IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

JOE HOUSE,	)	
Plaintiff,	)	**Civil Action No. 1:99-1306**
v.	)	**Judge Todd**
CITY OF JACKSON and the JACKSON POLICE DEPARTMENT,	)	
Defendants.	)	

UNITED STATES' BRIEF AS *AMICUS CURIAE*
IN RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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BACKGROUND

The State of Tennessee has enacted five state statutes which mandate various minimum qualification standards for all persons employed or seeking employment in any of five different law enforcement positions in the state: "police officer" (Tenn. Code Ann. §38-8-106); "sheriff" (Tenn. Code Ann. §8-8-102); "correctional officer" (Tenn. Code Ann. §41-1-116); "youth service officer" (Tenn. Code Ann. §37-5-117); and "public safety dispatcher" (Tenn. Code Ann. §7-86-201). Among the numerous standards imposed by each of these statutes is the following requirement, which is stated in nearly identical language in all five statutes:

> Persons employed in these positions must "be free of all apparent mental disorders as described in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association," and "must be certified as meeting these criteria by a qualified professional in the psychiatric or psychological fields."[1]

By means of this provision, these statutes mandate the automatic exclusion from employment of all persons who have any mental condition listed in the DSM, without allowing for an individualized assessment of whether a particular individual can safely perform the essential functions of the particular job in question with or without a reasonable accommodation, and without providing for any exception.[2]

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[1] The Diagnostic and Statistical Manual, or "DSM," is a compendium of all mental conditions that psychiatrists generally consider to be "mental disorders." Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition ("DSM-IV"), American Psychiatric Association (Washington, D.C. 1994). The DSM states that its "purpose...is to provide clear descriptions of diagnostic categories in order to enable clinicians to diagnose, communicate about, study, and treat people with various mental disorders." DSM-IV at xxvii.

[2] The state statute applicable to public safety dispatchers, Tenn. Code Ann. §7-86-201, contains an ineffective "grandfather provision" which purports to exempt current employees who have mental disabilities covered by the ADA, but only if they are over fifty years-old and have been continuously working as a public safety dispatcher for five years. See Tenn. Code Ann. §7-86-

On November 16, 1999, Plaintiff Joe House, a police officer, brought this suit against his former employers, Defendants City of Jackson and the Jackson Police Department, alleging that they unlawfully discriminated against him on the basis of disability in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. §§12101, *et seq.* Among his other claims, Plaintiff alleges that Defendants unlawfully relied upon Tenn. Code Ann. §38-8-106[3] when they refused to reassign him to a desk officer position as a reasonable accommodation of his disability (post-traumatic stress disorder). See Plaintiff's Complaint, p. 4. Plaintiff alleges that this statutory provision conflicts with the ADA and is therefore preempted, and that Defendants are estopped from relying upon it as a defense to a claim of unlawful discrimination under the ADA. Id. at 4-5. In addition to other requested relief, Plaintiff prays for injunctive relief and a declaration that this provision violates the ADA. Id. at 6.[4]

On October 13, 2000, Defendants filed a Motion for Summary Judgment, arguing, *inter alia*, that Plaintiff, who has been diagnosed with a "mental disorder" as defined by the statute,

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201(d). Similarly, a separate state statute applicable to police officers, Tenn. Code Ann. §38-8-104, authorizes the Peace Officer Standards and Training (POST) Commission to "establish criteria for determining whether to grant an exception to or waive the qualifications of minimum standards" as provided in Tenn. Code Ann. §38-8-106, "except that no waiver or exception shall be granted for...mental illness."

[3] Section (9) of Tenn. Code Ann. §38-8-106 mandates the requirement excerpted above with respect to police officers.

[4] The United States also currently has active claims in a related case currently pending before this Court, Nored v. Weakley County Emergency Communications District, et al. (Case No. 1:98-1357), in which the United States challenges the State of Tennessee's enactment and implementation of all five of these statutory provisions, as well as the implementation of the provisions by city and county employers. When this Court certified the challenge to the statutory provisions' validity to the state Attorney General, pursuant to 28 U.S.C. §2403 and Fed. R. Civ. P. 24(c), the state declined to defend them.

