defense includes threats to the disabled individual as well. A number of circuits have adopted the EEOC interpretation of the direct threat defense.

A. Purpose and Scope of Title I

Congress enacted the ADA in 1990 as a comprehensive mechanism to end discrimination against disabled individuals in all aspects of life.[17] Title I of the ADA targets discrimination in both public and private sector employment.[18] Titles II–IV cover discrimination in state and local government services, in public accommodations, and in telecommunications, respectively.[19] Congress found Title I necessary

16. *See* President George Bush, Statement on Signing the Americans with Disabilities Act of 1990, *in* 2 PUB. PAPERS: GEORGE BUSH 1990 1070, 1070–71 (1991).

17. Americans with Disabilities Act, Pub. L. No. 101-336, § 2, 104 Stat. 328 (1990) (codified as amended at 42 U.S.C. § 12,101(b)(1) (1994)).

18. 42 U.S.C. § 12,111(5) (1994).

19. *Id.* §§ 12,131–65(b), 12,181–89, 12,201–13; *see also* Robert L. Mullen, *The Americans with Disabilities Act: An Introduction for Lawyers and Judges*, 29 LAND & WATER L. REV. 175, 181 (1994).

because existing laws were inadequate to eliminate workplace discrimination.[20] For example, the Rehabilitation Act[21] offered protection for disabled individuals in public sector jobs, but no federal law protected disabled workers in the private sector.[22]

Before the enactment of the ADA, workplace discrimination contributed to staggering levels of unemployment and poverty among persons with disabilities in the United States.[23] Congress found that 43 million Americans had one or more disabilities[24] and that these Americans were "severely disadvantaged" in finding and retaining jobs.[25] Two-thirds of these disabled Americans were without employment, though a large majority wanted to work.[26] Disabled Americans who were lucky enough to have jobs received unequal pay for their efforts—in 1988, disabled men and women were earning between thirty-six and thirty-eight percent less than their non-disabled counterparts.[27] In its findings, Congress stated that this unequal treatment was a result of "stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society."[28] Furthermore, Congress found that if it did not act, this "unnecessary discrimination and prejudice" would continue to "[deny] people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous."[29]

Congress enacted Title I of the ADA to address workplace discrimination based on both real and perceived disabilities.[30] Congress included perceived disabilities under the ADA's protection, recognizing that social perceptions and myths about disabilities could be as disabling as the underlying conditions themselves.[31] Title I protects qualified

20. H.R. REP. NO. 101-485, pt. 2, at 47 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 329.

21. 29 U.S.C. §§ 701–96 (1994 & Supp. 2000).

22. H.R. REP NO. 101-485, pt. 2, at 47, *reprinted in* 1990 U.S.C.C.A.N. at 329.

23. *Id.* at 32, *reprinted in* 1990 U.S.C.C.A.N. at 314.

24. 42 U.S.C. § 12,101(a)(1) (1994).

25. *Id.* § 12,101(a)(6).

26. H.R. REP. NO. 101-485, pt. 2, at 32, *reprinted in* 1990 U.S.C.C.A.N. at 314.

27. *Id.* (internal citation omitted).

28. 42 U.S.C. § 12,101(a)(7).

29. *Id.* § 12,101(a)(9).

30. *Id.* § 12,102(2) (defining "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment").

31. *See id.*

disabled individuals[32] in all aspects of the employment relationship[33] by prohibiting discrimination in the terms, conditions, and privileges of employment—including hiring, advancement, discharge, job training, and benefits.[34] The prohibition of discrimination applies to public and private sector employers, employment agencies, labor organizations, and joint labor-management committees.[35]

B. The ADA Discourages Paternalistic Employment Decisions

The language and legislative history of the ADA and general employment discrimination case law state that adverse employment decisions should not be based on paternalistic concerns about the employee's welfare. Paternalism is the deliberate interference with an individual's freedom of choice for "his own good."[36] In the ADA's findings section, Congress suggested that paternalism was a cause of discrimination, resulting in "overprotective rules and policies" that exclude the disabled.[37] For example, Senator Edward Kennedy commented that the direct threat defense must not enable employers to make paternalistic decisions about what is "best" for HIV positive job applicants.[38] Finally, the Committee on Education and Labor noted in its report to Congress that "[p]aternalism is perhaps the most pervasive form of discrimination for people with disabilities."[39]

Although the United States Supreme Court has not yet addressed the issue of paternalism under the ADA, the Court has rejected paternalistic justifications for discrimination under Title VII of the Civil Rights Act of 1964.[40] Specifically, the Court has held that a bona fide occupational qualification (BFOQ) cannot exclude all members of a protected class

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32. *See infra* Section I.C.1.

33. Mullen, *supra* note 19, at 186.

34. 42 U.S.C. § 12,112(a).

35. *Id.* § 12,111(2).

36. Paul Burrows, *Analyzing Legal Paternalism*, 15 INT'L REV. L. & ECON. 489, 490 (1995).

37. 42 U.S.C. § 12,101(a)(5).

38. 136 CONG. REC. S9684-03, at S9697 (1990).

39. H.R. REP. NO. 101-485, pt. 2, at 74 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 356.

40. 42 U.S.C. §§ 2000e to 2000e-17 (prohibiting employers from discriminating on the basis of race, color, religion, sex, or national origin). The *Echazabal* court suggested that Supreme Court dicta stating that Title VII prohibits employers from making paternalistic decisions also applies to the ADA. Echazabal v. Chevron USA, Inc., 226 F.3d 1063, 1068 (9th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3619 (U.S. Mar. 9, 2001) (No. 00-1406).

out of a paternalistic concern for that protected class's welfare.[41] A BFOQ is a blanket rule that excludes all members of a protected class because they are either unable to perform an essential function of the job, or because it is impracticable to distinguish among members of the protected group.[42] For instance, under Title VII, a synagogue may require that its rabbi be Jewish, despite the fact that this requirement discriminates against non-Jews based on their religion. The text of Title VII explicitly provides that employers may utilize such BFOQs.[43] Unlike Title VII, however, the text of the ADA does not provide for the BFOQ as an employer defense. Thus, it is unclear whether the Title VII case law condemning paternalism applies to the ADA.[44]

C. *The ADA Permits Employers to Utilize Certain Requirements Regardless of Their Effect on Disabled Individuals in the Workplace*

1. *Requirements that Are Job-Related and Consistent with Business Necessity*

In certain circumstances, an employer may defend the use of discriminatory qualification standards by using the ADA's business necessity defense. While requiring employers to include disabled individuals in the workforce, the ADA's employment protections extend only to individuals who are "qualified" for a given job.[45] The statute defines a "qualified individual with a disability" as a disabled individual who can perform the "essential functions" of a job with or without reasonable accommodation.[46] Without expressly defining "essential functions," the statute indicates that courts will consider the employer's judgment as to which functions are essential.[47] Moreover, if an employer

41. *See* Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 206 (1991); Dothard v. Rawlinson, 433 U.S. 321, 335 (1977).

42. BLACK'S LAW DICTIONARY 168 (7th ed. 1999).

43. 42 U.S.C. § 2000e-2(e).

44. *But see* 42 U.S.C. § 12,117 (stating that enforcement mechanisms outlined in Title VII are applicable to ADA); Muth v. Cobro Corp., 895 F. Supp. 254, 255 (E.D. Mo. 1995) (stating that Title VII procedures—specifically, enforcement mechanisms—are applicable to ADA actions).

45. 42 U.S.C. § 12,111(8).

46. *Id.*

47. *Id.*

prepares a written job description before advertising the position or interviewing applicants, that description carries evidentiary weight as to the "essential" job functions.[48]

Employer discretion has limits: an employer may only use qualification standards that screen out the disabled if the employer shows such standards are "job-related for the position in question and consistent with business necessity."[49] This requirement gives rise to the business necessity defense under the ADA. Before taking advantage of the defense, an employer must either make a "reasonable accommodation"[50] for the applicant in question or show that accommodating the employee's disability would impose an "undue hardship" on the business.[51] Thus, the ADA combats qualification standards that are based on stereotypes but permits hiring criteria based on the *actual* attributes of a disability when those criteria are job-related and consistent with business necessity, and when the disability cannot be reasonably accommodated.[52] So far, one circuit has held that an employer may defend the use of safety requirements under the business necessity defense.[53]

2. *Requirements that Employees Not Pose a Direct Threat to Others in the Workplace*

The direct threat provision is one example of the kind of permissible qualification standards envisioned by the ADA's drafters. This provision allows employers to require that workers not pose a "direct threat to the health or safety of other individuals in the workplace."[54] The ADA

48. *Id.*

49. *Id.* § 12,112(b)(6).

