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July 2001

## Direct Threats Under the ADA

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Since being enacted more than ten years ago, the Americans with Disabilities Act (the “ADA”) has presented many challenges to defense practitioners, courts and employers. Although many key issues of interpretation have been resolved with some certainty over the last decade, one intriguing issue that remains unresolved is the scope of the “direct threat” affirmative defense available to employers under the ADA.

The ADA’s central anti-discrimination provision precludes covered entities from taking adverse employment actions against “a qualified individual with a disability” because of that individual’s disability. 42 U.S.C. § 12112(a). In order to qualify for protection under the ADA, a disabled individual must be able to perform the essential functions of the position the individual holds or desires, either with or without a reasonable accommodation. 42 U.S.C. § 12111(8). Because situations may arise where an employer may need to exclude an individual from employment for safety-related reasons resulting from the individual’s disability, the ADA does not cover an individual who poses a “direct threat to the health or safety of *other individuals in the workplace.*” 42 U.S.C. § 12111(3) (emphasis added). The ADA specifically defines the term “direct threat” as “a significant risk to the health or safety of *others* that cannot be eliminated by reasonable accommodation.” *Ibid.* Thus, even if an individual is “disabled” for purposes of the ADA, an employer may avoid liability under the ADA for discriminating against that individual provided that the “direct threat” affirmative defense is satisfied.

As a plain reading of the aforementioned statutory language reveals, Congress did not specifically address whether an employer may make an adverse employment decision under the direct threat standard if the individual’s disability poses a direct threat to the health or safety of *the individual.* However, the Equal Employment Opportunity Commission (“EEOC”), acting pursuant to its statutory directive to promulgate regulations interpreting the ADA, *see* 42 U.S.C. § 12116, addressed Congress’ silence on the issue by unequivocally interpreting the “direct threat” standard to include not only a direct threat *to others* (as the statute itself makes clear), but also a direct threat to the disabled person *him/herself.* 29 C.F.R. § 1630.2(r) and 29 C.F.R. § 1630, Appendix § 1630.2(r). Indeed, the regulations specifically define a 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.” 29 C.F.R. § 1630.2 (emphasis added).

Generally speaking, the federal courts tend to afford substantial deference to the EEOC's interpretation of the ADA since it is charged with administering that statute. *See Chevron, U.S.A., Inc. v. National Resource Defense Council, Inc.*, 467 U.S. 837, 844 (1984); *Francis v. City of Meriden*, 129 F.3d 281, 284 (2d Cir. 1997). It is perhaps for this reason that a number of the federal circuit courts have either directly or indirectly interpreted the ADA in accordance with the EEOC's broad interpretation of the direct threat defense without first inquiring whether the EEOC's inclusion of harm to oneself in the regulatory definition of direct threat was permissible. *See, e.g., Borgialli v. Thunder Basin Coal Co.*, 235 F.3d 1284, 1290 (10<sup>th</sup> Cir. 2000) ("Under 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."); *Doe v. Woodford County Bd. of Educ.*, 213 F.3d 921, 926 (6<sup>th</sup> Cir. 2000) (suggesting that the direct threat exception encompasses harm to one's self); *Rizzo v. Children's World Learning Centers, Inc.*, 173 F.3d 254, 259-260 (1999) (applying direct threat standard that encompasses direct threats to oneself), *aff'd*, 213 F.3d 209 (5<sup>th</sup> Cir.) (*en banc*), *cert. denied*, --- U.S. ---, 121 S.Ct. 382 (2000); *Hamlin v. Charter Tp. of Flint*, 165 F.3d 426, 431 (6<sup>th</sup> Cir. 1999) (stating that "[a]n individual who poses a direct threat to the health or safety of the individual or others in the workplace is not entitled to the ADA's protection"); *LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832, 836 (11<sup>th</sup> Cir. 1998) (framing the issue as whether plaintiff "produced evidence from which a reasonable jury could conclude that plaintiff was not a direct threat," and concluding that plaintiff's condition was not only a danger to himself, but due to the working environment, was a danger to others as well); *Moses v. American Nonwovens*, 97 F.3d 446, 447 (11<sup>th</sup> Cir. 1996) (specifically relying on the EEOC's regulation as the controlling standard for determining whether plaintiff posed a direct threat), *cert. denied*, 519 U.S. 1118 (1997); *EEOC v. Amego, Inc.*, 110 F.3d 135, 146 (1<sup>st</sup> Cir. 1997) (as part of decision to make an adverse employment decision, employer properly considered potential harm that plaintiff could inflict upon herself if plaintiff remained in her position).

