

9-2003

So What If I'm Gonna Hurt Myself: The ADA's Direct Threat Defense

Tory L. Lucas

Liberty University, tlucas3@liberty.edu

Follow this and additional works at: http://digitalcommons.liberty.edu/lusol_fac_pubs



Part of the [Law Commons](#)

Recommended Citation

Lucas, Tory L., So What If I'm Gonna Hurt Myself: The ADA's Direct Threat Defense (September 1, 2003). Nebraska Lawyer Magazine, p. 7, September 2003.

This Article is brought to you for free and open access by the Liberty University School of Law at DigitalCommons@Liberty University. It has been accepted for inclusion in Faculty Publications and Presentations by an authorized administrator of DigitalCommons@Liberty University. For more information, please contact scholarlycommunication@liberty.edu.

So What If I'm Gonna Hurt Myself: The ADA's Direct Threat Defense

by *Tory L. Lucas*



Introduction

A high beam walking ironworker atop a skyscraper develops a severe case of vertigo. A power saw operator develops narcolepsy. Must the employers of these individuals allow them to continue working regardless of the risk they pose to their own safety? The Americans with Disabilities Act of 1990 (ADA) clearly provides a defense to discrimination against an individual with a disability when the individual poses a direct threat to the health or safety of other individuals in the workplace. What if the employee poses a direct threat to his own health or safety, but does not pose a direct threat to the health or safety of other individuals in the workplace?



Tory L. Lucas received his B.A., magna cum laude, from Culver-Stockton College and J.D., summa cum laude, from Creighton University; LL.M. (thesis pending), University of Missouri-Kansas City). Tony is a law clerk for The Honorable William Jay Riley of the United States Court of Appeals for the Eighth Circuit. Before joining Judge Riley's staff, Tony was the Arthur Mag Fellow in Law at the University of Missouri-Kansas City School of Law, served as a judge advocate in the United States Air Force, and was a litigation associate in private practice in Sioux City, Iowa.

Since the ADA became law more than a decade ago, many attorneys have assumed the direct threat defense allowed employers to discriminate against an individual with a disability if the individual posed a direct threat to the health or safety of the individual or others in the workplace. While acknowledging it has no textual support in the ADA, an author of a disability law textbook made the following statement: "It is clear that . . . the ADA [does not] require employment of individuals when such action would result in a direct threat to the health or safety of the individual or others in the workplace."¹

Even though the ADA does not specifically include a threat-to-self defense, the Equal Employment Opportunity Commission (EEOC) expanded the direct threat defense to include direct threats to one's own health or safety. Some federal courts deferred to the EEOC's expansion of the direct threat defense. However, some courts refused to defer, holding that an individual with a disability cannot be denied a job just because the individual poses a direct threat to his own health or safety.

Because the appellate courts were split, the United States Supreme Court decided the issue last summer, holding the EEOC's expanded direct threat regulation was permissible.² Until then, courts, attorneys, employers and employees were left floundering on whether the direct threat defense included direct threats to one's own health and safety. This article will describe the ADA's direct threat defense and how the EEOC expanded it, discuss how lower federal courts analyzed the direct threat defense, examine the Supreme Court's direct threat decision, and briefly analyze the contours of the direct threat defense.

The Statutory and Regulatory Direct Threat Defense

The ADA's Direct Threat Defense

The ADA prohibits employment discrimination against a qualified individual with a disability because of the individual's disability.³ A "qualified individual with a disability" is "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."⁴ The ADA authorizes discrimination against individuals with disabilities in certain circumstances: "It may be a defense to a charge of discrimination under this Act 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."⁵ In addition to that general defense, the ADA specifically provides for a defense to employment discrimination based on 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."⁶ Clearly, this provision sets forth the direct threat defense. The ADA defines "direct threat" as "**a significant risk to the health or safety of others** that cannot be eliminated by reasonable accommodation."⁷

A simple reading of the ADA's plain language reveals nothing in the direct threat defense authorizes an employer to discriminate against an individual with a disability when that individual poses a direct threat to his own health or safety. It only specifically allows for such a defense when the individual poses a direct threat to the health or safety of other individuals in the workplace. The ADA's plain language does not end the inquiry, however, as the ADA specifically authorized the EEOC to issue and enforce regulations implementing the ADA.⁸ The EEOC has complied with this Congressional charge.

