Direct Threat under the ADA

Great Lakes ADA Center*

March 2018

I. Overview

A truck driver with epilepsy has a seizure while driving at work. A surgical nurse with HIV cuts herself during a medical procedure. A postal worker with post-traumatic stress disorder tells his supervisor that he may not be able to control his violent outbursts. Can an employer remove a person with a disability from a job if it is believed that the person poses a health or safety risk within the workplace?

Courts have ruled that under Title I of the Americans with Disabilities Act ("ADA"), an employer may exclude an individual from a job if that individual would pose a "direct threat"—a significant risk of substantial harm—to the health or safety of the individual him or herself or to others that cannot be eliminated or reduced by a reasonable accommodation. However, in order to ensure that employers do not unjustly exclude people from the workplace based on unwarranted fears, generalizations, stereotypes, or myths about a particular disability, the ADA requires that employers engage in an individualized assessment that is based on reasonable medical judgment relying on the most current medical knowledge and/or on the best available objective evidence.

This brief will review the foundations of direct threat; the current law as stated in the ADA and the EEOC regulations and guidance; the scope of direct threat, including who it applies to and where the conduct can take place; who has the burden to prove direct threat, the employer or the employee; how employers should assess the potential harm; what medical evidence should be used; and how reasonable accommodation issues affect the analysis of direct threat.

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II. The Foundations of "Direct Threat": The Rehabilitation Act and the *Arline* Decision

The foundations of the ADA's direct threat provisions can be found in the U.S. Supreme Court's decision in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). In

Arline, a teacher with tuberculosis was terminated from her elementary-school teaching position.[1] Subsequently, she brought suit, alleging that her termination violated Section 504 of the Rehabilitation Act.[2] Section 504 prohibits discrimination by employers receiving federal funding against otherwise qualified individuals with disabilities solely on the basis of their disability.[3] When the case reached the Supreme Court, it presented the question of whether a person with a contagious disease was deemed a person with a disability within the meaning of Section 504, and, if so, whether such an individual is 'otherwise qualified' to teach elementary school."[4] Based on her record of hospitalization, which established substantial limitations regarding her major life activities, the Court held that Arline was an individual with a disability.[5]

After finding that an individual with a contagious disease is covered by Section 504, the Court ruled that the school district must make an individualized assessment to determine whether, despite her disability, the teacher was qualified:

> The fact that *some* persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act all persons with actual or perceived contagious diseases. Such exclusion would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were "otherwise qualified." Rather, they would be vulnerable to discrimination on the basis of mythology—precisely the type of injury Congress sought to prevent.[6]

[1] *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 276 (1987).
[2] *Id.*
[3] *Id.* at 278 (citing 29 U.S.C. § 794).
[4] *Id.* at 275.
[5] *Id.* at 281, 289.
[6] *Id.* at 280–86, 285.

To determine whether Arline was qualified, the Court stated that the district court would need to conduct an individual inquiry to balance "protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks."[7] The Court directed the district court to consider four factors: (1) the nature of the risk, (2) the duration of the risk, (3) the severity of the risk, and (4) the probability of the risk and likelihood of the harm.[8]

The Supreme Court's analysis in Arline has been incorporated into the ADA's direct threat provisions, as can be seen in the ADA's text, the EEOC's regulations, and federal court cases focusing on direct threat.

III. Current Law

A. The ADA and Direct Threat

In the "Defenses" section, the ADA provides that, under certain conditions, covered employers may impose qualification standards that establish specific requirements for positions. Specifically, Section 12113(a) provides:

> It may be a defense to a charge of discrimination . . . that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation . . . [9]

Section 12113(b) continues that "[t]he 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."[10] The ADA defines direct threat to mean "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[11] Both of these provisions were unchanged under the ADA Amendments Act (ADAAA) passed in 2008.

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[7] *Id.* at 287.
[8] *Id.* at 288.
[9] *Id.* § 12113(a).
[10] *Id.* § 12113(b)
[11] 42 U.S.C. § 12111(3)

B. EEOC Regulations and Direct Threat

The definition of direct threat in the EEOC's regulations adds additional language to the ADA's definition. The regulation states that a direct threat is "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] (Language added to the regulation is in bold)

First, the EEOC regulations state that to prove direct threat not only requires a "significant risk," but also requires that there be "substantial harm." So, if there is a "significant risk" that a person with epilepsy will have a seizure at work, but it cannot be shown that the seizure would cause "substantial harm," under the EEOC's regulation, that person would not be deemed a "direct threat."

Second, the EEOC regulations broaden the scope of "direct threat." Although the text of the ADA limits direct threat to the health and safety "of others," the EEOC expands direct threat to also include the health and safety "of the individual." The U.S. Supreme Court upheld the EEOC's act to broaden the scope of direct threat to include threats to oneself in *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002), which is further discussed in Part IV.

Third, the EEOC regulations state that if the threat can be "reduced" by a reasonable accommodation so that the person is no longer a significant risk of substantial harm, then there is no direct threat. This is broader than the text of the ADA, which states that the reasonable accommodation must completely "eliminate" the threat.

Additionally, the EEOC regulations set forth the standard for whether an individual is a direct threat. Under the regulations, a decision whether an individual presents a direct threat must be based on a particularized inquiry. Such a determination must be based on "an individualized assessment of the individual's present ability to safely perform the essential functions of the job" which itself must be based on "a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence."[13] The assessment should consider four factors: (1) the duration of

[12] 29 C.F.R. §1630.2(r)

[13] 2`9 C.F.R. § 1630.2(r); *see also* EEOC Interpretive Guidance, *supra* note 20 ("Such consideration must rely on objective, factual evidence—not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes—about the nature or effect of a particular disability, or of disability generally.").

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.[14] These are essentially the same four factors articulated by the Supreme Court in the *Arline* case discussed above.

The EEOC's Interpretative Guidance to 29 C.F.R. § 1630.2(r) emphasizes the "case by case" determination of whether an employee poses a direct threat.[15] According to the EEOC:

> The employer should identify the specific risk posed by the individual. For individuals with mental or emotional disabilities, the employer must identify the specific behavior on the part of the individual that would pose the direct threat. For individuals with physical disabilities, the employer must identify the aspect of the disability that would pose the direct threat. The employer should then consider the four factors listed in part 1630.[16]

The Interpretative Guidance also states that the "determination must be based on individualized factual data, using the factors discussed above, rather than on stereotypic or patronizing assumptions and must consider potential reasonable accommodations."[17] "Relevant evidence may include input from the individual with a disability, the experience of the individual with a disability in previous similar positions, and opinions of medical doctors, rehabilitation counselors, or physical therapists who have expertise in the disability involved and/or direct knowledge of the individual with the disability."[18] An individual may not be disqualified based on fears, generalizations, stereotypes, or myths.[19]

IV. The Scope Issue: Who and Where?

A. Who: Direct Threat to Self and Others

[14] 29 C.F.R. § 1630.2(r).
[15] EEOC Interpretive Guidance, *supra* note 20.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *See id.* Many direct threat cases involve people with HIV, epilepsy, mental illness and diabetes. A common component in these cases is that there continues to be a great deal of fear, ignorance, stereotypes and stigma associated with these four disabilities.

Direct Threat under the ADA

As noted above, the EEOC regulations broadened who is covered by the ADA's direct threat provision. Although the ADA limits direct threats to the health and safety of others, the EEOC regulations expand the definition to include a threat to one's own health and safety. As a result, there was confusion in the workplace as to the scope of the direct threat and courts were split on this issue as well.

