NOTE

Employers Beware: The Ninth Circuit's Rejection of the "Direct Threat to Self" Disability Discrimination Defense in *Echazabal v. Chevron*

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In May of 2000, the Ninth Circuit addressed for the first time the issue of whether an employer can defend against an employee's disability discrimination claim by asserting that the employee's disability poses a direct threat to the employee's own health and safety. In *Echazabal v. Chevron*,[1] the Ninth Circuit analyzed in depth the "direct threat to self" defense, which has been available to employers under the Equal Employment Opportunity Commission (EEOC) regulations in apparent conflict with the Americans with Disabilities Act (ADA)[2] provision defining affirmative defenses. The defense was asserted by Chevron when Echazabal, a contract employee applying for a permanent position in an oil refinery plant, sued for disability discrimination. Chevron did not hire Echazabal because he was suffering from a severe case of hepatitis C. The position he sought required exposure to chemicals, which would almost certainly have worsened his critical condition, resulting in death. The Ninth Circuit's decision not to recognize the "direct threat to self" defense has wide-reaching implications for employers and employees alike. This Note will discuss those implications and analyze the court's rationale and reasoning in coming to the conclusion.

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1. 226 F.3d 1063 (9th Cir. 2000), *cert. granted*, 2001 WL 267478 (U.S. Oct., 29, 2001). The U.S. Supreme Court granted certiorari to *Echazabal* but has yet to decide the issue as of November 2001.

2. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. § 12112 (1994)).

The ADA, which prohibits employers from discriminating against "qualified individuals with a disability," provides a direct threat affirmative defense for employers.[3] Before *Echazabal*, an employer charged with disability discrimination could assert the defense against an employee who presented a direct threat to the health and safety of the employee himself or herself and others in the workplace.[4] The Ninth Circuit's failure to recognize the direct threat defense in *Echazabal* improperly eliminates the defense's application in situations where there is a threat to an individual's health and safety. The court should have allowed the "direct threat to self" defense because (1) the EEOC should be given deference in interpreting the ADA provision, (2) limiting the defense will result in numerous inherent conflicts between anti-discrimination laws and workplace health and safety laws, (3) the narrowness of the direct threat test serves to alleviate concerns of improper paternalistic employment practices, and (4) limiting the defense will adversely affect employers, imposing undue burdens on them.

This Note will address whether the Ninth Circuit should have upheld the "direct threat to self" defense. First, the Note will introduce the "direct threat to self" debate in the context of the ADA's language, the EEOC-outlined regulatory provisions, and the case law surrounding the direct threat question. Specifically, the Note will address (1) the relationship between the ADA and the EEOC, (2) the compatiblity of the ADA with the Rehabilitation Act of 1973, and (3) the case law applying the EEOC regulations, the ADA provisions, and the Rehabilitation Act provisions. Next, the Note will discuss the factual context of *Echazabal*, the Ninth Circuit's rationale supporting its holding that the "direct threat to self" defense is invalid, and the dissent's argument that such defense should be recognized. Finally, the Note will discuss the court's flawed reasoning, arguing that the "direct threat to self" defense is valid and should have been applied in *Echazabal*.

I. THE DIRECT THREAT DEBATE

The ADA prohibits employers from discriminating against "qualified individuals with a disability" on the basis of that disability.[5] "Qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position. . . . Con-

3. 42 U.S.C. § 12112 (a).
4. 29 C.F.R. § 1630.2(r) (2001).
5. 42 U.S.C. § 12111(8) (1994).

sideration shall be given to the employer's judgment as to what functions of a job are essential."[6] The first question a court must address when assessing the validity of a disability discrimination claim is whether the disabled individual is able to perform the essential functions of the job.[7] If an employer fires, or does not hire, an individual who is able to perform the essential functions of the job, the employer may assert, in some instances, a direct threat defense. To prevail on a direct threat defense, the employer must demonstrate that the employee cannot perform the job functions without a significant direct threat to the health and safety of the employee or others.[8] Herein lies the debate: should the direct threat defense apply only to a threat to the health and safety of others, as is stated in the ADA, or should it be expanded to encompass a threat to the health and safety of the employee as promulgated by the EEOC? The final inquiry for determining if the employer has wrongfully discriminated on the basis of disability is whether, given the direct threat the employee may present, the employer can make a reasonable accommodation that would enable the employee to perform the essential functions of the job without undue hardship on the employer.[9]

A. Relationship Between the ADA and the EEOC

The crux of this debate grows out of the apparent conflict between provisions of the ADA and the regulations promulgated by the EEOC. As the administrative agency implementing the ADA, the EEOC draws its administrative powers from the Act itself.[10] The ADA provides that the Act must be implemented so as not to duplicate the efforts of, or create standards inconsistent with, the Rehabilitation Act of 1973, and the EEOC is charged with carrying out this task.[11] Thus, the EEOC must implement the Act's provisions consistent with the Rehabilitation Act.

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6. *Id.*

7. 29 C.F.R. § 1630.2(r); *See also* Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1247 (9th Cir. 1999); Mantolete v. Bolger, 767 F.2d 1416, 1423 (9th Cir. 1985).

8. The "defense" section of the ADA states that the term "qualification standards" may include a requirement that the individual shall not pose a direct threat to the health and safety of other individuals in the workplace. 42 U.S.C. § 12113 (a) (1994).

9. The relevant portion of the ADA states that discrimination includes:

> not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or an employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

42 U.S.C. § 12112 (b)(5)(a) (1994).

10. 42 U.S.C. §§ 12116, 12117 (1994).

11. 42 U.S.C. § 12117(b).

The Rehabilitation Act of 1973 was enacted to prohibit disability discrimination.[12] Its purpose was to "empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society . . . [and] ensure that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities."[13] The Act did not expressly address an affirmative defense by government agencies when the potential disabled employee poses a direct threat to the health and safety of the individual and others. However, the regulations enacted under the Rehabilitation Act explicitly addressed the issue in defining a "qualified handicapped person" as someone who can work in a position without endangering the health and safety of the *individual* or others.[14] This definition clearly makes an allowance for an employer to choose not to hire potential employees if, because of their disability, they pose a direct threat to the health and safety of themselves.