The EEOC's Direct Threat Defense

Under express Congressional authority, the EEOC has interpreted the ADA in an exhaustive set of regulations.⁹ The EEOC has specifically interpreted the direct threat defense and expanded it under its regulations. While the ADA seems to limit the direct threat defense to the health or safety of others in the workplace, the EEOC's regulations extend the defense to include those circumstances where an individual with a disability poses a direct threat to the health or safety of himself or others in the workplace.

The EEOC follows the ADA's general defense to discrimination charges whenever qualification standards have "been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished with reasonable accommodation."¹⁰ However, when it comes to the direct threat defense, the EEOC charts a different course: "The term 'qualification standard' may include a requirement that an individual shall not pose a **direct threat to the health or safety of the individual or others** in the workplace."¹¹ As can readily be seen, the EEOC extends the direct threat defense to include direct threats to the individual's own health or safety in addition to others in the workplace. Finally, the EEOC defines direct threat as "**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**."¹² The EEOC requires that any direct threat determination "be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job" and "shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence."¹³

Before the Supreme Court decided the issue, some courts followed the EEOC regulations, allowing employers to discriminate against individuals with disabilities who posed a direct threat to their own health or safety, regardless of the threat posed to other individuals in the workplace. Other courts struck down the EEOC's expansion of the direct threat defense because it contradicted the ADA's plain language and legislative history.

Lower Courts Tackle Direct Threat Defense

Courts Defer to EEOC's Direct Threat Defense

The Eleventh Circuit Court of Appeals cavalierly addressed the direct threat defense seven years ago without analysis. In *Moses v. American Nonwovens, Inc.*,¹⁴ an employer fired an employee because of his epilepsy. The employee stipulated that, had he continued working, he would have had seizures on the job. His assigned jobs included sitting on a platform above fast-moving rollers, sitting underneath a conveyor belt, and working next to exposed machinery with temperatures of 350 degrees. The court recognized each of the employee's "assigned tasks presented grave risks to an employee with a seizure disorder."¹⁵ After his employer fired him for posing a direct threat to his own safety, the employee sued under the ADA. The employer asserted the direct threat defense and the district court granted summary judgment in the employer's favor. The Eleventh Circuit affirmed after stating an "employer may fire a disabled employee if the disability renders the employee a 'direct threat' to his own health or safety."¹⁶ In doing so, the court simply cited both the ADA's and EEOC's direct threat provisions.¹⁷ The court did not discuss the disparity between the ADA's plain language and the EEOC's addition of the threat-to-self defense. Two years later, the Eleventh Circuit, in *LaChance v. Duffy's Draft House, Inc.*,¹⁸ again suggested the direct threat defense applies to threats to one's own health or safety. In *Borgialli v. Thunder Basin Coal Co.*,¹⁹ the Tenth Circuit Court of Appeals, without analysis, stated that, "[u]nder the ADA it is a defense to a charge of discrimination if an employee poses a direct threat to the health or safety of himself or others." As seen below, courts unwilling to yield to the EEOC had conducted the only reasoned analysis of the direct threat defense.

Ninth Circuit Rejects EEOC's Direct Threat Defense

The Ninth Circuit Court of Appeals took direct aim at the EEOC's expansion of

Continued on page 10

the direct threat defense. As you will see in Section IV below, the Supreme Court then took direct aim at the Ninth Circuit's opinion. In *Echazabal v. Chevron USA, Inc.*, the court asked "whether the 'direct threat' defense available to employers under the [ADA] 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."²⁰ Noting this was a question of first impression for the Ninth Circuit, the court observed the issue had received little treatment in other circuits, and, in the circuits that had addressed the issue, none provided useful analysis. Therefore, the court began an exhaustive analysis of the threat-to-self defense.