"could not perform duties as a desk officer...because he was a safety threat to himself and others." Defendants' Memorandum of Law, p. 12. Defendants also argue that "Plaintiff cannot, as a matter of law, be considered a 'qualified individual with a disability' [under the ADA] since he cannot satisfy the requirements of Tenn. Code Ann. §38-8-106," and that "[t]he ADA does not require an employer to accommodate a person's disability by ignoring duties imposed by state or federal statute." Id., p. 13. Thus, Defendants have invoked as an affirmative defense the very statutory provision asserted by both Plaintiff and the United States to be facially invalid under and preempted by the ADA.[5]

STATUTORY AND REGULATORY BACKGROUND

Title I of the ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees,...and other terms, conditions, and privileges of employment." 42 U.S.C. §12112(a). A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. §12111(8).[6]

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[5] Defendants also raise several other defenses to liability, arguing, *inter alia*, that Plaintiff is not a person with a disability and was not qualified for the desired position, and, alternatively, that he was offered and refused a position as a public safety dispatcher as a reasonable accommodation. The United States expresses no opinion with respect to these additional claims, except to note that Defendants appear to have overlooked the fact that, as a public safety dispatcher, Plaintiff would have been subject to the same blanket exclusion, and thus, under their theory, ineligible for employment in that position. See Tenn. Code Ann. §7-86-201.

[6] An individual has a "disability" under the ADA if he or she has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or [is] regarded as having such an impairment." 42 U.S.C.

As used in the ADA, the term "discriminate" specifically includes "using qualification standards...that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity..." 42 U.S.C. §12112(b)(6); 29 C.F.R. §1630.10.[7] The law also prohibits subjecting applicants and employees to medical or psychological examinations except as specifically permitted, and using the results of any such testing in any manner that is inconsistent with the requirements of the ADA. 42 U.S.C. §12112(d); 29 C.F.R. §1630.14(c). In particular, "if certain criteria are used to screen out an employee or employees with disabilities as a result of such examination or inquiry, the exclusionary criteria must be job-related and consistent with business necessity, and performance of the essential job functions [must not be capable of being] accomplished with reasonable accommodation." 29 C.F.R. §1630.14(b)(3).[8]

The ADA provides two defenses to employers who use employment qualification standards:

> (a) In General. It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection

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§12102(2).

[7] "Qualification standards" refers to "the personal and professional attributes including...physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired." 29 C.F.R. §1630.2(q).

[8] The term "discriminate" also includes "classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of [their] disability," and "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the] covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business." 42 U.S.C. §12112(b)(1) and (5)(a).

> 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, as required under this subchapter.
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> (b) Qualification standards. The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

42 U.S.C. §12113. In addition, the EEOC's interpretive guidance to its Title I regulations regarding these defenses provides that:

> With regard to safety requirements that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, an employer must demonstrate that the requirement, as applied to the individual, satisfies the "direct threat" standard in §1630.2(r) in order to show that the requirement is job-related and consistent with business necessity.

29 C.F.R. part 1630, App. §1630.15(b) & (c). The ADA defines "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. §12101(3). Implementing regulations establish the analysis to be used in determining whether an applicant or employee poses a direct threat:

> Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include: (1) the nature 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.

29 C.F.R. §1630.2(r). Finally, the EEOC's interpretive guidance for the "direct threat" provision provides that:

> [a]n employer...is not permitted to deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. The risk can only be considered when it poses a significant risk, i.e., high probability, of substantial harm; a speculative or remote risk is insufficient...Determining whether an individual poses a significant risk of substantial harm to others must be made on a case-by-case basis. 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...[C]onsideration [of the relevant factors] 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.

29 C.F.R. part 1630, App. §1630.2(r) (citations omitted).

ARGUMENT

I. Statutory Provisions Mandating the Blanket Exclusion From Employment of All Persons With Any "Apparent Mental Disorder" Listed in the DSM Are Facially Invalid Under the ADA

To be lawful under the ADA, any employment qualification standard that screens out individuals with disabilities must be "job-related and consistent with business necessity." 42 U.S.C. §12112(b)(6).[9] In most cases, this means that the standard must directly relate to the ability of an individual to perform the essential functions of the specific job to which the standard is being applied. However, if the qualification standard does not meet this test and is instead imposed for the purpose of excluding individuals who are thought to pose a threat to public health or safety, then the standard must be justified under the "direct threat" provision of the ADA. See 29 C.F.R. part 1630, App. §1630.15(b) & (c).