While both the ADA and the EEOC allow an affirmative defense to an employer who chooses not to hire a potential employee on the basis that the employee poses a direct threat to the health and safety of others,[15] only the EEOC clearly extends the defense to situations where the employee poses a direct threat to the health and safety of himself or herself. The EEOC regulations allow an employer to adopt a set of qualifications including that the employee not pose a direct threat to the health and safety of the individual or others in the workplace.[16] At first blush, this seems at odds with the ADA provision extending the direct threat defense only to others in the workplace. But, an in-depth look at the Act, the Act's purpose, the case law applying the standard, and the EEOC's role will clarify this discrepancy and demonstrate that the EEOC is correct in including the individual within the scope of the defense.

B. Case Law Addressing Direct Threat Defense

The tension between the ADA and the EEOC has received only minimal consideration in most circuit courts. Those circuits that have addressed the "direct threat to self" defense have generally accepted it as a valid defense to a disability discrimination claim. However, general acceptance of the "direct threat to self" defense does not present a clear rule as to whether it is a legitimate defense under the ADA.

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12. 29 U.S.C. § 701 (1994).
13. 29 U.S.C. § 701(b).
14. 29 C.F.R. § 1613.703 (2001).
15. 42 U.S.C. § 12113(a) (1994); 29 C.F.R. § 1630.15 (b)(2) (2001).
16. 29 C.F.R. § 1630.15(b)(2) (2001).

1. Circuits Accepting the "Direct Threat to Self" Defense

The First, Fifth and Eleventh Circuits have upheld the "direct threat to self" defense, although none of these circuits have analyzed the defense in depth. The Eleventh Circuit held that the allowable defenses to disability discrimination did include a "direct threat to self" defense in *Moses v. American Nonwovens, Inc.*,[17] a case involving an epileptic man who was terminated from his job because he worked above and below fast moving press rollers and conveyor belts. In reaching its conclusion permitting such a defense, the court relied almost exclusively on the EEOC regulations; consequently, there was no analysis as to whether the defense promulgated by the EEOC was valid under the ADA.[18] In a similar case, the Eleventh Circuit addressed the "direct threat to self" defense in dicta. In *La Chance v. Duffy's Draft House*[19] an employee's epilepsy caused him to be a direct threat to the health and safety of himself and others while he worked as a line cook, and, thus, he was not a "qualified individual with a disability" under the ADA.[20] During the first two days of work, the employee had three seizures.[21] The court emphasized that the employee posed a threat both to himself and to others because of the appliances he worked around, which included hot ovens, fryers with boiling grease, and slicers.[22] The *La Chance* case can be reconciled with the ADA provision applying to the direct threat to others as well as with the EEOC regulation applying to the direct threat to others or self.

The First Circuit addressed the question of "direct threat to self" in *EEOC v. Amego*.[23] The court held that an employee working at a home for the severely disabled was unqualified because she could not perform the essential functions of the job and that reasonable accommodations would cause an undue burden on the employer.[24] The employee was severely depressed and attempted suicide twice.[25] The court found that, because of her disability, the employee was unable to perform the essential functions of the job, which entailed administering and monitoring resident medications.[26] The court found it inappropriate to engage in the "direct threat to self" defense analysis be-

17. Moses v. Am. Nonwovens, Inc., 97 F.3d 446 (11th Cir. 1996).

18. *Id.* at 447.

19. 146 F.3d 832 (11th Cir. 1996).

20. *Id.* at 836. LaChance did not prevail in his suit in part due to his lack of probative evidence that Duffy's Draft House could have made his workplace safe. *See id.*

21. *Id.* at 833.

22. *Id.* at 835.

23. 110 F.3d 135 (1st Cir. 1997).

24. *Id.* at 144–49.

25. *Id.* at 138.

26. *Id.* at 144–47.

cause the employee, by failing to safely administer medications to the patients, necessarily posed a risk to others.[27] However, the court recognized that Congress intended the ADA's definition of "qualified individual with a disability" to be comparable to the definition used in regulations implementing Sections 501 and 504 of the Rehabilitation Act of 1973.[28] The regulations under the Rehabilitation Act define a qualified individual with a handicap as someone who does not endanger the health and safety of the individual or others.[29] Thus, the First Circuit clearly vocalized acceptance of the "direct threat to self" defense.

Along similar lines, the Fifth Circuit recognized the validity of the "direct threat to self" defense in *Turco v. Hoechst Celanese Corp.*,[30] a case where an employee with diabetes worked as a chemical process operator and was found to have posed a threat to the health and safety of others when he made dangerous mistakes due to his diabetic condition.[31] The employee became unfocused when his blood sugar dropped below certain levels. The court held that the employee failed to show that he was a "qualified individual with a disability" under the ADA because he could not perform the essential functions of the job, including walking, climbing, and concentrating on his work.[32] In dicta, the court indicated that even if the employee had been a "qualified individual with a disability" under the ADA, his employer could still have fired him since he posed a safety risk both to himself and to others.[33] The court editorialized that the employee was "a walking time bomb and woe unto the employer who places an employee in that [chemical process operator] position."[34]

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27. *Id.* at 144.

28. *Id.* (citing H.R. REP. 101-485, pt.2, at 55 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 337).

29. 29 C.F.R. § 1614.203(6) (2001)).

30. 101 F.3d 1090, 1094 (5th Cir. 1996).

31. *Id.* at 1090.