In 2002, the U.S. Supreme Court resolved this conflict and upheld the EEOC's interpretation of the scope of direct threat. In *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002), a person with Hepatitis C sought to work at a refinery where he would be exposed to chemicals. Although Mr. Echazabal's own physician did not believe it would be unsafe for him to work at the refinery, the employer's physician believed the exposure to the chemicals would pose a threat to Mr. Echazabal's health, and he was not hired for the position. Mr. Echazabal filed suit under the ADA and the employer, relying on the EEOC regulations, argued that direct threat should include threat to self and not just a threat to others. The Supreme Court agreed with the employer and held that the EEOC regulation was permissible finding that it balances Congress' policies that provide that individuals with disabilities have the right to work on equal terms in the workplace and that protect the safety of all employees.[20] The Supreme Court also stated that to rule that employers cannot use "threat to self" as a defense would put the ADA at odds with an employer's obligation under the Occupational Health and Safety Act (OSHA) requiring a safe workplace for employees.[21] Additionally, the Court stated that the EEOC regulations contained sufficient safeguards to addresses the concern that employers will use the direct threat defense in a paternalistic way to exclude people with disabilities from the workplace. Under the EEOC's regulation, an employer would have to demonstrate that its determination that an employee is a threat to self is based on reasonable medical judgment that relies on the most current medical knowledge and is an individualized assessment of the person's present ability to safely perform the essential functions of the job.[22] Courts have consistently followed the Supreme Court's decision and there are numerous decisions finding that the ADA's direct threat defense applies to threats to self.[23]

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[20] *See id.* at 84–86.
[21] *Id.*
[22] *Id.*
[23] *See e.g. Darnell v. Thermafiber, Inc.*, 417 F.3d 657 (7th Cir. 2005); *Taylor v. Rice*, 451 F.3d 898 (D.C. Cir. 2006); *Wurzel v. Whirlpool Corp.*, 482 Fed.Appx. 1 (6th Cir. 2012); *Smith v. Roberts*, 2017 WL 4236922 (N.D. Cal. Sep. 25, 2017); *McLane v. School City of Mishawaka*, 2017 WL 430843 (N.D. Ind. Feb. 1, 2017); and *Hann v. Nestle USA, Inc.*, 2016 WL 4537812 *7 (E.D. Mich. Aug. 31, 2016).

Direct Threat under the ADA

The EEOC only has authority to interpret the employment provisions of the ADA (Title I). This raises the question as to whether the Supreme Court's decision in *Echazabal* would apply to non-employment provisions of the ADA. The Department of Justice ("DOJ") has authority to interpret Title II (state and local government services) and Title III (public accommodation) of the ADA, but DOJ's regulations do not interpret direct threat to apply to "threat to self." There have been very few cases that have looked at this issue, and thus far, the courts are split. In *Celano v. Marriott International, Inc.,* plaintiff alleged that a golf provider violated Title III of the ADA for failing to provide an accessible golf cart.[24] In response, the defendant claimed that it did not have to accommodate plaintiff because he would be a direct threat to himself. The court rejected defendant's argument to apply *Echazabal's "*threat to self" analysis because that was based on the EEOC's regulation and DOJ had not promulgated a similar regulation in Title III that extended the definition of direct threat to "threat to self."[25] However, in *Class v. Towson University*, the court applied the Supreme Court's reasoning in *Echazabal* to Title II of the ADA when it upheld a University's decision to deny football player's return to team because he was a potential threat to himself after heatstroke and a liver transplant.[26]

B. Where: Direct Threat Based on Off-Duty Conduct

Courts have held that direct threat may extend to cases where the threat stems from off-duty conduct, though, thus far, the cases are limited to unsafe, off-duty conduct by police officers with alcoholism or drug use. In *Johnson v. New York Hospital*, the Second Circuit held that a jury could properly consider an employee's off-duty conduct of appearing at work intoxicated and subsequent fighting with security guards in determining whether his continued employment constituted a direct threat.[27] The court found that "[t]o turn a blind eye towards such conduct is justified neither by logic nor sound policy [because the employee's] off-duty actions are relevant to whether his employment may pose a threat to the safety of others . . . ."[28] In *Brennan v. New York City Police Department*, a transit officer was fired after leaving his service revolver in a

[24] *Celano v. Marriott International, Inc.*,2008 WL 239306 (N.D. Cal. Jan. 28, 2008).
[25] *Id. at *12.*
[26] *Class v. Towson University*, 806 F.3d 236, 255-257 (4th Cir. 2015).
[27] *Johnson v. New York. Hosp.*, 96 F.3d 33 (1996).
[28] *Id.* at 34.

bag on the subway after drinking four beers at two bars.[29] Subsequently, the office filed suit under the ADA, claiming he was forced to resign because of his alcoholism.[30] In its decision, the Second Circuit noted that the officer's actions violated the rules and regulations of the New York City Transit Police Department that were "consistent with the ADA, which permit an employer to impose a job requirement that its employees 'shall not pose a direct threat . . .'"[31] In *Maull v. Division of State Police*, a Delaware district court held that because "ensuring public health and safety is the sine quo non of [a police officer's] job," a state trooper's alcoholism—including drinking while off duty and on probation—so affected his performance that he "pose[d] a considerable threat to the health and safety of the public and his fellow troopers," such that he was not qualified.[32] In *McKenzie v. Benton*, the Tenth Circuit, while noting that being a sheriff was an inherently dangerous job, took into account the plaintiff officer's "reckless and dangerous" off-duty conduct, including firing her service revolver into her father's grave when off-duty, self-inflicting wounds, and overdosing on drugs, to place the burden on the plaintiff to prove she was not a direct threat.[33] In *Budde v. Kane County Forest Preserve,* a police chief with alcoholism was arrested for off-duty DUI and he was discharged for violating code of conduct. He sued under the ADA and the court held there was no ADA violation because the ADA does not require employers to tolerate misconduct, by employees, even if they have disabilities and the misconduct is off-duty.**[34]**

As noted above, the cases addressing the issue of off-the-job conduct have been limited to those involving police officers. Accordingly, it is still unclear whether courts would allow employers outside of the police context to rely on actions by employees away from the workplace when making a direct threat argument.

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[29] *Brennan v. New York City Police Dep't,* No. 97-7779, 1998 WL 51284, at *1 (2d Cir. Feb. 10, 1998).
[30] *Id.* at *2.
[31] *Id.* at *3 (citing 42 U.S.C. § 12113(b)).
[32] *Maull v. Division of State Police,* 141 F.Supp.2d 463, 474–75 (D. Del. 2001).
[33] *McKenzie v. Benton,* 388 F.3d 1342, 1355–56 (10th Cir. 2004).
[34] *Budde v. Kane County Forest Preserve,* 597 F.3d 860, 862-863 (7th Cir. 2010); *See also Makenin v. City of New York,* 53 F.Supp.3d 676 (S.D. N.Y. 2014)

V. Who has Burden of Proving Direct Threat?

Currently, the courts are split over who has to prove direct threat – the employer or the employee. This distinction is important because it is easier to prevail when the other party has the burden of proof.

Although the EEOC and most courts that have looked at this have found that direct threat is a defense, and therefore something the employer has to prove, some courts have found that direct threat is part of the employee's requirement of showing he or she is "qualified." According to the Seven Circuit:

> The [courts'] confusion stems from the language of the ADA itself, since the statute includes the direct threat language in a section entitled "Defenses," which suggests it is a affirmative defense on which the defendant bears the burden of proof, but also classifies the direct threat analysis as a "qualification standard," which suggests that the plaintiff bears the burden of proving that he or she does not constitute a direct threat, as part of the burden to prove he or she is qualified.[35]

The U.S. Supreme Court has not addressed the issue of which party bears the burden of proving a direct threat, but has referred to the principle as the "direct threat defense."[36] The EEOC deems direct threat to be a defense for which a defendant employer bears the burden of proof.[37]

There is a three-way split among the circuits as to the allocation of the burden to prove a direct threat. First, the Seventh, Eighth, and Ninth Circuits have held that the burden

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[35] *Branham v. Snow*, 392 F.3d 896, 906 n.5 (7th Cir. 2004) (citing Jon L. Gillum, *Tort Law and The Americans with Disabilities Act: Assessing the Need for a Realignment*, 39 IDAHO L. REV. 531, 539, 565–67 (2003)).