There is no question that the qualification standard at issue in this case screens out

[9] The burden is on the employer to produce evidence establishing that the standard meets these requirements in any given case. See Andrews v. Ohio, 104 F.3d 803, 807-808 (6th Cir. 1997).

individuals with mental disabilities from employment as police officers[10], because it constitutes a blanket exclusion of all individuals with any mental disorder listed in the DSM, including many conditions that would qualify as "disabilities" under the ADA but do not necessarily impact a person's ability to perform the essential functions of the job with or without a reasonable accommodation. There is also no question that the standard is imposed for the specific purpose of excluding certain individuals from employment as police officers because it is presumed that they will pose a threat to public health or safety. Therefore, the validity of this qualification standard under the ADA depends on (a) whether it is job-related and consistent with business necessity, and (b) whether the entire class of individuals excluded by the standard necessarily pose a "direct threat." The United States submits that the blanket exclusion of all persons with any mental disorder listed in the DSM can never meet these requirements, and thus the standard is facially invalid under the ADA.

A. The Blanket Exclusion Is Not Job-Related and Consistent with Business Necessity

The employment qualification standard at issue in this case categorically excludes an entire class of individuals on the basis of disability – every person with any "apparent mental disorder." See Tenn. Code Ann. §38-8-106(9). With respect to such "[qualification] standards that may exclude an entire class of individuals with disabilities," the EEOC has stated that

> "Blanket" exclusions of this kind usually have been established because employers believed them to be necessary for health or safety reasons...Employers who have such standards should review them carefully. In most cases, they will

[10] Although the United States maintains that this blanket exclusion is facially invalid as contained in all of the state statutes with respect to all five law enforcement jobs, for purposes of this *amicus* brief, we will hereafter limit our discussion to the one statute at issue in this case, and thus to the imposition of the standard on "police officers." See Tenn. Code Ann. §38-8-106.

> not meet ADA requirements[,...since g]eneralized "blanket" exclusions of an entire group of people with a certain disability prevent [the] individual consideration [required by the ADA].

EEOC's Technical Assistance Manual on Title I of the ADA at §4.4 (emphasis added).[11] This interpretation is based upon and fully consistent with the ADA's legislative history, which makes clear that it is individualized assessment, and not blanket exclusions, that must be employed to determine whether an individual is qualified for employment in any given position:

> [The ADA] prohibits the use of a blanket rule excluding people with certain disabilities except in the very limited situation where in all cases [a] physical [or mental] condition by its very nature would prevent the person with a disability from performing the essential functions of the job, even with reasonable accommodation.

S. Rep. No. 116, 101st Cong., 1st Sess. 27 (1989) (Senate Report) (emphasis added).

Consistent with Congress' intent as expressed in the ADA, courts have struck down disability-based blanket exclusions such as the qualification standard at issue in this case, both in and out of the employment context. For example, in Stillwell v. Kansas City, Missouri Board of Police Commissioners, 872 F.Supp. 682 (W.D. Mo. 1995), the court held that a local licensing authority's policy to deny armed security guard licenses to people with one hand violated the ADA because it did not consider an individual's actual abilities to perform the essential functions of the job of a security guard and instead relied on stereotypical assumptions that a person with one hand could not safely perform such functions. Similarly, courts have invalidated blanket exclusions in a numerous cases involving insulin-dependent diabetics, finding that "[t]he [ADA] makes it clear that blanket exclusions are to be given the utmost scrutiny." Bombrys v. City of

[11] The EEOC's Technical Assistance Manual was issued on January 27, 1992, pursuant to express statutory directive. 42 U.S.C. §12206(c)(3).

Toledo, 849 F.Supp. 1210, 1220 (N.D. Ohio 1993). See, e.g., EEOC v. Chrysler Corp., 917 F.Supp. 1164 (E.D. Mich. 1996), rev'd on other grounds, 172 F.3d 48 (6th Cir. 1998); Sarsycki v. United Parcel Service, Inc., 862 F.Supp. 336 (W.D. Okl. 1994) (same).[12]

The blanket exclusion at issue here is defined with specific reference to the DSM, and thus its scope of coverage includes every "mental disorder" listed in the DSM. The DSM is intended to be comprehensive and exhaustive, cataloging and describing any and all conditions with which psychiatrists may diagnose an individual seeking psychiatric treatment, ranging from common afflictions such as mild depression or insomnia to more serious conditions such as bi-polar disorder and schizophrenia. Thus, the DSM includes many conditions that, while they may substantially limit one or more of an individual's major life activities and thus amount to "disabilities" under the ADA, do not necessarily impose any limitations at all on the individual's ability to perform the essential functions of the position at issue.[13] For example, the DSM-IV