Quoting the ADA, the court aptly concluded "the language of the direct threat defense plainly does not include threats to the disabled individual himself."²¹ Based on the ADA's plain language, the court stated it could have held, without further analysis, that the ADA does not allow an employer to use the direct threat defense when the employee poses a threat to his own health or safety. Notwithstanding, the court analyzed the ADA's legislative history.

Noting "direct threat" is used hundreds of times in the ADA's legislative history, the court observed that nowhere is the direct threat defense accompanied by a reference to a threat to the employee himself.²² The court showed that nearly every time direct threat is even mentioned it is joined by a reference to a threat to other individuals.²³ The ADA's co-sponsor, Senator Edward Kennedy, pronounced "[i]t is important, however, that the ADA specifically refers to the health and safety threat to others. Under the ADA, employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health."²⁴ The court also showed Congress believed "overprotective rules and policies" are forms of discrimination confronting individuals with disabilities,²⁵ and recognized that the Supreme Court has generally "interpreted federal employment discrimination statutes to prohibit paternalistic employment policies."²⁶

After concluding the ADA's plain language and legislative history rejected the EEOC's expansion of the direct threat

The direct threat defense is a complex and difficult issue in theory and practice.

defense, the court squarely addressed the employer's arguments. First, the employer argued the court should defer to the EEOC's contrary interpretation of the ADA. Dismissing this argument, the court rejected the EEOC's interpretation because it plainly contradicts Congress' clear intent: "the language of the direct threat defense plainly expresses Congress's intent to include within the scope of § 12113 defense only threats to other individuals in the workplace."²⁷

The employer's second argument was Congress' clear intent should be ignored "because forcing employers to hire individuals who pose a risk to their own health or safety would expose employers to tort liability."²⁸ Referring to dictum from the Supreme Court in *UAW v. Johnson Controls*,²⁹ the court rejected this argument because "the Supreme Court strongly suggested that state tort law would be preempted to the extent that it interfered with federal antidiscrimination law."³⁰

The court then discussed the employer's claim that the individual with a disability who poses a direct threat to his own safety is not a qualified individual with a disability because he is not otherwise qualified to perform the essential job functions. The court summarily rejected this contention because the employer'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."³¹ Although the court

stated it would, in most circumstances, defer to an employer's decision as to what constitutes an essential job function, it nevertheless rejected the employer's interpretation in the instant case of what may constitute an essential job function and held "the risk that [the employee]'s employment might pose to his own health does not affect the question whether he is a 'qualified individual with a disability.'"³² The court then summed up its analysis and holding:

[W]e conclude 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.³³

The three-judge panel was not unanimous, however, as Judge Stephen S. Trott wrote a scathing dissent.³⁴ The dissent contended that an employee who poses a direct threat to his own safety is not otherwise qualified under the ADA: "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. To ignore this reality is bizarre."³⁵ The dissent then noted both state and federal statutes overflow with laws designed to protect workers from harm. Judge Trott recognized that America has readily "rejected the idea that workers toil at their own peril in the workplace."³⁶ Citing California and Arizona laws where "it is a crime knowingly to subject workers to life-endangering conditions," the dissent maintained that the court, in effect, repealed these laws with its ruling.³⁷

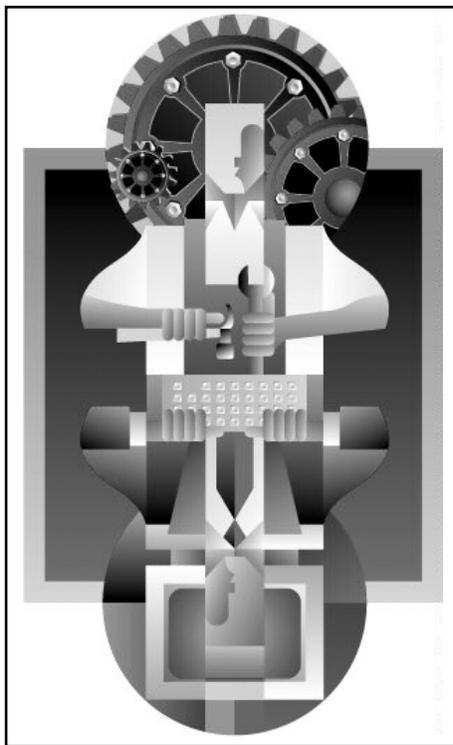
The dissent also made the following observation about workplace safety: "So much for OSHA [i.e., the Occupational Safety and Health Act of 1970]. Now, our laws give less protection to workers