[36] *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 86 (2002). In *Echazabal*, the Supreme Court referred to direct threat as the "direct threat defense." *Id.* This brief keeps with that nomenclature generally, though there is case law to the effect that direct threat is a part of the "qualified" analysis that the plaintiff is required to prove as part of his or her prima facie case. *See, e.g., Waddell v. Valley Forge Dental Associates, Inc.*, 276 F.3d 1275, 1280 (11th Cir. 2001) ("If [plaintiff] can meet this burden [of establishing that he was not a direct threat], he is not a qualified individual and therefore cannot establish a prima facie case of discrimination."); *see also* Part III.C, V.

[37] EEOC'S REGIONAL ATTORNEYS' MANUAL, PART 3: CONDUCTING LITIGATION 47 (Apr. 2005), *available at* http://www.eeoc.gov/litigation/manual/pdf/part3.pdf (instructing EEOC attorneys to consider a Federal Rule of Civil Procedure Rule 50(a) motion for judgment as a matter of law or a Rule 59 motion for a new trial after verdict after a loss where the defendant bears the burden of proof, including when direct threat is at issue).

is on the employer to show a direct threat.[38] (The Second Circuit has touched on the issue, noting that the burden is on the employer,[39] but later suggested that the issue could be open to argument.[40]) Second, in contrast, the Eleventh Circuit has stated the burden rests on the employee.[41] Additionally, one recent decision indicated that where the essential job duties necessarily implicate the safety of others, the burden is on the employee to show that he/she can perform those functions without endangering others. Therefore, direct threat becomes part of the employee's requirement of showing he/she is "qualified."[42] Third, in a middle-ground approach, the First Circuit has developed a burden-shifting framework. It concluded that, because a plaintiff applicant/employee must show he or she is "qualified" to perform the essential functions of the position in question, if essential functions implicate safety concerns, the plaintiff must show he or she is not a direct threat; however, if the issue arises merely by way of an employer's defense—that is, the position's essential functions do not implicate safety concerns, the burden is on the defendant employer to show a direct threat.[43] The Tenth Circuit follows

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[38] *Dark v. Curry County*, 451 F.3d 1078, 1091 (9th Cir. 2006) ("Under the ADA, an employer is entitled to defend [an] adverse employment action on the ground that 'an individual [poses] a direct threat to the health or safety of other individuals in the workplace." (citing 42 U.S.C. § 12113(b)); *Branham v. Snow*, 392 F.3d 896, 906 (7th Cir. 2004) (quoting *Dadian v. Vill. of Wilmette*, 269 F.3d 831, 841 (7th Cir. 2001) (citing U.S. E.E.O.C. v. AIC Sec. Investigations, 55 F.3d 1276, 1283–84 (7th Cir. 1995)); *EEOC v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 571–72 (8th Cir. 2007); for more recent cases, *see Nail v. BNSF Railway Company*, 2017 WL 607126 *20 (S.D. Tex. Feb. 14, 2017); *Littlefield v. Nevada*, 195 F.Supp.3d 1147, 1157 (D. Nev. 2016)

[39] *Hargrave v. Vermont*, 340 F.3d 27, 35 (2d Cir. 2003) ("In the employment context, it is the defendant's burden to establish that a plaintiff poses a 'direct threat' of harm to others . . . ." (citing Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208, 220 (2d Cir. 2001) (citing H.R. Rep. No. 101-485, pt. 3, at 46 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 469)); *Lovejoy-Wilson*, 263 F.3d at 220 ("The legislative history of the ADA also supports the premise that '[t]he plaintiff is not required to prove that he or she poses no risk.'" (quoting H.R. Rep. No. 101-485, pt. 3, at 46 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 469)).

[40] *See Sista v. CDC Ixis N. Am., Inc.*, 445 F.3d 161, 170 n.3 (2006) ("Although the parties disagree as to which party bears the burden or proving or disproving that an employee poses a direct threat an disagree as to whether this Court, in *Lovejoy-Wilson* [263 F.3d at 291–21], held that the 'poses a direct threat defense' is an affirmative defense to be proven by the defendant, we need not address this issue, given our resolution of the this case.").

[41] *See e.g. Lewis v. United States Steel Corporation Fairfield Works*, 2016 WL 7373733, *3 (N.D. Ala. Dec. 20, 2016) ("[I]n the Eleventh Circuit, the employee carries the burden of establishing that he was not a direct threat or that reasonable accommodations were available.") (internal quotations omitted). *See also LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832, 836 (11th Cir.1998) (citing *Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir.1997)); *Lewis v. City of Union City*, 877 F.3d 1000, 1014 (11th Cir. 2017)(court refers to direct threat as a defense, but states that plaintiff has provided sufficient evidence to show that she is not a direct threat, which seems to confirm the 11th Circuit's position that the burden is on the plaintiff.); *Leme v. S. Baptist Hosp. of Fla., Inc.*, 248 F. Supp. 3d 1319, 1341 (M.D. Fla. 2017)(plaintiff carries the burden of proving he's not a direct threat)

[42] *Bailey v. City of Englewood*, 2015 WL 4162778 *6 (D. Col. July 7, 2015)

[43] *EEOC v. Amego, Inc.*, 110 F.3d 135, 144 (1st Cir. 1997).

the approach of the First Circuit.[44] While the Fifth Circuit has yet to fully resolve the issue, precedent and several dissents support burden-shifting schemes.[45] Of the remaining circuits, the Third Circuit has reserved judgment on the issue,[46] and the D.C. Circuit has declined to decide the issue.[47]

Since the Supreme Court has not ruled explicitly on which party bears the burden of proof, employers and employees should research this issue carefully when litigating a direct threat issue.

VI. Assessing the Potential for Harm

As noted above, under EEOC regulations, an employer's decision regarding whether an individual poses a direct threat to health or safety must be based on "an individualized assessment of the individual's present ability to safely perform the essential functions of the job."[48] The "individualized 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." The assessment should consider four factors: (1) the duration of

[44] *See Jarvis v. Potter*, 500 F.3d 1113, 1122 (10th Cir. 2007)

[45] *See, e.g., Cleveland v. Mueller Copper Tube Co., Inc.*, 2012 WL 1192125, *7, n.5 (N.D. Miss. April 10, 2012) (citing *Rizzo v. Children's World Learning Ctrs., Inc.* (*Rizzo III*), 213 F.3d 209, 213 n.4., 217 (5th Cir 2000)).

[46] *See, e.g., Coleman v. Pennsylvania State Police*, 561 Fed.Appx. 138, 144, n.9 (3d Cir. 2014) ("While the burden is generally on the employer to prove the existence of a direct threat, *see EEOC v. Hussey Copper Ltd.*, 696 F.Supp.2d 505, 520 (W.D.Pa.2010), when "the essential job duties necessarily implicate the safety of others," the burden "may be on the plaintiff to show that she can perform those functions without endangering others." *See also NewDirections Treatment Servs. v. City of Reading*, 490 F.3d 293, 306 n.9 (3d Cir. 2007) ("[C]ourts have not come to an agreement . . . as to where the burden [of significant risk] lies. . . . We have previously reserved judgment on this issue when it was 'unnecessary to decide this question,' and do so again in this case as it would not affect our holding." (citing *Donahue v. Consol. Rail Corp.*, 224 F.3d 226, 230 (3d. Cir. 2000)).