50. *Id.* § 12,111(9) (stating that "reasonable accommodation" may include altering existing facilities or restructuring job to accommodate disabled individuals).

51. *Id.* § 12,111(10)(A) (stating that "undue hardship" is action requiring significant difficulty or expense); *id.* § 12,111(10)(B) (describing factors considered when determining if accommodation would pose "undue hardship"); *id.* § 12,112(b)(6) (stating that the term "discriminate" includes the use of qualification standards that screen out or tend to screen out individuals with disabilities unless such qualification standards are job-related and consistent with business necessity).

52. *See* Amanda Wong, Comment, *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, 1141–42 (2000).

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

54. 42 U.S.C. § 12,113(b).

defines direct threat as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[55]

The legislative history of the ADA explains that the direct threat defense codified the standard adopted by the United States Supreme Court under the Rehabilitation Act of 1973.[56] In *School Board of Nassau County, Florida v. Arline*,[57] the school board fired an elementary school teacher because it feared that her recurring bouts of tuberculosis would endanger the health of her students.[58] The Court faced the issue of whether Arline was "otherwise qualified" for the job of elementary school teacher in spite of her possibly contagious tuberculosis.[59] The Court held that under the Rehabilitation Act a disabled individual is not otherwise qualified for a job if he or she poses a significant risk of spreading an infectious disease to others in the workplace and if that risk cannot be eliminated with a reasonable accommodation.[60] Additionally, the Court explained that whether or not one posed a direct threat was a question of fact requiring a trial court to conduct an "individualized inquiry."[61] Thus, the direct threat defense involves a significantly higher burden of proof than does the business necessity defense.[62]

Like the *Arline* case, the legislative history to the ADA characterizes the direct threat defense only in terms of threats to others, not mentioning threats to self.[63] However, the legislative history suggests that employers could defend a qualification standard requiring employees not to risk their *own* health or safety in the workplace. In its discussion of medical examinations, the House Committee on Education and Labor explained that if a medical exam revealed a "high probability of substantial harm if the candidate performed the particular functions of the job in question, the employer could reject the candidate, unless the employer could make

55. *Id.* § 12,111(3).

56. H.R. REP. NO. 101-485, pt. 3, at 34, 45–46 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 457, 468–69 (referring to Sch. Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273 (1987)).

57. 480 U.S. 273 (1987).

58. *Id.* at 276.

59. *Id.* at 275.

60. *Id.* at 287–88.

61. *Id.*

62. *See* Bragdon v. Abbott, 524 U.S. 624, 649–50 (1998) (examining *Arline's* direct threat language as applied to ADA and holding that to rely on direct threat defense, one must assess risk using objective evidence rather than good-faith belief that risk exists).

63. *See* Wong, *supra note* 52, at 1148–51.

a reasonable accommodation . . . ."[64] The phrase "substantial harm" appears to include harm to self. As an example of the kind of "substantial harm" that a medical exam might reveal, the Committee mentioned exposures to toxic and hazardous substances that could have a "negative effect" on the individual worker.[65] Thus, Congress seems to have contemplated an interpretation of the direct threat defense that included threats to the disabled individual.

D. The EEOC Interpretation of the Direct Threat Defense

1. EEOC Regulations

Following Congress's mandate, the EEOC has issued substantive regulations implementing Title I of the ADA.[66] In these regulations, the direct threat defense covers threats to the health or safety of the disabled individual and others.[67] To defend the use of exclusionary safety requirements, employers must utilize the direct threat defense, rather than the lenient business necessity defense.[68] The employer must make an "individualized assessment of the individual's present ability to safely perform the essential functions of the job."[69] The assessment must be based on either the best available objective evidence or a reasonable medical judgment.[70] When assessing this evidence, courts must consider the duration of the risk, the nature and severity of the potential harm, the likelihood that the harm will occur, and the imminence of the harm.[71] With such strict requirements, the EEOC aims to prevent employers from

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64. H.R. REP. NO. 101-485, pt.2, at 73–74 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 355–56.

65. *Id.* at 74, *reprinted in* 1990 U.S.C.C.A.N. at 357.

66. 42 U.S.C. § 12,116 (1994); *see also* Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,726 (July 26, 1991) (codified as amended in scattered sections of 29 C.F.R § 1630).

67. 29 C.F.R. § 1630.15(2) (2000) (stating that "qualification standard" may include the "requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace"); *id.* § 1630.2(r) (stating that "direct threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation").

68. *Id.* Pt. 1630 App. § 1630.15(b) & (c).

69. *Id.* § 1630.2(r).

70. *Id.*

71. *Id.*

using the direct threat defense as a loophole for unlawful discrimination.[72]

2. *Case Law Interpreting the EEOC Regulations*

Prior to *Echazabal v. Chevron*,[73] the courts of appeals that had considered the direct threat defense agreed that it included threats to self as well as to others.[74] The First, Fifth, and Eleventh Circuits have all relied upon the EEOC regulation that defines the direct threat defense to include threats to the individual.[75] Finally, the Fifth Circuit has held that safety requirements are permissible qualification standards under the ADA.[76]

In *Moses v. American Nonwovens, Inc.*,[77] the Eleventh Circuit held that the direct threat defense included both threats to self and threats to others. Moses, an epileptic man, was discharged because his employer deemed an assembly-line job to be hazardous to an employee with a seizure disorder.[78] The trial court granted summary judgment for the employer on the ground that Moses could not prove that he was not a direct threat.[79] The court of appeals affirmed this decision, holding that

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72. *See* Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,730 (July 26, 1991) (codified as amended at 29 C.F.R § 1630.2(r)).

73. 226 F.3d 1063 (9th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3619 (U.S. Mar. 9, 2001) (No. 00-1406).

74. Two cases analyzing the "direct threat defense" have been published since the Ninth Circuit rendered its decision in *Echazabal*. In *Borgialli v. Thunder Basin Coal Co.*, 225 F.3d 1284 (10th Cir. 2000), the Tenth Circuit utilized the EEOC definition of direct threat in holding that an employee who "wasn't sure if he was going to hurt someone or hurt himself" was not "qualified" under the ADA. *Id.* at 1290. In *Kalskett v. Larson Mfg. Co.*, No. C99-3079 MWB, 2001 WL 630024 (N.D. Iowa June 1, 2001), a district court in Iowa held that, although the direct threat defense only includes threats to others, an employee who poses a direct threat to himself or herself is not "qualified" under the ADA. *Id.* at *21-22. Because this Note argues that *Echazabal's* analysis was wrong in light of the authority existing at the time of the decision, these cases are beyond the scope of this Note.

75. *See* LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 835 (11th Cir. 1998); EEOC v. Amigo, Inc., 110 F.3d 135 (1st Cir. 1997) (upholding trial court's determination that suicidal employee was not qualified to perform essential job function of administering and monitoring residents' medication); Moses v. Am. Nonwovens, Inc., 97 F.3d 446, 447 (11th Cir. 1996); Daugherty v. City of El Paso, 56 F.3d 695, 698 (5th Cir. 1995).

76. EEOC v. Exxon, 203 F.3d 871 (5th Cir. 2000).

77. 97 F.3d 446 (11th Cir. 1996).