known to be in danger than they afford to those who are not. That seems upside down and backwards. Precisely the workers who need protection can sue because they receive what they need.”³⁸ In addition to concluding that the employee was not otherwise qualified, the dissent stated “the EEOC has rationally and humanely spoken” on the direct threat defense and the court should have deferred to the EEOC’s interpretation.³⁹ Therefore, the dissent would have blessed the EEOC’s direct threat defense.

The dissent decried “that 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.”⁴⁰ In a similar vein, a legal commentator criticized the majority for its failure to understand the gravity of the safety issues involved:

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.⁴¹

Finally, the dissent in *Echazabal* would have allowed the employer to claim undue hardship: “I believe 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 legal peril involved is obvious, and a simple human to human matter, such a moral burden is unconscionable.”⁴² In its final analysis, the dissent gleefully acknowledged a conflict among the circuits: “Finally, and fortunately, we have created a conflict with the Eleventh Circuit. . . . I say ‘fortunately’ because this conflict will compel the Supreme Court — or Congress — to resolve this dispute — unless we do so ourselves by way of *en banc* review.”⁴³



Judge Trott’s prophesy was realized when the Supreme Court resolved the dispute by authorizing the EEOC’s expansion of the direct threat defense. An examination of the Supreme Court’s decision is contained in section IV below.

Courts Adopt Hybrid Analysis

Analyzing the direct threat defense as the Ninth Circuit did in *Echazabal*, some courts agreed the defense does not apply to threats to one’s own health or safety. These courts nevertheless allowed employers to claim an individual is not a qualified individual with a disability when he poses a direct threat to his own health or safety.

In one of the first cases to address the direct threat issue, a federal trial court in Illinois concluded, in *Kohnke v. Delta Airlines, Inc.*, “that any ‘direct threat’ jury instruction must refer to a direct threat to others, not a direct threat to [the disabled employee] himself.”⁴⁴ With precision analysis, the court quickly dismissed the EEOC’s expansion of the direct threat defense to include threats to self as untenable. Reviewing the ADA’s plain meaning, legislative history and caselaw (which was nonexistent at the time), the court determined the direct threat defense only applies to threats to others in the workplace.⁴⁵ Notwithstanding, the court still allowed the employer to raise the employee’s

safety in another context. Specifically, the court asserted an employer may be able to use the defense that a qualification standard excluding an employee with a disability who poses a direct threat to his own safety if the standard is job related and consistent with business necessity.⁴⁶ The court also suggested an employee still must prove he is a qualified individual with a disability, which he may not be able to do if he poses a direct threat to his own safety.⁴⁷

A federal district court in Iowa also provided a compelling discussion of the direct threat defense and aligned itself with *Kohnke*. In *Kalskett v. Larson Manufacturing Co.*,⁴⁸ the court rejected any argument an employer can use the direct threat defense against an individual with a disability when the individual poses a direct threat to the individual’s own health or safety. Specifically, the court concluded “the defense of direct threat to oneself is not a defense authorized by the plain language of the statute authorizing the defense of direct threat to others.”⁴⁹ Instead of analyzing the case under the direct threat defense, the court analyzed the threat to the individual’s own health and safety under the qualification element of the individual’s *prima facie* ADA claim.⁵⁰ Thus, the court held that an individual with a disability “has the burden to demonstrate whether she is qualified to perform the essential functions of [her] job without risk of injury to herself. In other words, if [the individual] cannot perform the essential functions of a job without risk of injury to herself, and that risk of injury cannot be prevented by a reasonable accommodation, [the individual] cannot perform the essential functions of the job as required by the qualification element.”⁵¹

With some courts accepting the EEOC’s direct threat defense, the Ninth Circuit rejecting it, and other courts transporting the direct threat defense to the plaintiff’s *prima facie* case, employers and employees were subject to different standards. Fortunately, the Supreme Court ended the confusion last year.