[47] *Taylor v. Rice*, 451 F.3d 898, 905 n.14 (D.C. Cir. 2006) ("In light of our disposition, we need not decide who bears the burden of proving that the plaintiff poses a direct threat to his health or safety.")

[48] 29 C.F.R. § 1630.2(r); *See also*, EEOC Interpretive Guidance, *supra* note 20 ("Such consideration must rely on objective, factual evidence—not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes—about the nature or effect of a particular disability, or of disability generally.").

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.[49]

The U.S. Court of Appeals for the 7th Circuit explored these four factors in detail in the seminal case of *Branham v. Snow.*[50] Mr. Branham claimed that his employer, the Internal Revenue Service ("IRS"), violated the Rehabilitation Act of 1973 ("Rehab Act") when it failed to hire him as a Criminal Investigator.[51] Mr. Branham, an individual with diabetes, worked for the IRS for twelve years before applying for this position.[52] Due to the factually intensive individualized nature of "direct threat" situations, the court provided a thorough explanation of Type I diabetes and how it affects Mr. Branham:

> Mr. Branham has Type I insulin-dependent diabetes, a noncurable metabolic condition characterized by elevated blood sugar (hyperglycemia). People with Type I diabetes use insulin to lower their blood sugar levels (the long term effects of chronically elevated blood sugar include heart disease, kidney disease, nerve disease and blindness). However, excessive use of insulin may cause too much sugar to leave the bloodstream, leading to abnormally low blood sugar levels (hypoglycemia). A person with mild to moderate hypoglycemia may experience symptoms including tremors, sweating, irritability, confusion and drowsiness. Eating simple carbohydrates will raise the blood sugar level in an individual with mild to moderate hypoglycemia. Severe hypoglycemia may lead to unconsciousness and convulsions and can be life-threatening.
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> In order to keep his blood sugar at an appropriate level, Mr. Branham follows a treatment regimen formulated by his physician, Dr. Paul Skierczynski. Mr. Branham must check his blood sugar level four to five times a day. He controls his blood sugar through the use of insulin [footnote omitted] and through diet and exercise. The readings produced by Mr. Branham's blood sugar tests dictate the amount of insulin that he must administer, as well as when and what type and amount of food he can eat. It is possible for Mr. Branham to skip or delay meals on occasion.

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[49] 29 C.F.R. § 1630.2(r).

[50] *Branham v. Snow*, 392 F.3d 896 (7th Cir. 2005).

[51] The Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq*.

[52] *Branham*, 392 F.3d at 899. For more information on diabetes, see the American Diabetes Association website, www.diabetes.org.

> Although Mr. Branham never has experienced a severe hyperglycemic or hypoglycemic reaction, approximately once every three weeks he does suffer from minor reactions to low blood sugar, including trembling and sweating. At all times, Mr. Branham keeps with him additional insulin and a certain amount of carbohydrates, for use in the event his blood sugar level falls below an acceptable level.[53]

Based on a pre-employment medical examination given to all job applicants for Criminal Investigator after a "tentative" job offer is extended, the IRS refused to hire Mr. Branham because of his diabetes. The IRS informed Mr. Branham by letter that he was "'medically disqualified for the position of Criminal Investigator'" as he could not "perform the essential functions of the job ... with or without accommodation."[54] The letter further stated:

> [T]he position requires the ability to work irregular hours, respond to unanticipated requests and react in a timely and appropriate manner to an emergency or crisis. Subtle and/or sudden incapacitation would place the applicant and others (other Special Agents, the public) at an extreme risk of safety and would be unacceptable.[55]

The IRS requirements for the position include operating a motor vehicle and "moderate to arduous physical exertion involving walking and standing, use of firearms, and exposure to inclement weather." IRS "Special Medical Requirements" for the position provide that:

> [A]ny condition that would hinder full, efficient performance of the duties of these positions or that would cause the individual to be a hazard to himself/herself or to others is disqualifying.[56]

The IRS decision was based on the determination of its physician, Dr. Miller, who reviewed "Mr. Branham's medical history, the results of his medical examination and the

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[53] *Branham*, 392 F.3d at 899.

[54] *Id* at 900.

[55] *Id*.

[56] *Id*.

report of his private physician."[57] Mr. Branham's physician, on the other hand, "concluded that Mr. Branham could perform the duties of a criminal investigator." [58]

In examining the "direct threat" issue, the court looked closely at the four factors identified in EEOC regulations that are cited above. Regarding the duration of the risk, the IRS asserted that Mr. Branham had experienced significant long term and short-term changes in his blood glucose levels that could affect his performance.[59] Mr. Branham and his physician acknowledged that diabetes cannot be cured but felt that Mr. Branham "has exceptional control over his blood glucose levels and has 'full awareness of all his reactions.'" As a result, Mr. Branham is able "to respond promptly to low blood sugar levels" and there is no "real... duration of risk."[60] For purposes of summary judgment, the court "believe[d] that a reasonable trier of fact could conclude that the duration of any risk would not be significant."[61]

As for the nature and severity of the risk, the court acknowledged that the severe hypoglycemia could cause "incapacitation, confusion, coma and death," but noted that Mr. Branham "never has lost consciousness and he never has experienced physical or mental incapacitation as a result of mild hypoglycemia."[62] As a result, the court found for Mr. Branham on this issue as well.

In reference to the likelihood of the potential harm, the IRS asserted that Mr. Branham's program of intensive treatment was "associated with increased risk" of severe hypoglycemia and that some of the job responsibilities "may increase this risk although no "statistical evidence" was provided.[63] Mr. Branham's physician countered this assertion by placing the risk of Mr. Branham suffering a severe hypoglycemic reaction at 0.2% per year. The court concluded that, based on Mr. Branham's evidence, "a reasonable jury could conclude that the likelihood of the harm that the IRS fears is quite low."[64]

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[57] *Id*.

[58] *Id*. at footnote 2.

[59] *Branham*, 392 F.3d at 907.

[60] *Id*.

[61] *Id*.

[62] *Id* at 908.

[63] *Id*.

[64] *Id*.

Regarding the fourth EEOC factor, the imminence of the potential harm, Mr. Branham noted that he "has never suffered any period of incapacitation or other hypoglycemic episode [at work or elsewhere] and there is no medical evidence … that he will do so in the future."[65] The IRS responded by stating, that, "Such an assertion is not supported by logic." The court disagreed with the "logic" of the IRS stating:

> On this record, a reasonable trier of fact could conclude that Mr. Branham can prevent severe hypoglycemia from occurring by maintaining his treatment regimen and vigilantly testing his blood sugar levels, thereby allowing himself to calculate accurately how much insulin he should administer himself and how much and what type of food he will need to ingest. On this record, a reasonable trier of fact could conclude that this practice eliminates any imminence with respect to the risk of harm.[66]

Based on its detailed "direct threat" analysis of the four factors, the court reversed the district court's holding for the employer on summary judgment. The appellate court held:

> On the record in this case, a reasonable trier of fact could find that Mr. Branham is qualified for the position of criminal investigator. Therefore, we must conclude that the IRS is not entitled to summary judgment on the question of Mr. Branham's qualifications. [internal citation omitted]. Mr. Branham has raised a genuine issue of material fact as to whether he can perform the essential functions of the position of criminal investigator without becoming a threat to the safety of himself or others. On this record, the [IRS] has not established otherwise.[67]

Branham v. Snow is noteworthy for its intense "direct threat" analysis. This opinion shows the importance of medical evidence and on performing the required "individualized assessment." Almost all IRS assertions were based on its assumptions regarding diabetes in general, not on how the condition affected Mr. Branham. Due to its faulty analysis that was based on stereotypes rather than an "individualized assessment" based on the "best available" medical information, the appellate court held that a jury could conclude that the IRS unlawfully refused to hire Mr. Branham as a Criminal Investigator.