78. *Id.* at 447–48. The job required Moses to perform a number of tasks: as a "product inspector," Moses would sit above fast-moving press rollers; as a "web operator," he sat beneath a conveyor belt; as a "Hot Splicer Assistant," he worked beside extremely hot exposed machinery. *Id.*

79. *Id.* at 447.

an employer could discharge a disabled employee if the disability posed a direct threat to his or her own health or safety on the job.[80]

Another Eleventh Circuit case, *LaChance v. Duffy's Draft House, Inc.*,[81] involved a man with epilepsy who was discharged from his job as a line cook because he could not perform the job safely.[82] The job involved cooking on a gas flat top grill, using a "fryolater" filled with hot grease, and operating slicing machines.[83] The district court granted summary judgment in favor of the defendant, finding LaChance unqualified because he could not do the job without risking harm to himself or others.[84] Affirming the district court's decision, the Eleventh Circuit Court of Appeals agreed that LaChance's seizures posed a danger both to himself and to others, rendering him a direct threat.[85]

As in *Moses* and *LaChance*, Fifth Circuit case law regarding the direct threat defense accepts the EEOC guidelines as a correct interpretation of the law. In *Daugherty v. City of El Paso*,[86] the Fifth Circuit found, as a matter of law, that an insulin-dependant diabetic was not qualified to drive a city bus because the disability posed a "genuine substantial risk" of injury to himself or others.[87] While the court was not confronted with a situation where a disabled individual posed a threat only to his or her own safety, the court suggested that it would recognize an employer defense on this basis.[88] The court reasoned that because the Rehabilitation Act term "qualified individual" includes a personal safety requirement and because Rehabilitation Act standards apply to the ADA, the ADA necessarily permits employers to have the same personal safety requirement.[89]

The Fifth Circuit also allows an employer to defend safety-based qualification standards either under the direct threat defense or the more lenient business necessity defense. In *EEOC v. Exxon Corp.*,[90] the Fifth

80. *Id.*
81. 146 F.3d 832 (11th Cir. 1998).
82. *Id.* at 834.
83. *Id.*
84. *Id.*
85. *Id.* at 836.
86. 56 F.3d 695 (5th Cir. 1995).
87. *Id.* at 698.
88. *See id.*
89. *Id.*
90. 203 F.3d 871 (5th Cir. 2000).

Circuit examined a job requirement at Exxon that prevented anyone with a history of substance abuse from working in certain high-risk jobs.[91] First, the court noted that Congress had used permissive language to designate the direct threat defense as an example of one discrete qualification standard permitted by the ADA.[92] As such, the *Exxon* court suggested that the permissive phrase "may include . . . direct threat[s] to others" would not prevent employers from having qualification standards that mandate personal safety.[93] Second, the court permitted Exxon to use the business necessity defense, as opposed to the direct threat defense, to defend its refusal to hire ex-substance abusers.[94] In doing so, the court reasoned that safety requirements were "not exclusively cabined into the direct threat test."[95]

Before *Echazabal*, the only court to hold that the direct threat defense did not include threats to the disabled individual was a district court in the Seventh Circuit. In *Kohnke v. Delta Airlines*,[96] the court reasoned that the EEOC's broad interpretation of direct threat would render meaningless the statutory language describing threats to the health or safety of "other individuals."[97] However, *Kohnke* did suggest that potential harm to self could be relevant to a defense of business necessity.[98] Specifically, the court suggested that if the employer found that a particular disability gave rise to injuries on the job, that fact could serve as evidence that an exclusionary qualification standard was "job related and consistent with business necessity."[99]

II. UNDER THE REHABILITATION ACT, EMPLOYERS COULD DISCHARGE EMPLOYEES WHO RISKED INJURY OR ILLNESS ON THE JOB

Prior to the ADA, case law and regulations under the Rehabilitation Act allowed employers to exclude disabled individuals who posed a risk

91. *Id.* at 872.

92. *Id.* at 873; (citing 42 U.S.C. § 12,113(b) (2000) (stating that qualification standards "may include" requirement that employees not pose direct threat to others)).

93. *Id.*

94. *Id.* at 875.

95. *Id.* at 873.

96. 932 F. Supp. 1110 (N.D. Ill. 1996).

97. *Id.* at 1111 (citing 42 U.S.C. § 12,113(b)(1994)).

98. *Id.* at 1113.

99. *Id.* (citing 42 U.S.C. § 12,113(a)(1994)).

of injury to themselves or future illness while working on the job. Because much of the Rehabilitation Act was incorporated in the ADA, courts often look to Rehabilitation Act law to interpret the ADA.

A. The Rehabilitation Act of 1973 Contributed Significantly to the ADA

Enacted in 1973, the Rehabilitation Act[100] was the predecessor to the ADA.[101] Unlike the ADA, which prohibits discrimination in both public and private sectors,[102] the Rehabilitation Act targets discrimination against disabled individuals only in programs and activities run by a federal executive agency, the United States Postal Service, or any organization receiving federal funds.[103] Like the ADA, the Rehabilitation Act aims to guarantee equal opportunity to disabled individuals.[104] To achieve these ends, the Rehabilitation Act aims to level the playing field for disabled persons who, despite a disability, have all the qualifications necessary for a given job. Specifically, Section 504 of the Rehabilitation Act prohibits employers from discriminating "solely by reason of... disability [against] otherwise qualified individual[s] with a disability."[105] Similar to the ADA, the Rehabilitation Act does not force employers to hire or retain disabled individuals who are not "otherwise qualified" for the job.[106] The Rehabilitation Act's legislative history provides evidence of Congress's intent to balance the realities of employment and the needs of the disabled.[107]

Rehabilitation Act case law applies to the direct threat defense because the ADA expressly requires agencies such as the EEOC to enforce the ADA in a manner that does not conflict with Rehabilitation

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100. Pub. L. 93-112 (1973) (codified as amended at 29 U.S.C. §§ 701–96 (1994 & Supp. 1999)).

101. H.R. REP. NO. 101-485, pt. 3, at 26 (1990), *reprinted in* 1990 U.S.C.C.A.N 445, 449 (stating that ADA "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").

102. 42 U.S.C. § 12,111(5) (1994).

103. 29 U.S.C. § 794(a) (1994 & Supp. 2000).

104. *See id.* § 701(b)(1)(F).

105. *Id.* § 794(a).

106. *See, e.g.*, S.E. Cmty. Coll. v. Davis, 442 U.S. 397, 406 (1979) (defining "otherwise qualified person" as one who meets all of a program's requirements in spite of disability).

107. *See* 124 Cong. Rec. 5950 (1978) (statement of Representative Hyde) ("The Congress needs to give thoughtful and wide-ranging consideration to the needs of such handicapped persons, balanced against the realities of economics, public safety, and commonsense.").

Act standards.[108] The ADA's legislative history indicates that Congress intended courts and administrative agencies to utilize Rehabilitation Act precedent when interpreting the ADA.[109] The legislative history also indicates that Congress intended that the ADA concept of a qualified individual with a disability be comparable to the definition found in the Rehabilitation Act regulations.[110] Although Congress amended the Rehabilitation Act in 1992 to provide that the same standards apply to both it and the ADA, the amendment did not limit the applicability of Rehabilitation Act precedent to ADA claims.[111] Courts in eleven circuits continue to apply Rehabilitation Act case law when interpreting the ADA.[112]

B. *Agency Regulations Define "Otherwise Qualified" Under the Rehabilitation Act*

Two executive agencies have determined that employees who risk injury to themselves or others are not "otherwise qualified" for protection under the Rehabilitation Act. Although the Rehabilitation Act itself does not define the phrase "otherwise qualified,"[113] Congress gave all executive agencies an express grant of authority to implement the terms of the Act.[114] Both EEOC and Department of Labor (DOL) regulations

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108. 42 U.S.C. § 12,117(b) (1994); *see also* Johnson v. U.S. Steel Corp., 943 F. Supp. 1108, 1114 n.2 (D. Minn. 1996).

109. Collings v. Longview Fibre Co., 63 F.3d 828, 832 (9th Cir. 1995).

110. *See* H.R. REP. NO. 101-485, pt. 3, at 33 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 455 (citing 42 Fed. Reg. 22,686 (1977)); *See* H.R. REP. NO. 101-485, pt. 2, at 55, *reprinted in* 1990 U.S.C.C.A.N. at 337.

111. *See* 29 U.S.C. § 794(d) (1994 & Supp. 2000).