Notwithstanding that most of the circuit courts addressing the direct threat defense have only passively embraced the E.E.O.C's interpretation of the direct threat defense in dicta, support for the EEOC's position may nevertheless be gleaned from these cases. Recently, however, a divided panel of the Ninth Circuit Court of Appeals specifically rejected the EEOC's broad interpretation in favor of a more narrow reading, holding that the direct threat affirmative defense does not apply to individuals who pose a threat solely to their own health or safety. *See Echazabal v. Chevron, U.S.A.*, 226 F.3d 1063 (9<sup>th</sup> Cir. 2000).

After being employed for more than twenty years by various maintenance contractors in the coker unit at a Chevron oil refinery, the plaintiff in *Echazabal* applied to work directly for Chevron at the same coker unit location. 226 F.3d at 1064. Chevron extended the plaintiff a conditional offer of employment contingent upon his passing a physical examination. *Ibid.* However, because the examination revealed that plaintiff had liver problems which might be damaged by exposure to the solvents and chemical released in the coker unit, Chevron rescinded its job offer. *Ibid.* As such, the plaintiff continued to work for his employer (a maintenance contractor) at the same coker facility. *Ibid.*

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After consulting with several physicians, the plaintiff was never advised that he should stop working at the refinery because of his condition. *Ibid.* Thus, not only did the plaintiff continue to remain employed at the refinery, but he again applied to Chevron for a position at the coker unit. *Ibid.* Once again, Chevron made a contingent offer of employment, but eventually rescinded the offer on the ground that there was a risk that his liver would be damaged if he worked at the coker unit. *Ibid.* Unlike the previous time, however, Chevron also requested that the mechanical contractor who employed the plaintiff immediately remove him from the refinery. *Ibid.* As a result, the plaintiff was no longer permitted to work at the refinery where he had been employed for more than twenty years. *Ibid.*

The plaintiff filed suit under the ADA. In defense, Chevron argued that because it reasonably concluded that the plaintiff would pose a direct threat to his own health if he worked at the refinery, its decision not to hire the plaintiff was not a violation of the ADA under the direct threat affirmative defense. *Ibid.* The district court concurred and entered summary judgment in favor of Chevron.

On appeal, the Ninth Circuit specifically framed the issue as “whether the ‘direct threat’ defense available to employers under the Americans with Disabilities Act applies to employees, or prospective employees, who pose a direct threat to their own health or safety, but not to the health or safety of others in the workplace.” *Id.* at 1064. Reversing the district court, a divided panel held that the plain language of the direct threat defense contained in the ADA does not include threats to the disabled individual himself. *Id.* at 1066-1067, 1071 (discussing 42 U.S.C. §§ 12111(3) and 12113(b)). For this reason, the Court concluded that it need not accord any deference to the EEOC’s interpretative regulations since the intent of Congress was clear from the statutory language and the legislative history underlying the direct threat defense. *Id.* at 1068-1069. As a policy reason cited in support of its decision, the Court also noted that, as a general principle, the Supreme Court has “interpreted federal employment discrimination statutes to prohibit paternalistic employment policies.” *Id.* at 1068. Accordingly, the Court held that, in light 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.” *Id.* at 1072.

In reaching its decision, the Court also rejected Chevron’s alternative argument that if employers are forced to hire individuals who pose a risk to their own health or safety, such employers would be exposed to possible tort liability under state law. *Id.* at 1070. The Court rejected this argument by stating that the issue was not properly before the Court since Chevron did not argue that it faced any costs from tort liability. *Ibid.* Additionally, the Court suggested in dicta that “state tort law would likely be preempted” if it interfered with the ADA’s requirements. *Ibid.*

The Court also rejected Chevron’s contention that the plaintiff was properly denied employment because he was not “otherwise qualified” for the position in question since he could not perform the essential functions of the job. *Id.* at 1070. Because the job description for the position that the plaintiff sought indicated that the applicant must be able to tolerate a

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work environment including chemicals, vapors, solvents and oils, Chevron argued that the plaintiff was not qualified for the position. *Ibid.* The Court, however, rejected this argument, concluding that Chevron's mere inclusion of this condition into the job description did not transform this limitation into an actual function of the job at issue. *Id.* 1071.

The *Echazabal* decision has created much uncertainty surrounding the scope of the direct threat defense which will need resolution. Indeed, as the dissent in *Echazabal* recognized, the Court's decision "has created a conflict which will compel the Supreme Court – or Congress – to resolve this dispute – unless [the Ninth Circuit] does so [itself] by way of *en banc* review." 226 F.3d at 1075 (Trott, C.J., dissenting). Until such time as the dispute is resolved, defense practitioners should review their employment positions and prospective employees very closely to determine whether a particular individual would threaten not only himself/herself, but also others at the workplace. Indeed, until this issue is resolved with some certainty, employers would be well-advised to take a conservative view of the direct threat defense and only seek to rely upon its application where an individual poses a threat to others.

This information is not to be construed as legal advice. If you have any questions please do not hesitate to contact the following attorney:

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