Supreme Court Authorizes EEOC’s Direct Threat Defense

Rejecting the Ninth Circuit’s ruling striking down the EEOC’s direct threat



defense, the United States Supreme Court held the ADA permits the EEOC's regulation.⁵² The Court scrupulously explained its reasoning for deferring to the EEOC's interpretation of the direct threat defense.

The Court first recognized the ADA "creates an affirmative defense for action under a qualification standard 'shown to be job-related [and] . . . consistent with business necessity.'"⁵³ Citing the ADA's direct threat defense as "[s]uch a standard," the Court immediately admitted the EEOC's direct threat regulation "carries the defense one step further."⁵⁴

Echazabal contended the ADA's direct threat defense constitutes a textual bar to the EEOC's expansive regulation, leaving no gaps for the EEOC to fill.⁵⁵ Echazabal recognized the "job-related" and "business necessity" defense would have authorized a threat-to-self defense, but argued the addition of the specific threat-to-others defense eliminated the possibility of a threat-to-self defense.⁵⁶ To bolster this argument, Echazabal showed how the EEOC had recognized a threat-to-self defense under the Rehabilitation Act of 1973 before the ADA was enacted, arguing the limited ADA direct threat defense precludes a regulatory expansion.⁵⁷ The Court recognized the Ninth Circuit relied on this argument in applying the interpretive canon, *expressio unius exclusio alterius*, which means "expressing one item of an associated group or series excludes another left unmentioned."⁵⁸ However, the Court rejected the expression-exclusion rule for three reasons.

First, the Court concluded, based on the ADA's text, Congress included the harm-to-others provision as simply an example of a legitimate qualification standard that is job-related and consistent with business necessity.⁵⁹ The Court showed how Congress wrote that qualification standards captured by the "job related" and "business necessity" defense "may include" a direct threat to others.⁶⁰ Classifying the defenses contained in sections 12113(a) and (b) as "spacious defensive categories," the Court decided they gave the EEOC "a good deal of discretion in setting the limits of permissible qualification standards."⁶¹

Second, the Court recognized the ADA does not contain an established series of terms, including threats to others and self,

from which an omission of one establishes a negative implication of the other.⁶² Echazabal claimed history shows Congress deliberately omitted the threat-to-self defense. Specifically, Echazabal shows how the Rehabilitation Act, like the ADA, contained only a threat-to-others defense, but the EEOC expanded it to include threat-to-self as well. As Congress passed the ADA without a threat-to-self defense, after the EEOC had expanded the Rehabilitation Act's threat-to-others defense, Echazabal argued this proves Congress deliberately rejected the threat-to-self defense.⁶³ The Court rejected this argument for two reasons. First, although the EEOC amplified the Rehabilitation Act's text by including a threat-to-self defense, three other interpreting agencies did not.⁶⁴ Given no standard usage by agencies, the Court refused to connect threat-to-self with threat-to-others such that the expression-exclusion rule would apply to Congress's action.⁶⁵ The Court then recognized Congress passed the ADA's threat-to-others defense by using the same language it had used in the Rehabilitation Act, "knowing full well what the EEOC had made of that language."⁶⁶ Thus, Congress's use of identical language could either mean it rejected the EEOC's addition of the threat-to-self defense or assumed the EEOC had the authority to expand the defense again under the ADA as it had done under the Rehabilitation Act.⁶⁷ "Omitting the EEOC's reference to self-harm while using the very language that the EEOC had read as consistent with recognizing self-harm is equivocal at best. No negative inference is possible."⁶⁹