112. *See, e.g.*, Gaston v. Bellingrath Gardens & Home, Inc., 167 F.3d 1361, 1363 (11th Cir. 1999); Francis v. City of Meriden, 129 F.3d 281, 284 n.4 (2d Cir. 1997); Crawford v. Ind. Dep't of Corr., 115 F.3d 481, 483 (7th Cir. 1997); Andrews v. Ohio, 104 F.3d 803, 807 (6th Cir. 1997); Yin v. California, 95 F.3d 864, 867 (9th Cir. 1996); Allison v. Dep't of Corr., 94 F.3d 494, 497 (8th Cir. 1996); Katz v. City Metal Co., 87 F.3d 26, 31 n.4 (1st Cir. 1996); McDonald v. Pa. Dep't of Pub. Welfare, 62 F.3d 92, 95 (3d Cir. 1995); Daugherty v. City of El Paso, 56 F.3d 695, 697–98 (5th Cir. 1995); Bolton v. Scrivner, Inc., 36 F.3d 939, 942–43 (10th Cir. 1994); Tyndall v. Nat'l Educ. Ctrs., Inc. of Cal., 31 F.3d 209, 213 n.1 (4th Cir. 1994).

113. *See* 29 U.S.C. §§ 705(20), 794 (1994 & Supp. 2000). Although § 794 speaks of an "otherwise qualified individual with a disability . . . as defined in section 705(20)," § 705(20) deals solely with the definition of an "individual with a disability." *Id.* The "otherwise qualified" language is not defined in this, or any other, section of the statute.

114. Pub. L. 95-602 (1978) (codified as amended at 29 U.S.C. § 794(a) (1994 & Supp. 1999). Amending the Rehabilitation Act in 1978, Congress inserted language in § 794(a) prohibiting discrimination under any program or activity conducted by any Executive Agency or by the United

have permitted employers to use safety-based criteria to determine whether an employee is qualified.[115] The EEOC defined "qualified individual with handicaps" as someone who could perform all essential job functions without risking the health or safety of the individual or others.[116] Similarly, the DOL guidelines for "job qualifications" permit exclusionary qualification standards where the qualifications are job-related and consistent with both business necessity and "safe performance."[117] The phrase "safe performance" is susceptible to a broad interpretation, which can allow employers to consider the safety of both the disabled individual and others. Thus, according to the plain language of these two regulations, the Rehabilitation Act appears to permit employers to mandate personal safety as a job requirement.[118]

C. *The Ninth Circuit Has Recognized a Defense Based on Personal Safety Under the Rehabilitation Act*

The Ninth Circuit has twice recognized a narrow defense under the Rehabilitation Act for employers who exclude from the workplace individuals who pose health or safety threats to themselves on the job. In *Bentivegna v. DOL*,[119] the Ninth Circuit examined the DOL regulation permitting job requirements that exclude disabled individuals because of their disability when necessary for "safe performance."[120] Bentivegna, a diabetic, repaired buildings for the City of Los Angeles.[121] Concerned for the personal safety of its workforce,[122] the City adopted a requirement that all diabetic employees must "control" their blood sugar levels.[123]

States Postal Service and requiring the heads of these agencies to promulgate regulations prohibiting discrimination. *Id.*

115. *See* Equal Employment Opportunity Commission Regulations, 29 C.F.R. § 1614.203(a)(6) (2000) ("qualified individual with handicaps"); Dep't of Labor Regulations, 29 C.F.R. § 32.14 (2000) (job qualifications).

116. *Id.* § 1614.203(a)(6).

117. *Id.* § 32.14.

118. *See id.* §§ 32.14, 1614.203(a)(6). Some agencies discussed employment qualifications without reference to safety, instead focusing on the "essential functions" of the job; however, these agencies never explicitly prohibited employers from considering threats to safety. *See, e.g., id.* § 85.3; 24 C.F.R. § 8.3.

119. 694 F.2d 619 (9th Cir. 1982).

120. *Id.* at 621 (citing 29 C.F.R. § 32.14(b) (1982)).

121. *Id.* at 620.

122. *Id.* at 622.

123. *Id.* at 620.

Pursuant to this rule, the City discharged Bentivegna when he failed to control his blood sugar level.[124] The court concluded that as an employer, the City could consider its employees' risk of future injury or long-term health problems, but that it must present adequate evidence of a direct connection between the disability and the safety concern to rely on the defense.[125] In Bentevegna's case, the court held that no direct connection existed between the control requirement and the employer's concern for either business necessity or safe job performance.[126]

Two years later, in *Mantolete v. Bolger*,[127] the Ninth Circuit created a strict legal standard to determine when a particular safety requirement could disqualify a disabled individual. After a pre-employment physical revealed that Mantolete had epilepsy, the Post Office denied her a job operating a letter-sorting machine out of concern that the machine's flashing lights might trigger seizures and injure her.[128] The court agreed that a job requirement could screen out a qualified disabled individual on the basis of a possible future injury, but only when the employer established a "reasonable probability of substantial harm"[129] based on the applicant's work and medical histories.[130] Even though the Rehabilitation Act regulations permitted employers to exclude at-risk disabled individuals from the workplace,[131] the Ninth Circuit limited the scope of the defense by requiring proof of potential harm.[132] In this way, the court helped ensure that safety-based qualification standards would not be used as a means for employers to discriminate against disabled individuals.

III. STATE WORKPLACE SAFETY LAWS REQUIRE EMPLOYERS TO PREVENT KNOWN RISKS IN THE WORKPLACE OR FACE CRIMINAL SANCTIONS

If an employer knows that a disabled employee faces an increased risk of personal injury on the job and that employee is subsequently injured,

124. *Id.*

125. *Id.* at 621–22.

126. *Id.* at 622–23.

127. 767 F.2d 1416 (9th Cir. 1985).

128. *Id.* at 1419.

129. *Id.* at 1422.

130. *Id.* at 1423.

131. 29 C.F.R. §§ 32.14, 1614.203(a)(6) (1985).

132. *See Mantolete*, 767 F.2d at 1423.

the employer could face criminal liability under state workplace safety laws. Nearly all of the states in the Ninth Circuit have strict safety laws that impose harsh criminal sanctions on employers who are in violation of these codes.[133] Because *Echazabal* discussed California's safety laws,[134] this Section focuses primarily on the California Labor Code.

The California Labor Code requires employers to provide safeguards for employees and to do everything else "reasonably necessary" to protect them.[135] Because the term "safeguards" is defined broadly, employers are expected to use "any practicable method" to protect employees.[136] Moreover, the Code seems to require employers to consider the safety of not just the average employee, but each employee individually.[137] An employer's failure to take necessary precautions to protect its employees' lives, safety, and health is a code violation.[138]

The California Labor Code further requires employers to prevent employees from going into or working in an environment that "is not safe and healthful."[139] The Code places the primary responsibility for the

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133. Alaska, Arizona, California, Hawaii, Montana, Nevada, Oregon, and Washington have adopted the same general workplace safety requirement: employers must furnish employment and a workplace that is safe and free from recognized hazards. ALASKA STAT. § 18.60.075 (Michie 2000); ARIZ. REV. STAT. ANN. § 23-403 (West 2000); CAL. LAB. CODE § 6403 (West 2000); HAW. REV. STAT. ANN. § 396-6 (Michie 2000); MONT. CODE ANN. § 50-71-201(1) (2000); NEV. REV. STAT. ANN. 618.375(1) (Michie 1999); OR. REV. STAT. § 654-010 (1999); WASH. REV. CODE ANN. § 49.17.060 (West 2000). In these states (with the exception of Montana), if an employer knowingly violates the general safety requirements and an employee dies as a result, the employer can be convicted of a felony or misdemeanor and is subject to a fine and jail time. ALASKA STAT. § 18.60.095; ARIZ. REV. STAT. ANN. § 23-418; CAL. LAB. CODE §§ 6423, 6432(a); HAW. REV. STAT. ANN. § 396-10; NEV. REV. STAT. ANN. 618.685; OR. REV. STAT. § 654-991(1); WASH. REV. CODE ANN. § 49.17.190(3).

134. Echazabal v. Chevron USA, Inc., 226 F.3d 1063, 1067–68 (9th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3619 (U.S. Mar. 9, 2001) (No. 00-1406).

135. CAL. LAB. CODE § 6401 (2000).

136. *Id.* § 6306(b) (2000).