32. *Id.* at 1093–94; *see also* Wann v. American Airlines, Inc., 878 F. Supp. 82 (S.D. Tex. 1994). In *Wann*, the court held that applicant, who suffered from serious breathing problems, was unable to perform the essential functions of the job, and the airline could not provide a reasonable accommodation without eliminating most of the job's essential functions. *Id.* at 85. The applicant suffered from a breathing problem that would worsen and be agitated by working as a fleet service clerk because of the necessary exposure to dust and fumes. *Id.* at 83–84. The court stated that the "qualified individual with a disability" also included a personal safety requirement. *Id.* at 85. While the court did not discuss direct threat to self it asserts a clear position that if an applicant's personal safety would be seriously jeopardized, the applicant might not be a "qualified individual with a disability." *Id.*

33. *Id.* at 1094.

34. *Id.*

2. Courts Not Accepting "Direct Threat to Self" Defense

At least one district court has addressed the "direct threat to self" defense and the discrepancy between the ADA and the EEOC regulations. In *Kohnke v. Delta Airlines, Inc.*,[35] the Federal District Court for the Northern District of Illinois held that any jury instruction on the direct threat defense must refer to a direct threat to other individuals, not to the disabled person himself.[36] There, the employer raised a defense that qualification standards, including the requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace, are job-related and consistent with business necessity and that such performance cannot be accomplished by reasonable accommodation. The court reasoned that the EEOC regulation interpreting the ADA direct threat provision to include threat to self would render meaningless certain words in the ADA.[37] Specifically, the ADA refers to "a direct threat to the health and safety of other individuals in the workplace,"[38] and an adoption of the EEOC regulation would defeat the words "other individuals in the workplace."[39] *Kohnke* serves as the only clear articulation of the ADA/EEOC discrepancy prior to *Echazabal*.

3. The "Direct Threat to Self" Defense as Interpreted under the Rehabilitation Act

Along with the scant "direct threat to self" precedent in the circuit courts, the case law on the Rehabilitation Act of 1973 also deserves attention as valid precedent. Prior to the ADA, the Rehabilitation Act answered the question of whether an employer could choose not to hire an individual posing a direct threat to his or her own health and safety. As such, the Rehabilitation Act decisions serve as guidelines for the EEOC's implementation of the ADA since Congress explicitly intended the ADA to be consistent with the Rehabilitation Act.[40] As previously mentioned, a regulation promulgated under the Rehabilitation Act defines a "qualified individual with a handicap" as a person who does not endanger the health and safety of the individual

35. 932 F. Supp. 1110 (N.D. Ill. 1996). There is very little reference to the facts of this case in the district court opinion. There is one other case that recognizes the discrepancy between the ADA provision and the EEOC regulations, but it is unpublished and lacks any substantive analysis of the direct threat issue. *See* Devlin v. Arizona Youth Soccer Ass'n, No. CIV 95-745 TUC ACM, 1996 WL 118445 (D. Ariz. Feb. 8, 1996).

36. *Kohnke*, 932 F. Supp. at 1110.

37. *Id.* at 1111.

38. 42 U.S.C. § 12113(b) (1994).

39. *Kohnke*, 932 F. Supp. at 1112.

40. 42 U.S.C. § 12117(b) (1994).

or others in the workplace.[41] Two Ninth Circuit cases, *Mantolete v. Bolger*[42] and *Bentivega v. United States Department of Labor*,[43] address the issue of whether an employer's choice not to hire an employee whose disability poses a threat to the employee's own health and safety was a legitimate defense under the Rehabilitation Act.

In *Mantolete v. Bolger*, the court held that a disabled employee was not a qualified handicapped person if her employment would pose a reasonable probability of substantial harm to her.[44] The applicant, who was epileptic, had applied to work at the post office as a "Multi-purpose Letter Sorter Machine" operator.[45] During the pre-employment physical examination, the doctor recommended that the applicant be placed in a position that did not involve using machinery with moving parts.[46] Based on this medical report, the post office declined to consider the applicant for the letter sorting machine operator position.[47] In reaching its conclusion, the court relied on both the language of the regulations and the Congressional intent behind the Rehabilitation Act.[48] The court also articulated the proper standard for review: the test is "whether, in light of the individual's work history and medical history, employment of that individual would pose a reasonable probability of substantial harm."[49] Under this rule, the employer must (1) gather all relevant information about the applicant's work and medical history and (2) independently assess both the probability and severity of potential harm to the applicant or to others in the workplace.[50]

In *Bentivega v. United States Dept. of Labor*, the Ninth Circuit, reviewing the decision of Secretary of Labor declining to award back-pay, held that Labor Secretary applied too lenient a standard in finding that because the individual's employment would cause an "elevated risk of injury," he was not a qualified handicapped person.[51] In that case, the employee, who was diabetic, was hired as a "building repairer."[52] The employer required diabetic employees to demonstrate

41. 29 C.F.R. § 1613.703 (2001).
42. 767 F.2d 1416 (9th Cir. 1985).
43. 694 F.2d 619 (9th Cir. 1982).
44. *Mantolete*, 767 F.2d at 1422.
45. *Id.* at 1418.
46. *Id.*
47. *Id.*
48. *Id.* at 1421–22.
49. *Id.* at 1422.
50. *Id.* at 1423.
51. 694 F.2d at 622–23.
52. *Id.* at 620.