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[65] *Id*.

[66] *Id*.

[67] *Id* at 908-909.

Direct Threat under the ADA

The more recent district court case *Searls v. Johns Hopkins Hospital*[68] also provides a good illustration of courts treating direct threat defenses with skepticism when there is not an individualized assessment of an employee's potential for significant risk of substantial harm. The case concerned a deaf prospective nurse employee whose job offer was rescinded following her request for an accommodation in the form of a full-time American Sign Language (ASL) interpreter. The Hospital argued that employing Searls as a nurse would have imposed a direct threat. Asserting that some patient alarms were only auditory, the Hospital argued that "it would have been a significant patient safety risk to rely on an interpreter, without any nursing training, to engage in nursing judgment by determining which alarm was sounding and to rely on the interpreter's judgment to determine when a patient emergency was occurring, requiring nursing assistance."[69] The court was not convinced by this direct threat defense, asserting that it was "based on post-hoc rationalizations and… therefore suggestive of pretext."[70] The court noted that there was no contemporaneous evidence that the Hospital had considered direct threat when rescinding Searls' offer of employment, and in fact contemporaneous communications stated that the job offer was being rescinded due to an "undue hardship based on cost".[71] Further, the court found that the direct threat defense also failed because the record showed a failure to conduct an individualized assessment of Searls' present ability to safely perform essential job functions. [72] Instead of conducting an individualized assessment in line with the ADA, the Hospital instead relied on stereotypes or generalizations about deafness. In deposition testimony, a hospital staff member expressed concern about Searls' ability to function safely as a nurse based on her inability to hear alarms, despite the fact that she had never observed Searls failing to respond to an alarm.[73] Likewise, the staff member's conclusion that Searls would pose a patient safety risk was based on speculation that because Searls was deaf, and cannot hear alarms, that she would therefore endanger patient health.[74] Because this conclusion was not derived from any medical basis, nor did it account for whether safety concerns could be alleviated by a reasonable accommodation, the Hospital failed to meet its burden of establishing that Searls constituted a direct threat to the safety of others.[75]

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[68] *Searls v. Johns Hopkins Hospital*, 158 F.Supp.3d 427 (D. Md. 2016)
[69] *See id*. at 439.
[70] *Id*.
[71] I*d* at 439- 440.
[72] *Id*. at 440.
[73] *Id*.
[74] *Id*.
[75] *Id*.

However, if an employer does conduct an "individualized assessment" of an individual's disability, and finds that the individual's condition causes a "direct threat," it may be justified in terminating or refusing to hire the individual. For example, in *Darnell v. Thermafiber*, *Inc*., another Seventh Circuit case involving an individual with insulin dependent Type 1 diabetes, the plaintiff admitted that his diabetes was not under control (unlike Mr. Branham).[76] As a result, the court affirmed summary judgment for the employer after it refused to rehire the job applicant.[77] Before applying for employment, Mr. Darnell had worked for Thermafiber as an Operator through a temporary placement agency from October 2000 through May 2001.[78] The position required working around heavy machinery in extremely hot conditions. Before starting work, Mr. Darnell passed a pre-employment physical given by a "nurse practitioner." In April 2001, Mr. Darnell applied for employment directly with Thermafiber. While working there, he had not had "any debilitating episodes… related to his diabetes."[79]

When Mr. Darnell applied in April 2001 for direct hire, he was required to undergo a pre-employment physical with a physician consisting of "a urine glucose test and interview."[80] Based on these two procedures, Thermafiber's physician, "whose practice includes 180 diabetes patients," determined that Mr. Darnell's "diabetes was not under control; as a result he felt there was no need to conduct further tests or review Darnell's medical chart." The physician was "shocked" by Mr. Darnell's "disinterest" in his condition and concluded that his uncontrolled diabetes rendered him unqualified for the position as he posed a "direct threat."[81] The doctor based the conclusion on his belief that the risk of harm was "significant," and that there was "a very definite likelihood" that "harm could occur." The doctor stated that it was "a reasonable medical certainty that Darnell would pass out on the job ... sooner or later ...."[82]

Mr. Darnell argued that this limited examination did not constitute an "individualized assessment," that he did not pose a "direct threat" as he has not experienced any hypoglycemic events, and that Thermafiber failed to investigate or provide reasonable

[76] *Darnell v. Thermafiber, Inc.*, 417 F.3d 657, 659 (7th Cir. 2005).

[77] *Id* at 663.

[78] *Id* at 658-659.

[79] *Id* at 659.

[80] *Id*.

[81] *Id*.

[82] *Id* at 662.

accommodations such as "additional food and water breaks."[83] The court did not agree with any of Mr. Darnell's arguments stating, "where the plaintiff's medical condition is uncontrolled, of an unlimited duration, and capable of causing serious harm, injury may be considered likely to occur."[84] The court noted that Thermafiber's physician assumed that the requested accommodations would be in place. The court found that harm was likely even though Darnell worked safely on the job for ten months.[85]

Often defendants will argue that they should not be held liable under the ADA as long as had a "good faith" belief that the plaintiff was in fact a direct threat. The U.S. Supreme Court rejected this argument in *Bragdon v. Abbott.*[86] In *Bragdon,* a dentist refused to treat a patient with HIV. She sued under ADA and he claimed she was a direct threat. Court held that risk assessment must be based on medical or other objective evidence. As a health care professional, the defendant had a 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.[87]

Courts have consistently found that employer policies that categorically exclude certain disabilities run afoul with direct threat analysis. For instance, in *Littlefield v. Nevada, ex. Rel. Dept. of Public Safety*,[88] a man was denied a position as highway patrol officer due to policy that excluded people with monocular vision. The court held that the employer failed to conduct individualized assessment whether plaintiff could perform the essential functions despite his monocular vision.[89]

When employers conduct an individualized assessment, courts have emphasized that the individualized assessment must focus on the employee's disability and the employee's job. For example, in *EEOC v. American Tool & Mold, Inc.*,[90] a job applicant disclosed a prior back and spine injury and corresponding surgery in a post-offer

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[83] *Id* at 659-660.

[84] *Id* at 662.

[85] *Id* at 663.

[86] *Bragdon v. Abbott*, 524 U.S. 624 (1998).

[87] *Id.* at 649-650; *see also, Stragapede v. City of Evanston*, 865 F.3d 861 (7th Cir. 2017) (A direct threat defense can only be based on medical or other objective evidence, and cannot be based on a good faith belief of significant risk).

[88] *Littlefield v. Nevada, ex. Rel. Dept. of Public Safety*, 195 F.Supp.3d 1147 (D. Nev. 2016).

[89] *Id.* at 1158; *See also, Nathan v. Holder*, 2013 WL 3965241 (EEOC July 19, 2013) (finding lack of individualized assessment for FBI agent applicant with monocular vision doomed direct threat argument).