137. *Id.* § 6309 (stating that administrative agency may take action if it "learns or has reason to believe that any employment or place of employment is not safe or is injurious to the welfare of *any* employee") (emphasis added).

138. *Id.* § 6403:

> No employer shall fail or neglect to do any of the following: (a) To provide and use safety devices and safeguards reasonably adequate to render the employment and place of employment safe; (b) To adopt and use methods and processes reasonably adequate to render the employment and place of employment safe; (c) To do every other thing reasonably necessary to protect the life, safety, and health of employees.

139. *Id.* § 6402.

safety of workers upon the employer.[140] As a result, the law is necessarily paternalistic because it requires that the employer not permit any employee to work in an unsafe environment—even if that employee wants to work there.

An employer who violates California's Labor Code safety provisions can be charged with a misdemeanor.[141] If an employee dies as a result of such a violation, his or her employer can be charged with involuntary manslaughter.[142] The employer could also be charged with involuntary manslaughter if it places an employee in a position "which might produce death . . . without due caution and circumspection," and the employee dies as a result.[143] If an employer knows that a disabled employee faces a significant risk of death on the job, these laws may require the employer to keep the employee out of the workplace or face criminal sanctions.

IV. COURTS USE COMMON TOOLS OF STATUTORY CONSTRUCTION WHEN DECIDING WHETHER TO REJECT AN ADMINISTRATIVE REGULATION

The *Chevron* doctrine, coupled with traditional rules of statutory construction, helps courts decide whether to follow an agency's interpretation of a statute. In *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*,[144] the United States Supreme Court created a two-step process by which a court can determine how much deference to give

140. Bendix Forest Prod. Corp. v. Div. of Occupational Safety & Health, 600 P.2d 1339, 1343–44 (Cal. 1979) (holding that Division of Industrial Safety had authority to issue order requiring employer to furnish protective gear at employer's expense).

141. *See* CAL. LAB. CODE § 6423 (stating that employer commits misdemeanor by "[k]nowingly or negligently" committing "serious violation" of labor code); *id.* § 6432 (stating that "serious violation" exists if a "substantial probability that death or serious physical harm could result.") (internal quotation marks omitted).

142. CAL. PENAL CODE § 192(b) (2000); *see* People v. Cleaves, 280 Cal. Rptr. 146, 155 (Cal. Ct. App. 1991) (defining involuntary manslaughter as commission of act involving high degree of risk of death or great bodily injury, committed with criminal negligence, and defining criminal negligence as departure from conduct of ordinarily prudent person under same circumstances so as to be incompatible with proper regard for human life); Granite Constr. Co. v. Superior Court, 197 Cal. Rptr. 3, 7–8, 149 Cal. App. 3d 465, 471–72 (Cal. Ct. App. 1983) (finding that corporate employer may be prosecuted for manslaughter in death of employees under existing law).

143. Somers v. Superior Court, 108 Cal. Rptr. 630, 634, 32 Cal.App.3d 961, 967 (Cal. Ct. App. 1973).

144. 467 U.S. 837 (1984).

an agency regulation.[145] In step one of the process, the court decides "whether Congress has directly spoken to the precise question at issue."[146] The court will proceed to the second step of the *Chevron* analysis *only* if it finds an ambiguity in the statute.[147] Step two of the process requires the court to determine whether the agency regulation is "permissible."[148]

In the first step of the *Chevron* analysis, a court examines the statute to decide if the language clearly resolves the dispute at issue or if there is an ambiguity in the text.[149] If the court finds that Congress *has* spoken directly to that issue, both the court and the agency must give effect to that unambiguous statement of Congress and there the matter ends.[150] "A statute is ambiguous if it gives rise to more than one reasonable interpretation."[151] When assessing such ambiguities, courts must examine "the language of the statute"[152] by reading the statute as a whole, because the meaning of the text, whether it appears plain or not, depends on context.[153]

The circumstances underlying the enactment of a particular piece of legislation may persuade a court that Congress did not intend the statutory language to be taken literally.[154] For example, where a literal interpretation of a statute produces absurd results, courts should avoid such an interpretation. In *McNely v. Ocala Star-Banner Corp.*,[155] the Eleventh Circuit utilized this cannon of construction when it decided that a narrow reading of the ADA produced absurd results.[156] Specifically, the Eleventh Circuit held that the ADA's prohibition of discrimination "because of" a disability should not be interpreted as prohibiting

145. *Id.* at 842–43.

146. *Id.* at 842.

147. *Id.* at 842–43.

148. *Id.* at 843.

149. *Id.* at 842.

150. *Id.* at 842–43.

151. DeGeorge v. U.S. Dist. Court for Cent. Dist. of Cal., 219 F.3d 930, 939 (9th Cir. 2000) (internal quotation marks omitted).

152. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999) (internal quotation marks omitted).

153. *See* King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991).

154. Watt v. Alaska, 451 U.S. 259, 266–67 (1981).

155. 99 F.3d 1068 (11th Cir. 1996).

156. *Id.* at 1075.

discrimination "solely because of" a disability.[157] The court reasoned that if the ADA prohibited only discrimination that was "solely because of" a disability, an employer could fire an individual who was both black and disabled without incurring any liability under the ADA.[158]

A court reaches step two of the *Chevron* analysis only if it has determined that Congress did *not* directly address the disputed issue. If an ambiguity exists within the statute, the court cannot impose its own interpretation of the statute.[159] Instead, the court is to defer to the agency's interpretation, as long as that interpretation is "based on a permissible construction of the statute."[160] If Congress expressly delegated authority to an agency, a court must give agency regulations controlling weight unless the regulations are "arbitrary, capricious, or manifestly contrary to the statute."[161]

V. IN *ECHAZABAL V. CHEVRON*, THE NINTH CIRCUIT REJECTED THE EEOC'S DEFINITION OF DIRECT THREAT

The Ninth Circuit, applying the *Chevron* doctrine, decided not to defer to the EEOC interpretation of the direct threat defense in *Echazabal v. Chevron*.[162] The court held that neither the direct threat defense nor the business necessity defense allow an employer to exclude disabled individuals who pose a direct threat to themselves on the job.[163] The United States Supreme Court has not yet decided whether it will grant certiorari in this case.

A. Facts and Procedural History

In *Echazabal*, the Ninth Circuit reviewed a summary judgment ruling that Mario Echazabal had no valid ADA claim against his employer.[164] Echazabal worked as a contract laborer at Chevron's oil refinery in El

157. *Id.* (internal quotation marks omitted).

158. *Id.*

159. Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

160. *Id.* at 843. A permissible construction must be a "reasonable interpretation." *Id.* at 844.

161. *Id.* at 843–44.

162. 226 F.3d 1063 (9th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3619 (U.S. Mar. 9, 2001) (No. 00-1406).

163. *Id.* at 1070, 1072.

164. *Id.* at 1065.

Segundo, California between 1972 and 1996.[165] In 1992, Echazabal applied to work directly for Chevron in the same capacity and Chevron offered him a job, "contingent on his passing a physical examination."[166] A pre-employment physical exam revealed a liver condition that was later diagnosed as hepatitis C.[167] Chevron's doctors determined that by allowing Echazabal to continue working with the liver-toxic solvents and chemicals present on the job,[168] Chevron would be putting his life in danger.[169] Accordingly, Chevron rescinded its offer, though Echazabal remained at the refinery as a contract laborer for the next three years.[170]

Mr. Echazabal again applied for a permanent position in 1995.[171] As before, Chevron extended the same conditional offer, contingent on the outcome of a physical exam.[172] Again, Chevron rescinded its offer on finding that Echazabal's liver might not be able to handle the toxins present in the refinery.[173] Ultimately, as a result of the exam, Mr. Echazabal lost his job at the refinery.[174]

After losing his job, Mr. Echazabal filed a complaint with the EEOC and brought suit in state court. He alleged that Chevron and his contract employer had discriminated against him based on his disability, and in doing so violated the ADA, the Rehabilitation Act, and California's Fair Employment and Housing Act.[175] Chevron removed the case to federal district court and moved for summary judgment on all claims.[176] Although the district court granted summary judgment in favor of Chevron, it certified the case for appeal to the Ninth Circuit Court of Appeals.[177]

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165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 1073 (Trott, J., dissenting) (stating that toxins present on the job included "hydrocarbon liquids and vapors, acid, caustic, refinery waste water and sludge, petroleum solvents, oils, greases, and chlorine bleach") (internal quotation marks omitted).