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[12] Similar blanket employment policies have been found equally invalid under the ADA because they do not allow for a case-by-case assessment of an individual's ability to perform the essential functions of the job with or without a reasonable accommodation. For example, in Krocka v. Bransfield, 969 F.Supp. 1073, 1089 (N.D. Ill. 1997), the court held that a police department's mandatory policy of automatically placing officers taking Prozac under a special monitoring program violated the ADA. See also Heise v. Genuine Parts Co., 900 F.Supp. 1137, 1154 & n.10 (D. Minn. 1995) (holding that an employer's "100% healed" policy, in which injured employees were required to be completely free of any physical restrictions before they were permitted to return to work, was a per se violation of the ADA); Hutchinson v. United Parcel Service, 883 F.Supp. 379, 397 (N.D. Iowa 1995) (same); Hammer v. Board of Education of Arlington Heights School District No. 25, 955 F.Supp. 921, 927 (N.D. Ill. 1997) (finding a disputed question of fact as to whether the employer in fact had a "blanket policy," but noting that "a per se violation [of the ADA] is one in which an individual assessment of an individual's ability to perform the essential functions of the person's job with or without accommodation is not made by the employer.")

[13] The DSM contains the following cautionary statement regarding its use outside of medical settings, which makes clear that diagnosis alone does not equate to an individualized assessment of what actual limitations, if any, are posed by any particular mental disorder:

includes descriptions of certain sexual dysfunctions and eating disorders that could substantially affect a major life activity such as reproduction or eating but which have no effect whatsoever on an individual's ability to perform the duties of a police officer.

Blanket exclusions will rarely be job-related and consistent with business necessity. See, e.g., Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999); EEOC v. Exxon Corp., 203 F.3d 871 (5th Cir. 2000). As provided in the ADA, in order for any employment qualification standard to be considered "job-related and consistent with business necessity," it must relate to the "essential functions" of the specific job to which it is being applied and measure the individual's actual ability to perform those functions. See 29 C.F.R. §1630.10, App.; EEOC Technical Assistance Manual for Title I of the ADA at §4.3.[14] "It is not enough that [a standard] measures

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> [T]he fact that an individual's presentation meets the criteria for a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorder. Even when diminished control over one's behavior is a feature of the disorder, having the diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his or her behavior at a particular time.

DSM-IV at xxiii.

[14] "Essential functions" are the fundamental job duties of the position at issue, as distinguished from its marginal functions. 29 C.F.R. §1630.2(n). They are the specific job tasks themselves, rather than the way the tasks are performed. See, e.g., H.R. Rep. No. 485 part 2, 101st Cong., 2d Sess 54-55 (1990) (Labor Report) ("driving" or "typing" are "essential functions" if they are fundamental to a particular job); H.R. Rep. No. 485 part 3, 101st Cong., 2d Sess. 32 (1990) (Judiciary Report) ("essential function" of job requiring use of a computer "is the ability to access, input and retrieve information from the computer"); 29 C.F.R. part 1630, App. §1630.2(n) (examples of "essential functions" include operating a cash register for a cashier's job; carrying a person from a burning building for a firefighter; typing for a typist; and cleaning for a chambermaid). See also EEOC's Technical Assistance Manual for Title I of the ADA at §2.3(b) (examples of job functions that may be essential include filing, answering the telephone, or typing for clerical job; proofreading for a proofreader job; availability to work odd shifts for substitute "floating" supervisor; foreign language fluency for job selling products to foreign companies; landing a plane for pilot position).

qualifications for a general class of jobs" – rather, to be job-related and consistent with business necessity, the standard must relate directly to the specific job for which the individual is being considered, and measure the individual's ability to perform the essential functions of that particular job. Id. at §4.3(1) (emphasis added).[15] Thus, in order to prevail on a claim that the blanket exclusion at issue in this case is job-related and consistent with business necessity under the ADA, Defendants would have to prove that the requirement that individuals "be free of all apparent mental disorders listed in the DSM" directly relates to ability of such individuals to perform a specific, concrete job function that is "essential" to the performance of all police officer positions in the state. Defendants cannot carry this burden.[16]

Defendants cannot show that the blanket exclusion directly measures skills required by the job of police officer or the actual ability of individuals to perform the essential functions of that position. In fact, by categorically excluding all individuals with any apparent mental