"control" of their blood sugar levels.[53] After a routine test, the employee's blood sugar level indicated that there was a significant possibility of lack of control, and he was fired.[54] The issue was whether the employment qualification that the employee have a certain blood sugar level was "directly connected with, and substantially promote[d] business necessity and safe performance."[55] The employer claimed that this standard was employed to avoid risk of future injury and long-term health problems.[56] In concluding that this "elevated risk of injury" was insufficient to disqualify a handicapped person, the Ninth Circuit questioned the standard applied, but not the right of the employer to include in the job qualifications that the employee does not pose a risk to either himself or to others.[57]

In light of the case law addressing the "direct threat to self" defense, it is clear that there is no bright line rule for determining whether "direct threat to self" should or should not be applied. In this context, the discussion will now turn to *Echazabal v. Chevron.*

II. *ECHAZABAL V. CHEVRON U.S.A., INC.*

Echazabal began working in Chevron's oil refinery in 1972 as a contract employee, and his employment continued until 1996.[58] He had been working at the oil refinery for twenty years as a contract employee when he decided to apply for a position with Chevron working in the same coker unit location.[59] In 1992, he was extended a job offer that was contingent on a physical examination.[60] Echazabal accepted the offer and submitted to a pre-employment medical examination; unfortunately, the examination uncovered that he had contracted hepatitis C, which resulted in a serious liver problem.[61] Based on the results of the examination, Chevron rescinded the job offer after it determined that the job's necessary exposure to various solvents and chemicals would put Echazabal at risk of further damage to his liver.[62] Despite his diagnosis with hepatitis C, Echazabal continued working in the coker unit through his employment with the maintenance con-

53. *Id.*
54. *Id.*
55. *Id.* at 622–23.
56. *Id.* at 623.
57. *Id.*
58. Echazabal v. Chevron U.S.A., Inc., 226 F.3d 1063, 1065 (9th Cir. 2000), *cert. granted,* 2001 WL 267478 (U.S. Oct., 29, 2001).
59. *Id.* at 1065.
60. *Id.*
61. *Id.*
62. *Id.*

tractor.[63] Ironically, his continuing work with the contractor was the very same work with the very same exposure to the very same dangerous chemicals as the job he was applying for with Chevron.[64]

In 1995, Echazabal again applied to Chevron for the same position in the coker unit.[65] As before, Chevron offered him the job contingent on passing the physical examination.[66] The examination results were the same, and Chevron again rescinded its offer based on its concern that Echazabal would be at risk of further liver damage.[67] However, this time, in addition to rescinding its job offer, Chevron took further steps to remove Echazabal from the coker unit altogether.[68] Chevron requested the maintenance contractor employing Echazabal to immediately remove him from the coker unit and place him in a position that would eliminate his exposure to solvents and chemicals that would likely worsen his liver condition.[69] Shortly thereafter, the contractor took action; instead of reassigning Echazabal to a safer location, it terminated his employment altogether.

Echazabal filed several complaints with the EEOC and sued Chevron in state court for disability discrimination under the ADA.[70] The case was removed to federal court, and the district court granted Chevron's motion for summary judgment.[71] Echazabal appealed, and the case went before the Ninth Circuit.[72] The Ninth Circuit held (1) that any direct threat posed by Echazabal to his own health and safety did not provide Chevron with an affirmative defense to its ADA liability for refusing to hire him and (2) that any risk that Echazabal's liver would be damaged from further exposure to solvents and chemicals that were present in the refinery did not preclude him from being "otherwise qualified" within the meaning of the ADA.[73]

A. The Ninth Circuit's Rationale

The court supported its holding with (1) the plain language of the ADA, (2) the Act's legislative history, (3) the Act's purpose and policy, and with (4) case law prohibiting paternalistic employment policies. In addition, the court denied deference to the EEOC's inter-

63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 1067.

pretation of the ADA, holding that the EEOC regulation providing for the "direct threat to self" defense goes against the clear intent of the ADA direct threat provision.

The court relied most heavily on the language of the ADA to justify its limitation of the scope of the defense. Specifically, the direct threat defense provision states that employers can impose a requirement that "an individual shall not pose a direct threat to the health and safety of other individuals in the workplace."[74] The fact that the provision does not explicitly include reference to the individual's own health and safety, the court concluded, is a clear indication that the direct threat defense was limited to others.[75] Furthermore, the definition section of Title I of the ADA defines a direct threat as one that poses a "significant risk to the health and safety of others that cannot be eliminated by reasonable accommodation."[76] This exclusion of any reference to the individual is consistent throughout the statutory provisions.[77] For the forgoing reasons, the court concluded that the plain language of the provision does not include a direct threat to the individual.

The court then turned to the legislative history of the ADA to further support its conclusion that the direct threat defense does not apply to threat to self. Interwoven throughout the ADA committee reports and hearings are references to the direct threat defense.[78] At no point are these references to the defense ever accompanied by a reference to the health and safety of the individual.[79] Additionally, according to at least two reports, the direct threat defense is intended to be a codification of the Supreme Court decision, *School Board of Nassau County v. Arline*,[80] which defines direct threat as a "significant risk to the health and safety of others that cannot be eliminated by reasonable accommodation."[81] While the Ninth Circuit recognized that the House Committee on Education and Labor clearly stated that a potential employee may be denied employment based on a high probability of substantial harm to his own health, the court dismissed the statement outright and gave it no deference.[82] Ultimately, the court relied

74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. 480 U.S. 273 (1987).
81. Echazabal v. Chevron U.S.A., Inc., 226 F.3d 1063, 1067 (9th Cir. 2000) (citing H.R. REP. NO. 101-485, pt. 3, at 34, 45–46 (1990) (citing *Arline*), *reprinted in* 1990 U.S.C.C.A.N. 445, 457), *cert. granted*, 2001 WL 267478 (U.S. Oct., 29, 2001).
82. *Id.*

on the absence of any mention of the individual in the legislative history to support its contention that threats to one's own health or safety should be excluded from the scope of the direct threat defense.[83]

Another line of reasoning offered in support of the court's limitation on the scope of the direct threat defense involves the purpose and policy behind the ADA. The Act was designed to prohibit paternalistic discrimination against individuals with disabilities.[84] The fundamental purpose behind limiting paternalism is to deter employers from making "overprotective rules and policies" affecting individuals with disabilities.[85]

The court also discussed the Supreme Court cases that have held that paternalistic employment policies relating to other areas of employment discrimination are prohibited by various statutes. Specifically, the court cited *Dothard v. Rawlinson*[86] and *International Union, United Automobile Aerospace & Agricultural Implement Workers of America v. Johnson Controls, Inc.*,[87] both of which deal with gender discrimination. In *Dothard*, the Court said in dicta that an employer normally cannot refuse to hire a woman for a dangerous job since Title VII allows a woman to choose for herself whether to accept a job even if the job is very dangerous.[88] However, the Court allowed the employer to restrict its hiring policy to only men because, in a maximum-security male penitentiary, "sex was a bona fide occupational qualification."[89] The Court reasoned that, in such a situation, there was more to be weighed than the individual woman's decision to accept the risks of the employment; more importantly, the employment of the female guard could create a "real threat to the safety of others if violence broke out."[90]