169. *Id.*

170. *Id.* at 1065.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 1065 & n.1.

176. *Id.*

177. *Id.*

B. Holding and Rationale

In *Echazabal*, the Ninth Circuit questioned "whether the direct threat defense includes threats to one's own health or safety."[178] The issue was one of first impression in the Ninth Circuit and, at the time, had received little treatment in other Circuits.[179] The court noted that several cases had stated, in dicta, that direct threats include threats to the protected individual.[180] After briefly mentioning these cases, the court turned to the one case that had explicitly held that direct threats include threats to one's own health or safety: *Moses v. American Nonwovens*.[181] The court, however, declined to follow *Moses*, on the ground that *Moses* offered no analysis to support its holding.[182]

After rejecting all of the case law on point, the court attempted to resolve the scope of the direct threat defense by examining the language of the statute.[183] The court stated that the language itself was "dispositive" and reasoned that because the statute specified direct threats to others, Congress meant to limit the scope of the defense to others only.[184]

Next, the court invoked the legislative history of the ADA to support its conclusion that the direct threat provision does not include threats to disabled individuals.[185] The court noted that the term direct threat was used hundreds of times in the legislative history, and in almost every case was accompanied by a reference to threats to "others."[186] The court found additional support in committee reports, which indicated that the direct threat provision was meant to codify the standard set forth in *School Board of Nassau County v. Arline*,[187] a case that involved only threats to others.[188] Finally, the court referred to a comment made by the ADA's co-sponsor, Senator Kennedy, stating that the ADA "specifically

178. *Id.* at 1066.

179. *See id.*

180. *Id.* (citing LaChance v. Duffy's Draft House, Inc., 146 F.2d 832 (11th Cir. 1998); EEOC v. Amigo, 110 F.3d 135 (1st Cir. 1997); Daugherty v. City of El Paso, 56 F.3d 695 (5th Cir. 1995)).

181. *Id.* (referencing Moses v. Am. Nonwovens, Inc., 97 F.3d 446, 447 (11th Cir. 1996)).

182. *Id.*

183. *Id.*

184. *Id.* at 1066–67.

185. *Id.* at 1067.

186. *Id.* (internal quotation marks omitted).

187. 480 U.S. 273 (1987); *see supra* notes 57–62 and accompanying text.

188. *Echazabal*, 226 F.3d at 1067.

refers to health and safety threats to others."[189] Finding no ambiguity under the first prong of the *Chevron* analysis, the court held that Congress clearly intended to limit the direct threat defense to threats to others, and rejected the EEOC's contrary interpretation.[190]

In addition to striking down a defense based on direct threats to the disabled individual, the court also held that an employer could not use the business necessity defense to justify excluding disabled employees who risked injury or illness.[191] Initially, the court reasoned that the ability to perform a job without posing a threat to one's own health or safety was not an "essential" function of any job.[192] The court deemed such qualification standards "paternalistic" and inconsistent with the ADA's underlying policy.[193] The court declined to follow the reasoning of *EEOC v. Exxon Corp.*,[194] which held that an employer could defend general safety requirements using the business necessity defense.[195] The court chose not to follow the case, stating only that the case's factual scenario involved threats to others, not threats to individuals.[196]

Next, the court refused to extend the Ninth Circuit Rehabilitation Act holdings of *Mantolete v. Bolger*[197] and *Bentivegna v. DOL*,[198] which established that personal safety requirements were valid qualification standards.[199] Because the Rehabilitation Act did not define "qualified handicapped person," the *Mantolete* and *Bentivegna* courts had applied an EEOC regulation that permitted them to consider safety of the disabled individual as a qualification standard.[200] However, the *Echazabal* court noted that the ADA already had a definition of "qualified individual with a disability" so there was no need to look to Rehabilitation Act regulations or case law defining that term.[201] Noting that the ADA's definition of "qualified individual with a disability" did

189. *Id.* (quoting 136 CONG. REC. S9684-03, at S9697 (1990)).

190. *Id.* at 1069.

191. *Id.* at 1072.

192. *Id.* at 1071–72.

193. *Id.* at 1068, 1071.

194. 203 F.3d 871, 873–75 (5th Cir. 2000).

195. *Echazabal*, 226 F.3d at 1072 n.11 (citing *Exxon*, 203 F.3d at 873–75).

196. *Id.*

197. 767 F.2d 1416 (9th Cir. 1984); *see supra* notes 127–32 and accompanying text.

198. 694 F.2d 619 (9th Cir. 1982); *see supra* notes 119–26 and accompanying text.

199. *See Echazabal*, 226 F.3d at 1071 n.10.

200. *Id.* (internal quotation marks omitted).

201. *Id.* (internal quotation marks omitted).

not mention threats to the individual, the *Echazabal* court concluded that the ADA definition superceded the Rehabilitation Act's regulatory definition, rendering both *Mantolete* and *Bentivegna* inapplicable to the ADA.[202]

Finally, the court dismissed Chevron's argument that employers would face tort liability if required to hire at-risk disabled individuals, stating that the issue was not properly before it.[203] The court briefly mentioned *International Union, UAW v. Johnson Controls*,[204] suggesting that state tort law would likely be preempted where it interfered with federal anti-discrimination law.[205] The court, however, did not discuss whether state criminal laws would be preempted by its interpretation of the ADA.

In a strongly worded dissent, Judge Trott questioned the court's "bizarre" holding that Mr. Echazabal was "qualified," because performing the essential functions of his job could kill him.[206] Judge Trott asserted that the court's prohibition of paternalism in the workplace was "pernicious" when used to displace longstanding workplace safety laws protecting employees.[207] Judge Trott further noted that the holding would lead to absurd results: those very workers known to be in danger would receive the least amount of protection because employers would be reluctant to exclude them from dangerous work.[208] Chevron has since petitioned the United States Supreme Court for certiorari to resolve the issue of whether the direct threat defense includes threats to disabled individuals.[209]

VI. THE *ECHAZABAL* COURT SHOULD HAVE DEFERRED TO THE EEOC'S REGULATIONS

By rejecting the EEOC's interpretation of direct threat that allowed employers to consider the personal health and safety of disabled

202. *Id.*

203. *Id.* at 169–70.

204. 499 U.S. 187, 206 (1991) (holding that bona fide occupational qualification cannot exclude all members of protected class out of paternalistic concern for welfare of protected class).

205. *Echazabal*, 226 F.3d at 1069 (citing *Johnson Controls*, 499 U.S. at 210).

206. *Id.* at 1073–74 (Trott, J., dissenting).

207. *Id.* at 1074 (Trott, J., dissenting).

208. *Id.*

209. *Id.*

applicants, the *Echazabal* court completely disregarded both precedent and workplace safety concerns. The court erred during step one of the *Chevron* analysis by determining that the statute's "plain language" prevented employers from defending a discrimination claim on the grounds that the plaintiff posed a safety threat to himself or herself. Because the ADA's language is ambiguous on this issue, the court should have proceeded to step two of the *Chevron* analysis, which requires the court to defer to an agency regulation unless that regulation is arbitrary, capricious, or manifestly contrary to the statute. Because the EEOC interpretation of direct threat as including threats to disabled individuals is a permissible reading of the statute, the court should have deferred to the regulation. Finally, the court's utter disregard for a job-applicant's personal safety runs counter to existing workplace safety laws and forces employers to risk violating either the ADA or state criminal and labor laws.

A. The Plain Language of the ADA Is Ambiguous on the Topic of Direct Threats to Disabled Individuals

Step one of the *Chevron* process required the *Echazabal* court to examine the ADA's text to determine whether or not Congress intended to permit the exclusion of at-risk disabled individuals from the workplace.[210] From the statutory text, it is unclear whether Congress meant the direct threat defense to be the ADA's exclusive safety-based defense, or whether the direct threat defense was simply an example of the kind of qualification standard permitted by the ADA. Had it adhered to the traditional tools of statutory construction, the *Echazabal* court would have discovered this ambiguity and, as a result, would have deferred to the EEOC's interpretation of direct threat.