Finally, the Court briefly engaged in slippery slope reasoning as further justification for rejecting the expression-exclusion rule. Recognizing Congress chose to specify only threats to others in the workplace, strict application of the expression-exclusion rule would disallow a defense when an employee poses a threat to others outside the workplace as well: "If Typhoid Mary had come under the ADA, would a meat packer have been defenseless if Mary had sued after being turned away?"⁶⁹

Concluding Congress's inclusion of the threat-to-others defense did not exclude the threat-to-self defense, the Court then analyzed whether *Chevron* deference should attach to the EEOC's direct threat

defense.⁷⁰ In deferring to the EEOC's expansion of the direct threat defense, the Court focused on the interaction between the ADA and OSHA. Specifically, an employer's decision to hire an individual with a disability who poses a direct threat to his own safety "would put Congress's policy in the ADA, a disabled individual's right to operate on equal terms within the workplace, at loggerheads with the competing policy of OSHA, to ensure the safety of 'each' and 'every' worker."⁷¹ Thus, the EEOC made a proper substantive choice between two competing objectives.⁷²

The Court then rejected the argument that the EEOC's direct threat defense allows the type of paternalism the ADA tried to outlaw.⁷³ The Court decided the EEOC reasonably interpreted the ADA to strike at "untested and pretextual stereotypes," but refused to force employers to ignore "specific and documented risks to the employee himself, even if the employee would take his chances for the sake of getting a job."⁷⁴ In addition, the regulation's particularized inquiry requirement disallows an employer from claiming it excluded an individual with a disability for the individual's own good when the employee really does not pose a direct threat to his own safety.⁷⁵

Finally, the Court rejected the argument that the ADA's direct threat defense had been rendered mere surplusage.⁷⁶ Just because the threat-to-self defense could reasonably fall within the general job-related and business necessity defense did not make Congress's direct threat defense useless.⁷⁷ For instance, specifically including the defense avoided future litigation or rulemaking fights over the issue.⁷⁸ Furthermore, the Court noted "[a] provision can be useful even without congressional attention being indispensable."⁷⁹

Brief Analysis of Direct Threat Defense

Given the Supreme Court's validation of the EEOC's direct threat defense, it is imperative for attorneys to understand when and how the defense applies. Briefly, I will discuss the scope of the defense and the Supreme Court's narrow interpretation of it. The focus of this section is to implore attorneys to understand

Continued on page 14

that the direct threat defense should be sparingly utilized.

The direct threat defense is a complex and difficult issue in theory and practice. Individuals with disabilities have been stereotyped for centuries and fear is a huge discriminator. The direct threat defense, as applied to an individual who poses a threat to his own safety, could be sporadically and illogically applied to individuals with disabilities based on stereotypes and fear. Clearly the ADA attempted to shoot down a paternalistic employer's ability to discriminate against individuals with disabilities based on unsubstantiated stereotypes and fears. Americans clearly have an interest in assuring individuals with disabilities have the right to make their own employment decisions rather than paternalistic employers. For the most part, the ADA supports such a view. However, in the limited circumstances in which the direct threat defense may apply, the employee's safety outweighs the employee's right to work. Because the direct threat defense only applies in limited circumstances, attorneys must be extremely critical when analyzing an employer's attempted use of the defense. Although it may appear at first blush that an individual with a disability could easily be negated a job opportunity based on the likelihood he would pose a direct threat to his own health or safety, I do not believe that is the case. If properly applied, the narrowly-interpreted direct threat defense will exclude individuals with disabilities in rare circumstances for three main reasons.