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[15] See Senate Report at 36-37 (qualification standards that screen out an individual or class of individuals "because of a disability...must concern an essential, non-marginal aspect of the job, and be carefully tailored to measure the person's actual ability to do this essential function of the job"); Labor Report at 70-71; see also Judiciary Report at 42 ("[t]he requirement that job selection procedures be job-related and consistent with business necessity underscores the need to examine all selection criteria to assure that they...provide an accurate measure of an applicant's actual ability to perform the job."); see also Hendricks-Robinson v. Excel Corp., 154 F.3d 685, 698-99 (7th Cir. 1998) (finding "most troubling" the possibility that an employer may have imposed a "separate criterion of 'physical fitness' – unrelated to job requirements – as a qualification standard for promotions, layoffs and recalls [because it would] tend[] to screen out, whether intentionally or unintentionally, disabled employees," and thus "violat[e] the ADA's requirement of an individualized assessment of an employee's capabilities.")

[16] Even in cases where a qualification standard would be job-related and consistent with business necessity, employers are still prohibited from invoking the standard to deny a job to an individual with a disability unless they can show that no reasonable accommodation is available that would allow the individual to perform the job. See 42 U.S.C. §12113(a). By their nature, blanket exclusions are irreconcilable with this requirement, since they eliminate the individual from the pool before any reasonable accommodation can be considered.

disorder at any stage of employment, including those who have successfully worked as police officers for years, the standard requires employers to ignore the best evidence of the individual's actual ability to perform the functions of the police officer position. "Once an employee is on the job, the actual performance on the job is, of course, the best measure of his ability to do the job." Senate Report at 38; Labor Report at 74.[17]

Rather than pertaining to a specific essential job function, the standard at issue in this case simply excludes an entire class of individuals with disabilities because they are presumed to pose a safety threat. Consequently, because the standard does not measure an individual's actual ability to perform the essential functions of the job of police officer, it is not job-related and consistent with business necessity.[18] Thus, the only way for Defendants to establish that this qualification standard is lawful under the ADA is to prove that it meets the ADA's criteria for a qualification standard that excludes individuals who pose a direct threat.

B. The Blanket Exclusion Cannot Be Justified Under the "Direct Threat" Provision

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[17] See, e.g., Prewitt v. United States Postal Service, 662 F.2d 292, 309 (5th Cir. 1981) (holding in a case brought under the Rehabilitation Act that the plaintiff, who had satisfactorily performed the job of postal worker in the past despite his disability, had "raised a genuine issue of material fact as to whether the postal service's physical standards for employment are sufficiently 'job related' to justify the employer's refusal to hire him" for the position).

[18] Although a given qualification standard may be so unrelated to the job to which it applies that it may be found to be not job-related and consistent with business necessity as a matter of law, the reverse is not true. The Sixth Circuit has stated that the determination that an employment qualification standard is job-related and consistent with business necessity must take into consideration the way the criteria are actually imposed in the specific case. See Andrews v. Ohio, 104 F.3d 803, 807 (6th Cir. 1997) (affirming dismissal of an ADA claim but rejecting the district court's conclusory determination that state-mandated weight and fitness qualification standards were job-related and consistent with business necessity as a matter of law, where the court had not considered the application of the standards in the circumstances of that case).

As shown, this employment qualification standard does not measure the ability of individuals to perform the essential functions of the position of police officer; instead, it presumes the inability of an entire class of individuals to perform those functions safely. As such, it falls into the category of qualification standards that exclude categories of individuals that, regardless of their skills or abilities, are deemed to pose an unacceptable safety risk. Although such standards are not always unjustified, they are significantly more susceptible to employer speculation and stereotyping on the basis of disability – precisely what the ADA was intended to prohibit. Because such standards are imposed for the purpose of protecting public health and safety, they are only valid under the ADA if they qualify under its express provision regarding safety standards imposed for this purpose – the "direct threat" provision. See 42 U.S.C. §12113(b); see also Judiciary Report at 486 ("If the [individual] is otherwise qualified for the job, he or she cannot be disqualified on the basis of a physical or mental condition unless the employer can demonstrate that the [individual's] disability poses a direct threat to others in the workplace.")