[90] *EEOC v. American Tool & Mold, Inc.*, 21 F. Supp.3d 1268 (M.D. Fla. 2014).

medical questionnaire. Without knowing the essential functions of the applicant's position, the company doctor deemed him unfit for duty, refused to conduct further examination, and demanded medical records. The applicant obtained a medical examination from an independent doctor, and presented a report to the employer, but the employer rejected the report and withdrew the offer. The EEOC brought suit on behalf of the applicant under the ADA and the court found that the company failed to perform an individualized assessment into the applicant's physical condition. The court also found that the company doctor failed to assess the specific requirements of that particular job. Accordingly, the court found that the employer had no basis to declare the applicant a direct threat or unqualified, and the withdrawal of the job offer was a violation of the ADA.[91]

As noted previously, when determining whether there is a direct threat, it is necessary to look at not only how significant the risk is, but also how substantial the harm will be. Many courts will make a finding of direct threat if the harm is very substantial, even if the risk of that harm is low. For instance, in *Gardner v. University of Conn. Health Center*,[92] a social worker who worked in a prison had a seizure while she was with an inmate and she was subsequently terminated. She filed suit under the ADA and the employer argued that the termination was justified because she was a direct threat. Plaintiff admitted that part of her job meant that she could come into contact with maximum security inmates with violent tendencies, and that dangerous situations, such as thefts of keys, could occur within seconds. However, she claimed she would not have another daytime seizure if she maintained her medication regimen, so there was not a "significant risk" and therefore no direct threat. The court found in favor of the employer upholding the direct threat defense. The court explained that even if the likelihood of another daytime seizure is small, the severity and scale of potential harm made it permissible to find plaintiff posed a direct threat.[93]

In some direct threat cases, the disability is the result of an injury and the question is how likely re-injury will occur. In those cases, courts usually find this is a question of fact requiring a determination by a jury. For instance, in *Fortkamp v. City of Celina*[94], an employee injured his back while working as an electric lineman for the City of Celina. After a spinal fusion surgery and nearly five year absence, he applied for reinstatement, but the City refused, arguing that he posed a direct threat. The City argued there was a

[91] *Id.* at 1285.
[92] *Gardner v. University of Conn. Health Center*, 2016 WL 4582039 (D. Conn. Sept. 1, 2016).
[93] *Id.* at *6.
[94] *Fortkamp v. City of Celina*, 159 F.Supp.3d 813 (N.D. Ohio 2016).

high likelihood that re-injury would occur. The employee countered that employer was inflating the arduousness of the essential functions of an electric lineman and that some of the issues the City was concerned about were not even essential functions of his job. He also provided videos of him lifting weights as well as support from his physicians. The court ruled in favor of the employee finding that whether the plaintiff was a direct threat was a genuine issue of material fact for the jury to decide.[95]

VII. Medical Information – A Reasonable Medical Judgment Based on the Best Available Objective Evidence

As noted previously, employers may only request that employees undergo medical examinations and inquiries that are job-related and consistent with business necessity.[96] This requirement is satisfied when an employer has:

> [A] reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition."[97]

After basing a request for medical information on objective evidence, employers should be aware that the nature of the medical evidence relied upon is important. Employers are generally on strong ground if there is medical substantiation for the conclusion that the employee poses a direct threat to health and safety. However, when employers rely solely on the opinion of company doctors or on stereotypes, and ignore contrary medical opinions, especially those of treating physicians, courts are less likely to find for the employer.[98]

Whether the employer used the "best available objective medical evidence" was at issue in *Taylor v. USF-Red Star Exp. Inc*. In *Taylor*, a fork-lift driver experienced two

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[95] *Id.* at 825-826.

[96] 42 U.S.C. § 12112(d)(4)(A).

[97] *EEOC Guidance on Reasonable Accommodation and Undue Hardship,* Question 5, October 17, 2002, http://www.eeoc.gov/policy/docs/accommodation.html#requesting;

[98] See generally, *EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA),* July 27, 2000, http://www.eeoc.gov/policy/docs/guidance-inquiries/html.

seizures that were deemed to be consistent with a seizure disorder.[99] Taylor informed Red Star of his seizure disorder and, according to Red Star, stated that he had been diagnosed with "infantile epilepsy." Based solely on this diagnosis, Red Star did not allow Taylor to return to work for 18 months. During this time, several physicians evaluated Taylor's condition. Twice, Taylor was examined by medical professionals who cleared him to work, but reversed their opinions after speaking with a physician retained by the company.[100] Red Star attempted to justify its refusal to return Taylor to work based on his statement that he had "infantile epilepsy."

However, the Third Circuit Court of Appeals found that Red Star's belief that Taylor was unable to work was not based on Taylor's alleged comment, but rather on the assessments of doctors who were reporting to, and retained by, Red Star.[101] Thus, the court held that Red Star violated the ADA when it refused to allow Taylor to return to work because it regarded him as being disabled. This case demonstrates the EEOC Guidance caveat mentioned earlier about the dangers of employers relying solely on company physicians and ignoring contrary opinions. It was clear to the court that Red Star's refusal to let the employee return to work was based on the assessment of doctors who were reporting to, and retained by, the company. The court also utilized the company doctor to get other doctors to change their medical opinions and the court found for the employee as a result.[102]

Similarly, in *EEOC v. Burlington Northern & Santa Fe Railway Co.*,[103] a train conductor experienced an accident that resulted in the amputation of his right leg below his knee. The conductor's physician released him to return to work with no restrictions. However, the employer's doctors determined that the conductor posed a direct threat and he was terminated. The court found in favor of the employee because the employer's doctors never examined or observed the conductor, but referred only to their general knowledge of amputations, rather than conducting an individualized assessment. Moreover, the employer ignored the contrary opinion of the employee's physician who had examined him.[104]

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[99] *Taylor v. USF-Red Star Exp. Inc.*, 212 Fed. Appx. 101, 2006 WL 3749598 (3rd Cir. 2006).

[100] *Taylor v. USF-Red Star Exp. Inc.*, 212 Fed. Appx at 104, 2007 WL 750391 at 1-2.

[101] *Taylor v. USF-Red Star Exp. Inc.*, 212 Fed. Appx at 108, 2007 WL 750391 at 5.

[102] *Id.*

[103] *EEOC v. Burlington Northern & Santa Fe Railway Co.*, 621 F. Supp. 2d 587 (W.D. Tenn. 2009).

[104] *Id.* at 601-602.

Direct Threat under the ADA

The timing of the employer's individualized medical assessment can be a key factor in direct threat cases. If the assessment is *after* the adverse employment action, it will likely carry less weight with the court. In *Fahey v. Twin City Fan Companies, Ltd.*, the plaintiff was hired as a parts expediter, a position whose job duties involved operating a forklift and a bridge crane. After being hired, Fahey's job offer was rescinded when his prospective employer learned that he was blind in his right eye.[105] Fahey brought various ADA claims at trial, and the court ultimately ruled in his favor. One aspect of the litigation was the defendant's attempted direct threat defense, which was heavily derived from a medical expert's deposition testimony. The court rejected this medical evidence, because it was presented subsequent to the decision to rescind Fahey's offer of employment:

> During the trial, Twin City Fan relied heavily on deposition testimony from Dr. Edinger to establish Fahey posed a direct threat. The deposition of Dr. Edinger, however, was taken after the decision to rescind Fahey's job offer and her testimony was not available to Twin City Fan at the time it made its employment decision. It is therefore inappropriate to consider Dr. Edinger's after-the-fact opinions about any threats posed by Fahey when deciding whether Twin City Fan met its obligation to undertake an individualized inquiry that relied on the best current medical or other objective evidence…. As a result, the court will only consider the information Twin City Fan had available to it at the time it rescinded Fahey's job offer.[106]

What happens when the company doctor and the employee's doctor both conduct an individualized assessment regarding direct threat but reach different conclusions? In some cases, courts will find there is a question of fact that must be resolved by the jury. Other courts have held that as long as the company doctor's conclusion is objectively reasonable, then that will be sufficient. For instance, in *Michael v. City of Troy Police Department,*[107] a patrol officer with a brain tumor engaged in aberrant behavior. The police department would not let him return to work after brain surgery unless he passed a psychological examination. The employee underwent testing and the employer's and employee's doctors had opposite assessments about the employee's ability to return to work. The court held that the employer's doctor's opinion was sufficient for a finding of direct threat. The court explained that the law only requires the employer to rely on an "objectively reasonable opinion" rather than a "correct opinion". In this case, the court