In *Johnson Controls*, the Court again emphasized, "danger to the woman herself does not justify discrimination."[91] Here, the danger was that the female employee would be exposed to lead if allowed to work at the battery manufacturing plant.[92] Exposure to lead, a key element used in batteries, is harmful to the female reproductive system, especially to an unborn fetus.[93] The Ninth Circuit in *Echazabal*

83. *Id.*
84. *Id.* at 1068.
85. *Id.*
86. 433 U.S. 321 (1977).
87. 499 U.S. 187 (1991).
88. *Dothard*, 433 U.S. at 335.
89. *Id.*
90. *Id.* at 336.
91. *Johnson Controls*, 499 U.S. at 202.
92. *Id.* at 206–207.
93. *Id.*

related these Supreme Court decisions to the disability discrimination in a similar context where the individual's choice to accept the risks of the job, regardless of the effects on the health and safety of the individual, is limited by the employer's policy of not employing those whose health and safety would be at risk because of their employment.[94]

Finally, the *Echazabal* court addressed whether it should defer to the EEOC's interpretation and implementation of the ADA, or whether it should scrutinize the Act to determine if a "direct threat to self" defense is allowed. The court chose the latter as the proper course of action.[95] In addressing this question, the court looked to the Supreme Court decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,[96] which laid out the test for determining if a court should defer to an administrative agency's interpretation of a statute rather than the court making that determination itself.[97] The test, which will be discussed at length in Section III(A) of this Note, requires the court to defer to the administrative agency if there is any ambiguity or lack of clarity in congressional intent regarding the matter at hand.[98] If congressional intent is clear, then the court and the administrative agency must give effect to that intent.[99] In such a case, the court does not owe deference to the administrative agency's interpretation of the Act.[100]

In determining that Congress clearly intended not to include a "direct threat to self" defense, the court looked to the legislative history of the ADA. While acknowledging that the legislative history does include statements that could be read as allowing a "direct threat to self" defense for employers, the court nonetheless finds that the intent of Congress was not to include a "direct threat to self" defense because of the numerous other instances where the application to the individual is not included.[101]

The court also addressed the argument put forth by Chevron that excluding the "direct threat to self" defense from application to threat to self would be exposing employers to substantial tort liability.[102] This point was raised and dismissed with little discussion; the

94. *Echazabal*, 226 F.3d at 1068.
95. *Id.* at 1069.
96. 467 U.S. 837 (1984).
97. *Id.* at 842–43.
98. *Echazabal*, 226 F.3d at 1069.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at 1070.

court merely stated that the federal anti-discrimination law would preempt state tort law.[103]

B. The Dissenting Opinion

Judge Trott, in dissent, argued that the court should have allowed Chevron to choose not to hire Echazabal for the following reasons: (1) Echazabal was not "otherwise qualified" for the job because performing the essential functions of the job would end up killing him; (2) not recognizing the "direct threat to self" defense creates an inherent conflict with other laws and regulations relating to employment discrimination and workplace safety; (3) the court should defer to the EEOC's interpretation of the Act because the EEOC is in a better position to decide these matters; (4) Congress could not have intended such patently absurd results as follow from the majority's reasoning; and (5) forcing Chevron to hire Echazabal would place an undue burden on Chevron in light of the potential legal peril and the moral burden that would result as Echazabal's condition inevitably worsens, eventually resulting in death.[104]

Judge Trott argued that Echazabal is not "otherwise qualified" to work in the coker unit for the simple reason that performing the essential functions of the job would likely kill him and to ignore such an inevitable result would be "bizarre."[105] Furthermore, there are numerous statutes and regulations requiring the employer to provide a safe and healthy workplace. Judge Trott stated:

> Long ago we rejected the idea that workers toil at their own peril in the workplace. "Paternalism" here is just an abstract out-of-place label of no analytical help. . . . [T]he concept is pernicious when it is allowed to dislodge longstanding laws mandating workplace safety. . . . In many jurisdictions, it is a crime . . . to [knowingly] subject workers to life endangering conditions.[106]

There are three specific examples of this inherent conflict created by not allowing the "direct threat to self" defense. They are (1) the California Labor Code that "expressly forbids an employer from putting an employee in harms way,"[107] (2) an Arizona law that creates criminal felony liability for employers that fail to provide a safe work-

103. *Id.*
104. *Id.* at 1073–75 (Trott, J., dissenting).
105. *Id.* at 1073–74 (Trott, J., dissenting).
106. *Id.* at 1074 (Trott, J., dissenting).
107. *Id.* (citing ANN. CAL. LABOR CODE § 6402).

place,[108] and (3) the Occupational Safety and Heath Act (OSHA), which was enacted to "assure so far as possible every working man and woman . . . safe and healthful working conditions."[109] In essence, not allowing an employer to assert a "direct threat to self" defense nullifies these laws as they apply to the particular employee.[110]

The dissenting judge offered other justifications for the recognition of the "direct threat to self" defense. One of them is that the court has a responsibility to defer to the EEOC's interpretation of the Act.[111] This responsibility is attributed to the EEOC's superior knowledge about disability in the workplace and the threat to health and safety that such disability might create.[112] Additionally, to hold that "direct threat to self" is not a legitimate affirmative defense will lead to absurd results, such as "a steelworker who develops vertigo can keep his job constructing high rise buildings . . . or a person who is allergic to bees is entitled to be hired as a bee keeper."[113] This absurdity cannot have been Congress's intent in enacting the ADA.[114]

Furthermore, Judge Trott argued that even if the "direct threat to self" defense is not available to Chevron, refusing to allow the employer to make a choice not to hire Echazabal would result in an undue hardship for Chevron.[115] This is an alternative affirmative defense available when an employer can show that an accommodation for the disabled individual will result in an undue hardship.[116] Hardship would result because the employer would knowingly subject workers to life threatening situations opening the door for legal peril and an unconscionable moral burden.[117]

III. THE "DIRECT THREAT TO SELF" DEFENSE AND THE COURT'S FLAWED REASONING

The *Echazabal* majority erred in holding that the "direct threat to self" defense was not warranted or intended under the ADA and that the EEOC's extension of such defense to the individual was, thus, an inappropriate extension of scope. The court erroneously limited the direct threat defense to a threat to the health and safety of others.