First, decisions based on unsubstantiated fears and stereotypes will not carry the day.⁸⁰ In order to show an individual cannot perform his job safely without posing a significant risk of substantial harm to his own health or safety, an employer must rely on more than mere stereotypes or simple speculation. As the EEOC has pronounced, the direct threat determination can only be made after an "individualized assessment of the individual's present ability to safely perform the essential functions of the job."⁸¹ Therefore, the threat cannot be based on some future

event or the danger posed by performing non-essential functions. Instead, the threat must be based on the current state of the disability and the existing threat it poses to the individual's safety while performing the job's essential functions. In addi-

Because the direct threat defense only applies in limited circumstances, attorneys must be extremely critical when analyzing an employer's attempted use of the defense.

tion, the direct threat assessment must "be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence."⁸² Assumptions and best guesses will not suffice. When deciding whether the direct threat defense applies, an employer should consider the following factors: "(1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm."⁸³ A proper consideration of these factors, along with the appropriate individualized assessment based on "the most current medical knowledge and/or on the best available objective evidence," will not allow the direct threat defense to be abused.

Second, the direct threat standard does not allow an employer to exclude an individual with a disability when that individual's disability might pose a direct threat to his own health or safety. Instead, the employee must pose a significant risk to his health or safety.⁸⁴ The Supreme Court has recognized that, "[b]ecause few, if any, activities in life are risk free, [the ADA does] not ask whether a risk exists, but whether it is significant."⁸⁵ Furthermore, the standard does not simply require a significant risk of any harm to the employee's health or safety. Instead, the EEOC requires a significant risk of substantial harm to meet this standard.⁸⁶ Therefore, a high probability must exist that the individual is indeed a danger to himself and that the resulting injury would be substantial. When this heightened standard is combined with the required individualized assessment based

on a reasonable medical judgment, the use of the direct threat defense should be diminished.

Indeed, the Supreme Court has revealed that the use of the direct threat defense is not readily attainable. *In Bragdon v. Abbott*,⁸⁷ a dentist's examination of an HIV-infected patient discovered a cavity. The dentist informed the patient that he did not fill cavities of HIV-infected patients at his office, but offered to fill the cavity at a local hospital, with the patient absorbing the

additional cost of using the hospital's facilities. The patient sued the dentist under the ADA's prohibition of disability discrimination in places of public accommodation,⁸⁸ and the dentist asserted a direct threat defense. The district court granted summary judgment to the patient, holding the dentist presented no genuine issue of material fact that the patient posed a direct threat to others.⁸⁹ On appeal, the Supreme Court recognized that Title III of the ADA, like Title I dealing with employment, contains an exclusion where the "individual poses a direct threat to the health or safety of others."⁹⁰ As the Supreme Court further recognized, Title III's direct threat provision parallels Title I's employment provision, so the Court's analysis applies with equal force to employment cases applying the direct threat defense.

In determining whether the direct threat defense applied, the Supreme Court had to decide whether the patient posed "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services."⁹¹ The Court stressed that "[t]he existence, or nonexistence, of a significant risk must be determined from the standpoint of the person who refuses the treatment or accommodation, and the risk assessment must be based on medical or other objective evidence."⁹² It is important to note the Court refused to defer to the dentist's judgment of the potential risk: "As a health care professional, [the dentist] had the duty to assess the risk of infection based on the objective, scientific information available to him and others in his profession. His

belief that a significant risk existed, even if maintained in good faith, would not relieve him from liability . . . [because he] receives no special deference simply because he is a health care professional.”⁹³ The dentist was unable to show objective, medical evidence that treating the patient in the hospital was safer than treating her in his well-equipped office.⁹⁴

The dentist then argued “that the use of high-speed drills and surface cooling with water created a risk of airborne HIV transmission.”⁹⁵ The Court rejected this assertion because it was based on inconclusive studies. The dentist also asserted that the Center for Disease Control (CDC) “had identified seven dental workers with possible occupational transmission of HIV.”⁹⁶ The Court also rejected this evidence because, although the “dental workers were exposed to HIV in the course of their employment,” the “CDC could not determine whether HIV infection had resulted from this exposure . . . because [the workers] did not present themselves for HIV testing at an appropriate time after this occupational exposure.”⁹⁷ Regardless, this evidence, “[s]tanding alone, [would not likely] meet the objective, scientific basis for finding a significant risk to the [dentist].”⁹⁸

At its core, *Bragdon* announced the direct threat defense’s medical judgment or objective evidence standards cannot be based on good faith beliefs, inconclusive studies, or potential threats. The threat must be current and objectively verifiable. Clearly, *Bragdon* is a high hurdle for those wishing to assert the direct threat defense against an individual with a disability who seeks to work.