[105] *See Fahey v. Twin City Fan Companies, Ltd.*, 994 F.Supp.2d 1064, 1069-71(D.S.D. 2014).
[106] *Id.* at 1074.
[107] *Michael v. City of Troy Police Department*, 808 F.3d 304 (6th Cir. 2015)

also found that the employer could rely on non-medical information (the employee's conduct) when assessing direct threat, which may have tipped the balance for the court.[108]

Courts may also resolve the different opinion between the company doctor and the employee's doctor by determining which physician has the best *current* objective evidence. In *Shelton v. City of Cincinnati*[109], an employee worked as a firefighter and had diabetes diagnosis. He experienced one hypoglycemic episode while firefighting, another while driving to work, and also once vomited at work. The employer terminated him and the employee sued under the ADA. In response, the employer alleged that the employee constituted a direct threat. The company doctor and the employee's doctor reached opposite conclusions as to whether the employee was fit for duty. The court denied employer's effort to dismiss the case finding that the employee's doctor covered time periods subsequent to the company doctor's evaluation, indicating that it was the best *current* objective evidence.[110]

It was held that the company complied with the ADA in *Ward v. Merck & Co.,* when it terminated a pharmaceutical company chemist with mental illness, including anxiety and panic disorders, for failing to comply with the company's demand for a fitness for duty evaluation.[111] Mr. Ward's co-workers & supervisors became concerned about his performance and behavior when "Ward began to engage in strange behavior" including having a "temper tantrum," walking around like a "zombie," and causing a disruptive "episode in Merck's cafeteria" that resulted from a "brief psychotic disorder."[112] As a result of Mr. Ward's behavior, his difficulties interacting with others, and his limited productivity and participation at work, Merck requested that he undergo a fitness for duty evaluation with the company's physician. Mr. Ward refused, was suspended without pay, and terminated when he did not respond to a follow-up letter insisting that he undergo the examination.[113] The court held that Merck's requirement for the fitness for duty examination met the "business necessity" test under the ADA. The court placed the burden of proof on Merck to show that Mr. Ward posed a "direct threat" and found

[108] *Id.* at 308-309.
[109] *Shelton v. City of Cincinnati*, 2012 WL 5385601 (S.D. Ohio Nov. 1, 2012).
[110] *Id.* at *12-13.
[111] *Ward v. Merck & Co.*, 226 Fed. Appx. 131, 2007 WL 760391 (3rd Cir. 2007).
[112] *Ward v. Merck & Co.*, 226 Fed. Appx. at 132-133, 137; 2007 WL 750391 at 1, 3.
[113] *Ward v. Merck & Co.*, 226 Fed. Appx. at 133-134, 2007 WL 750391 at 1.

that the possible "threats to employee safety" based on the conduct cited above "were sufficient to meet the business necessity element."[114]

Similarly, in *Leonard v. Electro-Mechanical Corp.,*[115] a janitor with back problems was perceived by his employer as having difficulty doing his job when he took frequent breaks and had multiple leaves of absence. The employer expressed concern for the safety of the employee and others and required him to undergo an independent medical exam. The employee did not comply with the request and was terminated. The court held that the employer's request for a medical examination was job-related and consistent with medical necessity. Since the employer had a reasonable belief that employee's medical condition impaired his ability to do the essential functions of his job and was potentially a direct threat to himself and others, the employer was not deemed to have violated the ADA.[116]

Courts will be less deferential to an employer's request that an employee submit to a medical examination if the employer is unable to show there is a necessity based on current knowledge. For example, in *Sanders v. Illinois DCMS,*[117] an employer required an employee to undergo medical examination after he supposedly made threats in the workplace. It was later determined that the threats were unfounded. Despite this additional information, the employer still required the employee to undergo medical examination. The employee sued under the ADA for the improper medical examination and the employer raised the direct threat defense. The court refused to dismiss the case finding that there was a question of fact whether the business necessity for the examination still existed once the employer learned that the threats were unfounded.[118]

In some cases, employers don't even consult with the company doctor, but instead make direct threat determinations based upon their own incorrect knowledge of medical facts. For instance, in *Davis v. Larry's IGA*[119], a grocery store owner learned that an employee had genital herpes, and terminated him. The employee sued under the ADA and the employer raised the direct threat defense. The court rejected the direct threat defense because the employer had relied upon incorrect assumptions about genital herpes, including that the employee's condition would compromise the sanitation of the employer's food supply and would pose a risk to customers. The court found these

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[114] *Ward v. Merck & Co.*, 226 Fed. Appx. at 138-140, 2007 WL 750391 at 6.
[115] *Leonard v. Electro-Mechanical Corp.*, 36 F.Supp.3d 679 (W.D. Va. 2014).
[116] *Id.* at 686-688.
[117] *Sanders v. Illinois DCMS*, 2012 WL 549325 (C.D. Ill. Feb. 21, 2012).
[118] *Id.* at *12.
[119] *Davis v. Larry's IGA*, 2010 WL 746433 (E.D. Mich. Mar. 2, 2010).

assertions completely unsupported and thereby invalidated the employer's direct threat defense.[120]

Similarly, in *Nutall v. Reserve Marine Terminals*[121], employee worked as a heavy equipment maintenance mechanic and sustained a severe back injury due to heavy lifting. Two years later, he received a release from his doctor that he was cleared to return to full-duty work. However, the employer did not trust the opinion and viewed employee as "not yet released." The court refused to enter summary judgment in favor of the employer finding that the employer offered no medical or objective evidence that the employee was a direct threat, including failing to get the company doctor to conduct an examination. Since the only medical testimony offered was that of employee's doctor, the court let the employee's ADA case proceed.[122]

Employers should be careful not to let the opinions of co-workers influence decisions regarding direct threat, especially if there is contrary medical evidence. In *Rednour v. Wayne Township*[123], an employee with diabetes worked as a paramedic and experienced multiple hypoglycemic episodes while driving ambulance. The employer's own doctor recommended that employer accommodate the employee by moving him to "light duty status." The employer disregarded the company doctor's opinion and instead terminated the employee based on co-workers feeling unsafe and internet research he had conducted about Type 1 diabetes. The court found that the employer's direct threat decision was not based on best available objective evidence nor most current medical knowledge of employee's individual diagnosis. The company doctor brought more expertise than subjective opinion and freelance research.[124]

VIII. Reasonable Accommodations to Reduce or Eliminate the Direct Threat

The analysis of direct threat does not end with the inquiry of whether the person poses a significant risk of substantial harm to oneself or to others. Instead, as set forth in the text of the ADA and the EEOC regulations, an employer must determine whether the potential threat can be reduced or eliminated through the implementation of some type

[120] *Id.* at *3.
[121] *Nutall v. Reserve Marine Terminals*, 2015 WL 9304350 (N.D. Ill. Dec. 22, 2015).
[122] *Id.* at *6-7*; see also, Adduci v. Yankee Gas Services Co.* , 2016 WL 4926412 (D. Conn. Sept. 14, 2016) (even though the opinion of the employee's doctor was vague, employer's efforts to rebut it were unsuccessful when it failed to have a separate examination conducted by the company doctor).
[123] *Rednour v. Wayne Township*, 51 F.Supp.3d 799 (S.D. Ind. 2014).
[124] *Id.* at 823-825.

of reasonable accommodation.[125] Court decisions since the passage of the ADA have provided additional interpretation of how reasonable accommodations must be incorporated into the direct threat analysis. Interestingly, although in most ADA cases, courts have required that the reasonable accommodation process be initiated by the person with the disability, courts are increasingly finding that employers have not proven a direct threat defense if they failed to consider possible reasonable accommodations that could reduce or eliminate the perceived threat.[126]