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108. *Id.* (Trott, J., dissenting) (citing ARIZ. REV. STATS. ANNOT., LABOR §§ 24-403, -418).

109. 29 U.S.C. § 651(b) (1994).

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

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. 42 U.S.C. § 12112(b)(5)(A) (1994).

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

Such limitation is incorrect because (1) the court should have deferred to the EEOC's interpretation and implementation of the ADA, (2) the limitation will result in numerous inherent conflicts between anti-discrimination laws and workplace health and safety laws, (3) the narrowness of the direct threat test is sufficient to safeguard against paternalistic policies usurping the Act's intent to allow the employee to make his or her own choice whenever possible, and because (4) the implications to the employer in terms of liability and moral burden are too adverse to support a limitation of the direct threat defense.

A. Agency Deference

The court should have deferred to the EEOC's interpretation of the ADA in accordance with the test for administrative agency deference laid out in *Chevron U.S.A., Inc. v. Natural Resources Defense Council.*[118] In *Chevron*, the Supreme Court articulated the test to determine whether to defer to an administrative agency's interpretation of a federal statute or whether to interpret the statute directly when deciding a point of law.[119] Under *Chevron*, the court must first look to whether Congress has spoken directly to the precise question at issue.[120] If Congress has spoken on the precise question, both the court and the agency must defer to Congress.[121] If Congress has not spoken on the precise issue or has been ambiguous in articulating a position, then the court must defer to the agency's position so long as it is reasonable.[122] In *Chevron*, the Supreme Court established broad judicial deference to administrative agencies that Congress has given the power to carry out the implementation of various federal acts.[123]

In applying the *Chevron* test to *Echazabal*, the first question to address is whether Congress has spoken directly to the precise question at issue. This can be found in either the statute itself or its legislative history. In *Echazabal*, the direct threat defense is explicitly included in the text of the ADA.[124] An employer is allowed to require that an "individual shall not pose a direct threat to the health and safety of other individuals in the workplace,"[125] and if the employer is faced with a disability discrimination charge, the employer may assert

118. 467 U.S. 837 (1984).
119. *Id.* at 842–43.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 844.
124. 42 U.S.C. § 12113(b) (1994).
125. *Id.*

the health requirement as an affirmative defense.[126] However, the *Chevron* analysis does not stop here because the ADA does not speak directly to the issue of whether an employer can assert the "direct threat to self" defense. The legislative history, however, provides insight into whether Congress intended to provide a defense to employers when the potential employee poses a threat to the employee's own health and safety.

The direct threat defense was discussed in Congress throughout the ADA enactment process. Admittedly, none of the discussions include the phrase "direct threat to the individual"; references to direct threat are usually made in the context of an employee who is a direct threat to the health and safety of others.[127] However, the Senate Report even includes a reference to the direct threat to property, which could be construed as an affirmative defense.[128] The House Judiciary Report, similar to the Senate Report, references the direct threat defense as applying to others.[129] This pattern is consistent throughout the ADA with one glaring exception found in the House Labor Committee Report.[130]

The House Labor Committee Report expressly addresses the issue of what an employer can do in the event the potential employee poses a risk of harm to himself/herself in the workplace.[131] While discussing this issue in the context of the permissibility of conditional job offers pending a pre-employment medical examination, the House Committee states:

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126. The statute reads, in part:

> [I]t may be a defense to a charge of discrimination . . . that an alleged application of qualification standards . . . 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.

42 U.S.C. § 12113(a). *See also* 42 U.S.C. § 12113(b) (providing that "qualification standards" may include that the employee not pose a direct threat to the health or safety of other individuals in the workplace).

127. *See* S. REP. NO. 101-116, at 27 ("It is . . . acceptable to deny employment to an applicant or to fire an employee with a disability on the basis that the individual poses a direct threat to the health and safety of others or poses a direct threat to property."); *see also id.* at 47 ("[T]he term 'qualification standards' may include a requirement that an individual with a currently contagious disease or infection shall not pose a direct threat to the health or safety of other individuals in the workplace.").

128. *Id.* at 27.

129. H.R. REP. NO. 101-485, pt.3, at 45–46 (1990) (stating that the qualification standard may "include a requirement that an individual not pose a direct threat to the health and safety of other individuals in the workplace" and that the direct threat defense is a codification of the Supreme Court decision in *School Bd. of Nassau County v. Arline*, 645 N.Y.S.2d 520 (App. Div. 1996)).