The language of the statute suggests that the direct threat provision is an example of one, but not the only, safety-based qualification standard that the ADA allows.[211] Initially, the statute provides that employers can adopt exclusionary qualification standards when those standards are job-related and consistent with business necessity.[212] Because employers must obey state workplace safety laws that make it a crime to subject

210. *See* Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

211. Appellee's Petition for Rehearing with Suggestions for Rehearing En Banc at 11, Echazabal v. Chevron USA, Inc., 226 F.3d 1063 (9th Cir. 2000) (No.98-55551).

212. 42 U.S.C. § 12,111(8) (1994).

employees to known dangers on the job,[213] safety is arguably both job-related and consistent with business necessity. Thus, an employer could potentially defend all safety-related requirements under the business necessity defense. The statute lists the direct threat defense as merely an example of one acceptable qualification standard, using the permissive language that employers "may" impose a requirement that employees not pose a direct threat to others.[214] Contrary to *Chevron*'s interpretation, this example need not prevent an employer from defending other safety-based qualification standards using the business necessity defense.

The Fifth Circuit, in *EEOC v. Exxon*,[215] recognized the effect of the permissive "may" and concluded that safety requirements are not "exclusively cabined into the direct threat test."[216] In effect, the *Exxon* court held that if a safety requirement did not fall within the direct threat defense, an employer could alternatively defend that requirement as a business necessity.[217] Although *Echazabal* disregarded this case because it dealt with threats to others, the *Exxon* court suggested its holding should apply to *all* safety-based qualification standards—those protecting the disabled individual *and* others.[218]

The *Echazabal* court avoided this textual ambiguity by failing to follow proper canons of statutory interpretation. First, the court focused entirely on the direct threat provisions to determine the plain meaning of the statute.[219] The plain meaning of the statute must be determined by looking at both the language in question *and* the entire statutory context.[220] The court should have read the provisions related to the direct threat defense in conjunction with the ADA section describing those qualification standards that are consistent with business necessity.[221] If the court had done so, it could have seen the direct threat defense for what it was—one example of an acceptable qualification standard.

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213. *See supra* Section III.

214. 42 U.S.C. § 12,113(b).

215. 203 F.3d 871 (5th Cir. 2000).

216. *Id.* at 873.

217. *See id.*

218. *See id.* at 874–75.

219. Echazabal v. Chevron USA, Inc., 226 F.3d 1063, 1066–68 (9th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3619 (Mar. 9, 2001) (No. 00-1406).

220. King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991).

221. *See* 42 U.S.C. § 12,112(b)(6) (1994).

Second, a restrictive reading of the direct threat defense produces the sort of absurd results that courts are supposed to avoid.[222] For example, the *Echazabal* court's narrow interpretation would force a peanut farm to hire an individual disabled by a severe peanut allergy to work in its nut-packing facility; a grocery store could not legally discharge a disabled butcher with hemophilia; and a window-washer disabled by vertigo could continue working on skyscrapers hundreds of stories above the ground.[223] In his *Echazabal* dissent, Judge Trott expressed the view that Congress could not have intended absurd results when codifying the ADA's direct threat provision.[224]

Although the *Echazabal* court read the "plain language" of the direct threat defense to prevent employers from excluding individuals at risk of workplace injury, the court could have just as easily concluded that the ADA preserves for employers the right to discharge such employees as a business necessity. In this way, the plain language of the ADA is ambiguous on the issue of whether an employer could exclude a disabled individual who risked harm to himself or herself on the job.

B. Under the Arbitrary or Capricious Standard, the Echazabal *Court Should Have Deferred to the EEOC Guidelines*

The EEOC interpretation of direct threat is permissible because it reconciles the ambiguity in the ADA's text in a way that is consistent with the ADA's legislative history, the Rehabilitation Act regulations, and the case law under both the ADA and the Rehabilitation Act. Furthermore, the EEOC interpretation minimizes paternalistic decisions based on stereotypes. The *Chevron* doctrine requires a court to defer to agency regulations that are based on a "permissible" reading of a statute.[225] Because Congress gave the EEOC an express grant of authority to implement Title I of the ADA,[226] the court must accept the

222. *See* McNely v. Ocala Star-Banner Corp., 99 F.3d 1068, 1075 (11th Cir. 1996); *supra* notes 155–58 and accompanying text.

223. For a list of similar hypotheticals, see Appellee's Petition for Rehearing with Suggestions for Rehearing En Banc at 13, Echazabal v. Chevron USA, Inc., 226 F.3d 1063 (9th Cir. 2000) (No. 98-55551).

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

225. Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

226. 42 U.S.C. § 12,116; *see also* Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 37,526 (July 26, 1991).

EEOC's regulations unless they are "arbitrary and capricious."[227] Since the EEOC regulations are compatible with the ADA's language, legislative history, and case law, the *Echazabal* court should have deferred to those regulations.

1. *The EEOC's Interpretation of Direct Threat is Consistent with the ADA's Text, Legislative History, and Case Law*

The EEOC interpretation that the direct threat defense includes threats to disabled individuals is permissible because the ADA allows employers to have exclusionary qualification standards that are "job related and are consistent with business necessity."[228] Ensuring the personal safety of employees is a business necessity, given that employers are required by state law to maintain a safe workplace.[229] Thus, it was not arbitrary or capricious for the EEOC to allow for a qualification standard that employees not pose a direct threat to self or others in the workplace.

The legislative history supports the assertion that the ADA allows employers to impose personal safety requirements on their employees. Although the legislative history normally mentions direct threats within the context of threats to others,[230] the legislative history does explicitly recognize the existence of threats to self. For example, the House Labor Committee asserted that the ADA permits an employer to reject a candidate if a pre-employment medical exam reveals a "high probability of substantial harm if the candidate performed the particular functions of the job in question."[231] As an illustration of an acceptable medical exam, the Committee mentioned that employers could test to determine whether exposures to toxic or hazardous chemicals have had a "negative effect" on individual employees.[232] Such a test would reveal ailments affecting primarily the health and safety of each individual. While the *Echazabal* court dismissed the Committee's discussion because it did not take place

227. *Chevron*, 467 U.S. at 843–44.

228. 42 U.S.C. § 12,112(b)(6).

229. *See supra* Section III.

230. *See* Echazabal v. Chevron USA, Inc., 226 F.3d 1063, 1067–68 (9th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3619 (U.S. Mar. 9, 2001) (No. 00-1406) (stating that throughout the legislative history, the term direct threat is accompanied by a reference to "others" or to "other individuals" in the workplace).

231. H.R. REP. NO. 101-485 pt. 2, at 73 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 355–56.

232. *Id.* at 74, *reprinted in* 1990 U.S.C.C.A.N. 303, 357.

"in the context of . . . the direct threat defense,"[233] this legislative history suggests that employers can consider threats to disabled individuals under the business necessity defense.

Finally, case law in the Fifth and Eleventh Circuits supports the EEOC interpretation of the direct threat defense. In *Moses v. American Nonwovens*,[234] the Eleventh Circuit explicitly held that the direct threat defense includes threats to the disabled individual as well as to others.[235] In *Daugherty v. City of El Paso*,[236] the Fifth Circuit explained in dicta that because the standards for liability are the same for both the ADA and the Rehabilitation Act, and because the Rehabilitation Act recognized an employer defense based on threats to disabled individuals, the ADA must also recognize that same defense.[237] At the very least, these cases show that the Fifth and Eleventh Circuits have found the EEOC regulations to be reasonable.

2. *The EEOC Interpretation of Direct Threat Is Consistent with the Regulations and Ninth Circuit Case Law Under the Rehabilitation Act*

Additional support for the EEOC interpretation of direct threat may be found in Rehabilitation Act regulations and Ninth Circuit case law, both of which recognize that a disabled individual might not be "qualified" if he posed a threat to his own health or safety on the job.[238] Because the ADA's text and legislative history indicate that Rehabilitation Act precedent applies to the ADA, and because the EEOC regulations are consistent with the Rehabilitation Act, the EEOC interpretation of direct threat is not arbitrary or capricious.