In *EEOC v. Wal-Mart Stores*,[127]a person with cerebral palsy applied for the positions of greeter and cashier. He was not hired and the EEOC filed suit under the ADA. Wal-Mart alleged that the applicant, who used crutches, would have caused a direct threat, with Wal-Mart's doctor identifying several safety risks. First, he alleged that the applicant was not capable of holding himself in a standing position for an extended period of time and would be a danger to himself in that he might fall or he might experience recurrent knee and back pain. Additionally, the doctor thought the applicant would be a danger to others because he is "very wide when he uses his crutches" and would pose an "obstacle" to customers. However, the applicant, in addition to using crutches, often used a wheelchair. The court found that the doctor's direct threat analysis did not include any consideration as to whether the alleged threat the applicant posed when using his crutches could be sufficiently reduced if he had been permitted to use his wheelchair when performing the duties of greeter and cashier. Because the employer failed to incorporate reasonable accommodation into its direct threat analysis, the court found in the EEOC's favor.[128]

In *Taylor v. Rice,*[129] Mr. Taylor applied to be a Foreign Service Officer, but was rejected because of his HIV status. The State Department had a policy prohibiting the hiring of people with HIV for these positions claiming that they could not perform the essential functions of the job. Specifically, the government argued that worldwide availability was an essential function of the job in question, and plaintiff's HIV prevented him from being able to work in any post worldwide due to the greater risk of contracting disease and insufficient medical care in certain locations. Thus, the government argued that Mr. Taylor posed a direct threat to himself due to his HIV status. Mr. Taylor had identified two potential reasonable accommodations that the government had rejected: deploy

[125] *See* 42 USC § 12111(3) and 29 C.F.R. §1630.2(r)

[126] *For example, see Siewertsen v. Worthington Steel Co.,* 134 F.Supp.3d 1091, 1106 (N.D. Ohio 2015) (employee's failure to request a specific accommodation does not bar his failure-to-accommodate claim)

[127] *EEOC v. Wal-Mart Stores* , 477 F.3d 561 (8th Cir. 2007)

[128] *Id.*

[129] *Taylor v. Rice,* 451 F.3d 898 (D.C. Cir. 2006)

him to countries that had sufficient medical care or provide him with leave to travel to a doctor when necessary to address his HIV. The D.C. Circuit Court of Appeals reversed the trial court's entry of summary judgment in favor of the government, finding there was a question of fact whether reasonable accommodations would be able to reduce the alleged direct threat to plaintiff's health so that there was not a substantial risk of significant harm and whether the accommodations requested for treatment would indeed result in the elimination of an essential job function.[130] Shortly thereafter, the State Department eliminated its ban on hiring people with HIV for the Foreign Service. This case is a good example that courts generally disfavor blanket policies that fail to incorporate individualized assessments and reasonable accommodations.

In *Dark v. Curry County*,[131] Mr. Dark, a heavy equipment operator with epilepsy, had an aura before work indicating that he might have a seizure, but he worked anyway and did not alert his employer to the aura he had experienced. Later that day, Mr. Dark had a seizure while driving at work, and although no one was hurt, the employer fired him claiming that Mr. Dark was not qualified and posed a direct threat. The court ruled that there was a genuine material issue of fact as to whether Mr. Dark was a direct threat in the workplace. Specifically, the court found that the employer needed to explore whether a reasonable accommodation, such as job reassignment or temporary medical leave, would have been able to eliminate the alleged threat in the workplace. The employer's failure to explore potential reasonable accommodations prior to terminating Mr. Dark allowed the case to continue to proceed.[132]

Employers in direct threat cases who ignore reasonable accommodation recommendations by the company doctor do so at their peril. For example, in *Fahey v. Twin City Fan Companies,* discussed previously, an applicant with monocular vision applied for a parts expediter position. He was given a conditional offer, but had to undergo a medical examination. Following the examination, the company doctor advised the employer that reasonable accommodations would need to be explored. Instead, the employer withdrew the conditional offer based on the view that the applicant would be a direct threat in the workplace. The court held that the employer failed to prove direct threat as it rescinded job offer without exploring with the company doctor or the applicant what accommodations might have worked. There was opening

[130] *Id.* at 911-912
[131] *Dark v. Curry County*, 451 F.3d 1078 (9th Cir. 2006)
[132] *Id.*

for another job that applicant could have done, but the reasonable accommodation of reassignment was not explored by the employer.[133]

Nevertheless, in some cases, courts have found that accommodations are unable to sufficiently reduce or eliminate the threat in the workplace. In *Jarvis v. Potter,*[134] a U.S. Postal Service employee with post-traumatic stress disorder had previously punched a co-worker who startled him. Employee told employer that his, "PTSD was getting worse and that he could no longer stop at the first blow, that if he hit someone in the right place he could kill him, and that he could not return to the workplace and be safe." As a reasonable accommodation, Mr. Jarvis requested that his co-workers be instructed, "not to startle him or approach him from behind." USPS placed him on leave, and upon determining that the accommodation request was not reasonable, he was terminated. After Mr. Jarvis filed suit, the court found in favor of the employer upholding the employer's determination that he was a direct threat. The court relied on the prior evidence of violence and the employee's own incriminating statements. The court stated that employers are not required to wait for a serious injury before eliminating the potential threat. In this case, the court found that the accommodation request was not realistic in a busy workplace like a post office and would not be effective in assisting the employee to act appropriately in the workplace.[135]

Similarly, in *Mayo v. PCC Structurals, Inc.,* 795 F.3d 941 (9th Cir. 2015),[136] an employee with major depressive disorder worked as a welder. He began making threatening comments, but claimed his behavior was caused by his disability. Regardless, employer terminated him. He filed suit and the employer raised the defense that the employee was a direct threat. The court agreed with the employer finding that the direct threat defense allows termination if someone poses danger to other employees or demonstrated potential of future violence. The court further found that the employee's requested accommodation – to be transferred to another supervisor – was not reasonable, as it would not reduce the threat, but rather, just add someone else to the employee's threat list.[137]

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[133] *Fahey, supra* at 1078-1079; *see also, Allen v. Baltimore County, Md.*, 91 F.Supp.3d 722 (D. Md. 2015) (court chastised the employer for totally ignoring the reasonable accommodation component of determining whether employee constituted a direct threat).

[134] *Jarvis v. Potter*, 500 F.3d 1113 (10th Cir. 2007)

[135] *Id.*

[136] *Mayo v. PCC Structurals, Inc.*, 795 F.3d 941 (9th Cir. 2015).

[137] *Id.* at 945-946. *See also, Gardner v. University of Connecticut Health Center*, 2016 WL 452039, *8 (D. Conn. Sept 1, 2016) (accommodation of allowing employee to use her sick time in the event of a seizure did not serve to reduce the risk of her experiencing another unanticipated seizure while working in a dangerous prison environment).

IX. Conclusion

When Congress passed the ADA, the direct threat provision was intended to balance the employer's interest in maintaining a workplace that is safe and healthy with the employee's interest not to be excluded from the workplace based on fears, generalizations, stereotypes, or myths about a particular disability. Accordingly, before making an adverse decision based on direct threat, employers must engage in an individualized assessment that is based on reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. Additionally, employers should engage in the interactive process to determine whether a reasonable accommodation exists that could sufficiently reduce or eliminate the potential threat in the workplace. By conducting individualized assessments and exploring reasonable accommodations, employers will ensure that people with disabilities are not unnecessarily excluded from the workplace, while at the same time enable the employer to do what is necessary to maintain a safe and healthy workplace.