130. H.R. REP. NO. 101–485, pt. 2, at 73.

131. *Id.*

> A candidate, undergoing a post-offer, pre-employment medical examination may not be excluded, for example, solely on the basis of an abnormality on the x-ray. However, if the examining physician found that there was 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 a reasonable accommodation to the candidate's condition that would avert such harm and such accommodation would not cause undue hardship.[132]

The "high probability of substantial harm" standard is based on the following three factors: (1) there must be a high probability of substantial harm that is "strictly based on medical analysis,"[133] (2) the examining physician's conclusions can be challenged by evidence from the potential employee's physician,[134] and (3) the decisions must not be based on "paternalistic views" about what is best for the employee with the disability.[135] An employer may use a physical or mental criterion to disqualify the disabled person, but the employee may do so only if the disability has a "direct impact on the ability of the person to do [his or her] actual job duties" and there is "an imminent, substantial threat of harm."[136]

Furthermore, Congress intended the ADA to be an addition to, not a replacement for, existing prohibitions on discrimination against handicapped individuals.[137] The ADA should not be interpreted as narrowing the scope of the Rehabilitation Act.[138] The Rehabilitation Act, the regulations promulgated under the ADA,[139] and the case law dealing with the Rehabilitation Act[140] all support the "direct threat to self" defense. The previously discussed cases strongly indicate acceptance of a "direct threat to self" defense. Most notably, the Ninth Circuit in *Mantolete* held that a woman with epilepsy was not a qualified handicapped person under the Rehabilitation Act regulations because her employment as a machine operator would pose a reasonable probability of substantial harm to herself.[141]

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132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at 74.
136. *Id.*
137. *Id.* at 55.
138. *Id.*
139. 29 C.F.R. § 1632.2(r) (2001).
140. *See* Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985); Bentivega v. United States Dep't. of Labor, 694 F.2d 619 (9th Cir. 1982).
141. *Mantolete*, 767 F.2d at 1424.

The Ninth Circuit's limitation on the direct threat defense conflicts with the Rehabilitation Act and its regulations, which define a "qualified handicapped individual" as someone who can work in a position "without endangering the health and safety of the individual or others."[142] While it is not expressly stated in the ADA or in its legislative history, Congress could not have intended to create a conflict by containing a directive in the ADA that would be inconsistent with the requirements of the Rehabilitation Act.[143] The Rehabilitation Act allows employers to have the choice of not hiring someone who is a threat to the health and safety of themselves. The Ninth Circuit should have deferred to the ADA's requirement for consistent implementation of the two Acts when deciding the fate of the "direct threat to self" defense.

While Congress did not include the word "self" in the text of the defense section of the ADA, its exclusion is not a clear articulation against the "direct threat to self" defense. Congress's intent for the ADA to be read consistently with the Rehabilitation Act and the House Labor Committee Report's allowance for a quasi "direct threat to self" defense support this argument. These considerations render Congress's intent with respect to the "direct threat to self" defense inconclusive, which lends support to the EEOC's interpretation of the ADA. While the House Labor Committee Report was not raised in the context of the direct threat affirmative defense, it goes directly to the issue of whether an employer declined to hire an employee because of a substantial threat to the health and safety of the individual. Congress's attention to the precise question is, at best, ambiguous. Under the *Chevron* standard, if Congress's treatment of an issue is ambiguous, the court is obligated to defer to the agency's interpretation of the statute.[144] Consequently, the *Echazabal* court erred in not paying deference to the EEOC's interpretation.[145]

142. 29 C.F.R. § 1613.703 (2001).

143. "The agency with enforcement authority for actions which allege employment discrimination under this subchapter, and under the Rehabilitation Act of 1973 . . . shall develop procedures to ensure that complaints . . . are dealt with in a manner . . . that prevents imposition of inconsistent or conflicting standards." 42 U.S.C. § 12117(b) (1994).

144. Chevron U.S.A., Inc. v. Natural Res. Defense Council, 467 U.S. 837, 842–43 (1984).

145. For a comprehensive analysis of *Echazabal*'s implications on workman's compensation and workplace health and safety laws, see the following article: Katelyn S. Oldham, *The Implications of* Echazabal v. Chevron U.S.A., Inc. *for Employers and for the Adminstration of Worker's Compensation and the Occupational Safety and Health Act*, 80 OR. L. REV. 327 (2001).

B. Inherent Conflict with Other Workplace and Safety Laws

The limitation imposed by the *Echazabal* court will also result in numerous inherent conflicts between anti-discrimination laws and workplace health and safety laws. The court's narrow interpretation of the defense opens the door to wildly inconsistent results and standards when viewed in conjunction with OSHA.[146] While the ADA and OSHA are different statutes applying to wholly different scenarios in the workplace, they are the two most prominent statutes regulating the relationship between employers and employees, and as such, must be read in light of each other in order for either statute to be effective. The purpose of OSHA is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions."[147] The Act requires, among other things, employers to "furnish to each of [its] employees employment and a place of employment which [is] free from recognized hazards that are causing, or are likely to cause death or serious physical harm to [its] employees."[148]

Whether the hazards implicit in allowing Echazabal to work in the presence of the particular chemicals with his liver condition were likely to cause death or serious physical harm is not in dispute. If Echazabal were to work in the coker unit, his liver condition would almost invariably deteriorate to the point of death or serious illness.[149] At least five separate doctors, including doctors hired not only by Chevron but also Echazabal's personal physician, strongly recommended that Echazabal not work near the dangerous chemicals because of the extremely adverse effects on his liver condition.[150] If Chevron were to hire Echazabal, it would be putting him in an unsafe and unhealthy work environment. While forcing Chevron to hire Echazabal will most likely avoid paternalism, it violates the very essence and purpose of OSHA.

Under OSHA, Chevron has a general duty to exercise a degree of care to ensure that the workplace is safe and healthy for the employee.[151] This requires Chevron to prevent recognized hazards to

146. 29 U.S.C. § 651 (1994). One commentator makes a similar argument focusing primarily on the conflict between the Ninth Circuit's holding in *Echazabal* and various state workplace health and safety laws. *See* Deborah Leigh Bender, Echazabal v. Chevron: *A Direct Threat to Employers in the Ninth Circuit*, 76 WASH. L. REV. 859 (2001) (addressing state workplace health and safety laws, but also addressing the potential inherent conflicts between OSHA and the Ninth Circuit's narrowing of the direct threat defense).

147. 29 U.S.C. § 651(b).

148. 29 U.S.C. § 654(a) (1994).

149. Echazabal v. Chevron U.S.A., Inc., 226 F.3d 1063, 1073 (9th Cir. 2000), *cert. granted*, 2001 WL 267478 (U.S. Oct., 29, 2001).