Ninth Circuit case law interpreting the Rehabilitation Act established an employer defense for refusing to hire an employee who posed a threat to his own health or safety in the workplace. In *Bentivegna v. United States Dep't of Labor*,[239] a Ninth Circuit panel held that in order to prove

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233. *Echazabal*, 226 F.3d at 1068 n.6.

234. 97 F.3d 446 (11th Cir. 1996).

235. *Id.* at 447.

236. 56 F.3d 695 (5th Cir. 1995).

237. *Id.* at 697–98.

238. *See* 29 C.F.R. § 1614.203(a)(6) (2000); Mantolete v. Bolger, 767 F.2d 1416, 1422 (9th Cir. 1985); Bentivegna v. U.S. Dep't of Labor, 694 F.3d 619, 622 (9th Cir. 1982).

239. 694 F.3d 619 (9th Cir. 1982).

an employee unqualified under the "safe performance" requirement, an employer must show a link between the disability and a possibility of future injury or health problem.[240] In *Mantolete v. Bolger*,[241] the Ninth Circuit again recognized a defense based on a threat to personal safety but limited the defense by requiring the employer to make, in each individual case, an independent medical assessment of the probability and severity of the potential harm.[242] Thus, the Rehabilitation Act's regulations and case law provided that employers would be able to exclude disabled individuals who posed a threat to their own personal safety in the workplace.

The *Echazabal* court chose to disregard this case law, concluding instead that the ADA superceded the Rehabilitation Act.[243] Specifically, the court distinguished the cases on the ground that unlike the Rehabilitation Act, the ADA defined the term "qualified individual with a disability" and the ADA definition did not mention threats to the disabled individual.[244] However, the ADA's legislative history evidences the intent that the ADA should mirror the Rehabilitation Act; in particular, the term "qualified individual with a handicap" was meant to be the same as in the regulations implementing the Rehabilitation Act.[245] The EEOC regulations implementing the Rehabilitation Act stated that an employee would not be "qualified" under the Rehabilitation Act if he could not perform the essential functions of the job without injury to himself or others.[246] Likewise, the DOL stated that an employer could have a job requirement that excluded disabled individuals and still be in compliance with the Rehabilitation Act, if that requirement provided for "safe performance."[247]

Moreover, in *Daugherty v. City of El Paso*,[248] the Fifth Circuit stated that the Rehabilitation Act regulations and case law would apply to the

240. *Id.* at 622.

241. 767 F.2d 1416 (9th Cir. 1985).

242. *Id.* at 1422.

243. Echazabal v. Chevron USA, Inc., 226 F.3d 1063, 1071 n.10 (9th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3619 (U.S. Mar. 9, 2001) (No. 00-1406).

244. *Id.* (internal quotation marks omitted).

245. H.R. REP. NO. 101-485, pt. 3, at 33 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 455 (citing 42 Fed. Reg. 22686 (1977)); *See* H.R. REP. NO. 101-485, pt. 2, at 55, *reprinted in* 1990 U.S.C.C.A.N. at 337.

246. 29 C.F.R. § 1614.203(a)(6) (2000).

247. *Id.* § 32.14.

248. 56 F.3d 695 (5th Cir. 1995).

ADA.[249] Since the cases and regulations under the Rehabilitation Act provided for a personal safety requirement, that same requirement should also apply to the ADA. *Echazabal* should have deferred to the EEOC interpretation of direct threat because the EEOC definition was consistent with both the Rehabilitation Act regulations and case law.

3. *The EEOC Interpretation of Direct Threat Reconciles the Statute's Ambiguous Text in a Way that Minimizes Paternalism*

The EEOC interpretation is reasonable because it fairly balances the competing interests of employers who want workplace safety and disabled individuals who want to work.[250] The EEOC regulation prohibits employers from defending safety-based qualification standards under the more lenient business necessity defense, as the district court in *Kohinke v. Delta Airlines*[251] and the Fifth Circuit in *EEOC v. Exxon Corp.*[252] suggested could be done.[253] To plead the direct threat defense, an employer must make an individualized assessment of one's ability to do a job safely, based on real medical evidence.[254] The employer must also show that the risk to self presently exists, that severe harm will result, and that the harm is both likely and imminent.[255] When defending a general qualification standard, however, the employer need only show that the standard is job-related and consistent with business necessity.[256]

By including threats to self within the direct threat defense, the EEOC interpretation prohibits employers from excluding an entire group of people out of a mere business interest in employee safety, instead forcing them to defend such exclusions on a case-by-case basis.[257] The interpretation is consistent with the Rehabilitation Act precedent in *Mantolete v. Bolger*,[258] which required an independent medical assessment of the likeliness and severity of harm before an employer

249. *Id.* at 698.

250. *See* Bush, *supra* note 16, at 1070–71.

251. 932 F. Supp. 1110 (N.D. Ill. 1996).

252. 203 F.3d 871 (5th Cir. 2000).

253. *Kohinke*, 932 F.Supp. at 1113; *Exxon*, 203 F.3d at 873.

254. *See* 29 C.F.R. Pt. 1630, App. § 1630.2(r) (2000).

255. *See id.*

256. *See id.*

257. *See supra* Section II.B.1.

258. 767 F.2d 1416 (9th Cir. 1985).

could label an applicant "unqualified."[259] The EEOC interpretation reconciles concerns about discrimination based on paternalistic stereotypes with an employer's legitimate need for safety in the workplace. As a result, the EEOC interpretation limits the number of paternalistic decisions that will be made, and supports, rather than undermines, the ADA's underlying policies.

C. Echazabal *Forces Employers to Choose Between Violating the ADA and Violating State Workplace Safety Laws*

Recall the hypothetical at the beginning of this Note: A construction worker with vertigo applies for a job at a California-based construction company that builds skyscrapers.[260] Although the employer could try to accommodate this employee with the standard harness and safety-rope, she is still at a greater risk of falling than the average worker. As shown above, California's Labor Code requires an employer to do everything "reasonably necessary to protect the life, safety, and health of employees."[261] If the employer cannot prevent this applicant from encountering vertigo-triggering heights on the job, the only way to adequately protect her "life, safety, and health" is not to hire her . . . or so a clever prosecuting attorney might argue, after her client's untimely death on the job. Under a standard requiring the workplace to be "safe and healthful" for an employee with vertigo, a jury could find the construction company liable for hiring her in the first place.[262]

By misreading the statute and incorrectly rejecting the EEOC interpretation of the direct threat defense, the *Echazabal* court has placed employers in an untenable position. After *Echazabal*, the ADA no longer permits employers to reject individual disabled applicants who are at an increased risk of injury, but state law still requires employers to comply with safety requirements.[263] As a result, employers in the Ninth Circuit

259. *Id.* at 1422–23.

260. *See supra* note 1 and accompanying text.

261. *See supra* note 135 and accompanying text.

262. *See supra* note 138 and accompanying text.

263. The *Echazabal* court did not address the issue of whether its interpretation of the ADA would preempt state criminal workplace safety laws. *See supra* Section II.C. While the issue of preemption is beyond the scope of this Note, it is unlikely that the ADA would preempt criminal workplace safety laws because such laws fall under the state's traditional police power. Moreover, the fact that the employer hired the disabled individual would defeat an argument that the ADA's purpose, to open employment opportunities to persons with disabilities, had been thwarted by criminal liability.

who follow the *Echazabal* ruling and disregard the health and safety of disabled job applicants will risk criminal sanctions under state workplace safety laws.

VII. CONCLUSION

The EEOC's direct threat provision, which permits employers to weed out those employees who are at a heightened risk of on-the-job injury, strikes a balance between the employer's interest in workplace safety and the interest of disabled individuals to participate in the workforce. The Ninth Circuit, in *Echazabal v. Chevron*, disrupted that balance by holding that an employer could not, under any circumstance, exclude a disabled individual from work just to protect that person's health or safety. Under the *Chevron* doctrine of deference to agency regulations, the court should have deferred to any interpretation of "direct threat" that was reasonable in light of the ADA's text and legislative history. In its attempt to rid the workplace of paternalism, the court turned its back on the state and federal safety laws that forbid employers from knowingly subjecting workers to life-endangering conditions. As a result, employers now have an ugly choice to make: risk an employee's life or risk a discrimination suit under the ADA.