Finally, even if an employer has diligently conducted the individualized assessment based on objective medical evidence that would satisfy *Bragdon*’s high standard and concluded the employee poses an immediate direct threat to his own health or safety, the direct threat defense is still not authorized. Even if an individual’s disability poses a direct threat to his health or safety, the ADA requires an employer to make a reasonable accommodation (that would not pose an undue hardship on the employer) so an individual with a disability can perform a position’s essential functions. In the informal, interactive process, the employer and employee should strive to accommodate the individual’s disability to eliminate the threat to the employee’s health or safety.⁹⁹ When engaging in the interactive process, the employer and employee should seek to “identify the precise

limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.”¹⁰⁰ The ADA and EEOC regulations do not provide an exhaustive list of the types of reasonable accommodations available. Indeed, reasonable accommodations are only limited by the imagination and creativity of those seeking an appropriate accommodation. At a minimum, the EEOC regulations state that reasonable accommodations may include “[m]aking existing facilities used by employees readily accessible to and usable by individuals with disabilities; [j]ob restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.”¹⁰¹ With some work on both sides, the use of the direct threat defense should be rendered moot whenever an appropriate accommodation can be discovered.

The interactive process might discover reasonable accommodations that would thwart the absurd results hypothesized by



Judge Trott's dissent in *Echazabal*. Clearly an ironworker walking the high beams cannot be placed at risk of falling because of a severe case of vertigo. However, a reasonable accommodation might be the use of a harness or reassignment to a job that is fully enclosed. Surely a honey producer would not be required to force a beekeeper who is deathly allergic to bees to freely roam amongst the bees. A reasonable accommodation could be the provision of shots or protective gear. Finally, a power saw operator with narcolepsy should not just operate the saw as though no risk of injury exists. A reasonable accommodation might include a unique shut off or protective guards. In *Moses*, the court held the employee posed a direct threat to his own health or safety. Therefore, the employer could fire him. You will recall the employee had epilepsy and stipulated that he would have had seizures on the job if he continued to work. His essential job functions included working above fast-moving rollers, underneath a conveyor belt, and next to hot machines. Was no reasonable accommodation available to ensure the employee's safety? Once the direct threat defense was held to apply, I believe the focus should have switched to the reasonable accommodation element. Focusing on this element would have appropriately protected the worker's and employer's rights. The bottom line is that, once it has been properly shown an individual with a disability poses a direct threat to his own health or safety, the employer and employee still must seek a reasonable accommodation to eliminate the threat. This interactive process, combined with the tough standards discussed above, should limit the use of the direct threat defense.

Conclusion

Determining whether the ADA's direct threat defense applied to threats to oneself had posed a vexing question to courts, employers and employees until the Supreme Court unanimously announced that the EEOC properly expanded the direct threat defense to include threats to self. Applying the direct threat defense to threats to self will ensure individuals with disabilities will not endanger themselves, while the strict application of the defense will ensure individuals with disabilities are not discriminated against based on stereotypes,

myths, speculation or unfocused paternalism. Requiring employers to conduct an individualized assessment based on the most current medical knowledge or best available objective evidence to determine whether an individual poses a significant risk of substantial harm to himself will not allow stereotypes, fear and unreasonable inferences to run amok. By buttressing this heightened standard with the required interactive process to find reasonable accommodations, the direct threat defense should be used only as a last resort. With these standards in mind, attorneys should be well-equipped to analyze the difficult question of whether an individual poses a direct threat to his own health or safety. ■■■

Endnotes available upon request. Contact Kathryn Bellman, kbellman@nebar.com or Pamela Moore, pmoore@nebar.com at the NSBA office, (402) 475-7091 or (800) 927-0117. Endnotes can also be obtained online at www.nebar.com, at "The Nebraska Lawyer" button.