150. *Id.*

151. 29 U.S.C. § 654(a).

employees.[152] The chemical exposure greatly increasing Echazabal's risk of liver failure is unquestionably a specifically recognized hazard for Echazabal. Arguably, Chevron cannot prevent the possible death and serious bodily harm that Echazabal will inevitably suffer. Under the Ninth Circuit's narrow decision, Chevron is now forced to hire Echazabal, thus aggravating his liver condition and likely expediting his death. This conflict between OSHA and the Ninth Circuit's narrow direct threat defense is inherently confusing and will frustrate many employers who try to abide by each standard.

Similarly, the California Labor Code explicitly outlaws any employer that "require[s], or permit[s] any employee to go or be in any employment or place of employment which is not safe and healthful."[153] Chevron cannot comply with this law if required to hire individuals whose disability poses a substantial risk to the health and safety of themselves. This conflict is even more apparent when the employee's disability is worsened by the conditions of the job and cannot be prevented by reasonable accommodations. The Ninth Circuit should not have ignored these blatant and disturbing conflicts.

C. Narrowness of the Direct Threat Test

The *Echazabal* court also erred in ignoring the narrowness of the direct threat test, which is sufficient in itself to ensure that paternalistic policies will not usurp Congress's intent to allow the employee to make his or her own choice. The EEOC regulations provide that the direct threat test shall include a weighing of four factors to determine whether a significant risk of substantial harm exists.[154] The four factors are (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.[155] This assessment must be based on an "an individualized assessment of the individual's present ability to safely perform the essential functions of the job"[156] and on current medical knowledge and/or the "best available objective evidence."[157] The accompanying notes to this regulation state that the direct threat defense cannot be permitted when there is merely a slight increased risk; the defense is only considered when there is a threat of significant risk.[158] This requirement is further supported in the legis-

152. *Id.*
153. *Echazabal*, 226 F.3d at 1074 (citing ANN. CAL. LABOR CODE § 6402).
154. 29 C.F.R. § 1630.2(r) (2001).
155. *Id.*
156. *Id.*
157. *Id.*
158. 29 C.F.R. app. § 1630.2(r) (2001).

lative history.[159] Addressing the "direct threat to self" test specifically and relying on the legislative history, the appendix to the EEOC regulations states that any assessment must not be based on "stereotypic or patronizing assumptions."[160]

Furthermore, the EEOC regulations cite to the two key Ninth Circuit cases decided under the Rehabilitation Act: *Mantolete* and *Bentivegna* discussed previously.[161] The requirement of imminence and a high probability of substantial harm under the direct threat test undermines the Ninth Circuit's conclusion that the "direct threat to self" defense allows a forum for employer's paternalistic fears. This test requires the employer to rigorously assess its employee's ability to perform before determining that the employee is a direct threat to himself or herself.[162] Paternalism and a refusal to hire based on anything less than a significant risk of harm is simply not permitted under the EEOC regulations.

Ignoring the narrow direct threat test's inherent protections against undue paternalism, the *Echazabal* court cited *Johnson Controls*, a case holding that the danger of lead exposure to a woman's reproductive system did not justify discrimination. However, *Johnson Controls* and all other cases dealing with the "direct threat to self" question involve a situation that is strikingly different than that in *Echazabal*. First, in any direct threat case, the employer is obligated to make a rigorous individualized assessment based on objective criteria.[163] *Johnson Controls* pertains to the exclusion of an entire gender from a certain type of job, not an individual based on their specific circumstances.[164] Second, in *Echazabal*, the employee is certain to suffer substantial adverse health effects as a result of his employment in the coker unit, whereas the women in *Johnson Controls* may or may not have experienced the negative effects of the lead exposure depending on their decision to become pregnant.[165]

D. Liability and Moral Burden

Finally, the *Echazabal* court gave little consideration to the adverse implications that would be felt by the employer if the "direct threat to self" defense is not recognized. Specifically, the court ig-

159. *See* S. REP. NO. 101-116, at 27.

160. 29 C.F.R. app. § 1630.2(r).

161. *Id.*

162. *See* 29 C.F.R. § 1630.2(r); *see also* S. REP. NO. 101-116, at 27.

163. 29 C.F.R. § 1630.2(r).

164. Int'l Union, United Auto. Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc., 499 U.S. 187, 198–99 (1991).

165. *Id.* at 197.

nored the potential for a substantial increase in tort liability, and more importantly, the moral burden to the employer. While an employer could limit its potential liability by requiring the employee to sign a waiver, this may not prevent suits brought by the deceased or injured employee's family and dependents. Furthermore, the moral implications to employers and managers are significant. Employers will carry the heavy burden of having hired an employee whose injury or death is likely because the employee was unable or unwilling to make his or her own decision to stay out of harm's way. Both of these collateral effects are too burdensome to support a limitation of the direct threat defense.

IV. CONCLUSION

The Ninth Circuit's decision not to accept the "direct threat to self" defense is wrong. Concern over paternalism, while certainly legitimate, clouded the court's reasoning and resulted in an unnecessary limitation on employer defenses under the ADA. Paternalism is a serious problem in the workplace, but even more serious is a person's health and safety. Employers make decisions everyday about what is best for their employees. When those decisions are improperly paternalistic in nature, there is no place for them in the workplace and they should be outlawed. However, an employer's concern about an employee's significant risk of substantial harm is a concern that should not be discouraged.

The distinction between an employer's proper and improper motivation is a fine line. The EEOC is in a better position than the courts to understand the realities of the modern workplace, and the courts should give deference to the agency's interpretation of the defense. As applied, the "direct threat to self" defense is sufficiently narrow to alleviate any improper use of the defense. Moreover, to conclude that "direct threat to self" is not a proper expansion of the defense is fundamentally at odds with other mandatory workplace health and safety laws. Finally, it is not logical that Congress could have intended such profoundly counterintuitive results, creating a disproportionate moral and litigation burden on employers.