For Defendants to justify this qualification standard under the direct threat provision, they bear the substantial burden of proving that any individual with any mental disorder listed in the DSM who applies for a job as a police officer will necessarily pose a "direct threat" to the health or safety of others – that is, a significant risk of substantial harm that cannot be reduced or eliminated by reasonable accommodation. 42 U.S.C. §12113(b). It is simply not sufficient for Defendants to make the conclusory assertion that the entire class of individuals who have any kind of mental disorder listed in the DSM may potentially pose a direct threat – they must

demonstrate that this is in fact the case.[19] Given the overbreadth of the statutory provision – requiring the blanket exclusion of all individuals with "mental disorders" no matter whether they are diagnosed with insomnia or paranoid schizophrenia – this burden cannot possibly be met. As the Supreme Court observed in the seminal direct threat case, "[t]he fact that *some* persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding...*all* persons with actual or perceived contagious diseases." School Board of Nassau County v. Arline, 480 U.S. 273, 285 (1987).

First, to meet the "direct threat" standard, there must be a "significant" risk of substantial harm, and it cannot be either speculative or remote. In Bragdon v. Abbott, 524 U.S. 624 (1998), the U.S. Supreme Court discussed the origin of the ADA's "direct threat" provision:

> The ADA's direct threat provision stems from the recognition in [Arline] of the importance of prohibiting discrimination against individuals with disabilities while protecting others from significant health and safety risks...Because few, if any, activities in life are risk-free, Arline and the ADA do not ask whether a risk exists, but whether it is significant.

Id., 524 U.S. at 649 (emphasis added, internal citations omitted).[20] The direct threat standard thus represents the balance struck by the Court in Arline and codified by Congress in the ADA,

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[19] In addition, even if a genuine significant risk of substantial harm were to exist in any given case, the employer would be required to consider whether the risk could be eliminated or reduced below the level of "direct threat" by reasonable accommodation. Again, except where it can be definitively established that no reasonable accommodation could ever be offered to allow any person subject to the exclusion to safely perform the essential functions of the job, blanket exclusions are clearly inconsistent with this requirement. 42 U.S.C. §12101(3).

[20] In Bragdon, the Supreme Court held that an individual doctor's unsupported belief that a patient's HIV status rendered her a health risk was not dispositive under the ADA. Id., 524 U.S. at 655. Instead, the determination whether an individual poses a direct threat to the safety of others "must be based on medical or other objective evidence." Id., 524 U.S. at 649. In Arline, the Court had held that a teacher with tuberculosis would not be qualified for her position only if she posed a "significant risk to others in the workplace." Id., 480 U.S. at 287.

advancing the "goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of [employers] as avoiding exposing others to significant health and safety risks." Arline, 480 U.S. at 287. It is precisely because persons with disabilities have long been excluded from jobs on the assumption that they may pose some greater risk of injury or accident that Congress saw fit to define as "significant" the level of risk an employer must show to justify disqualifying an individual whose disability poses a potential health or safety risk. 42 U.S.C. §12111(3).[21]

Secondly, the specific risk alleged must be identified and assessed on a case-by-case basis, based on objective medical or other factual evidence relating to the individual in question.[22] "Whether one is a direct threat is a complicated, fact-intensive question, not a question of law. To determine whether a particular individual performing a particular act poses a

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[21] See also Arline, 480 U.S. at 287 (the determination whether a person with a disability is "qualified" requires an "individualized inquiry" based upon "appropriate findings of fact," not upon "prejudice, stereotypes, or unfounded fear"); Judiciary Report at 45 (the direct threat provision "sets a clear, defined standard which requires actual proof of significant risk to others"); Labor Report at 74 ("A physical or mental employment criterion can be used to disqualify a person with a disability only if [it] has a direct impact on the ability of the person to do their actual job duties without imminent, substantial threat of harm."); see also Hamlin v. Charter Township of Flint, 165 F.3d 426, 432 (6th Cir. 1999) (finding that a city had not established that its fire chief posed a direct threat, since it "did not establish as a matter of law that there was a high probability of potential harm because of [the plaintiff's] physical limitations, or that the alleged risk was anything more than speculative or remote.")

[22] This is also fully supported by the legislative history of the ADA. See, e.g., House Report at 56-57 (quoting Hall v. U.S. Postal Service, 857 F.2d 1073, 1079 (6th Cir. 1988), additional citations omitted) (direct threat determination "requires a fact-specific individualized inquiry resulting in a 'well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives'"); and Senate Report at 27 ("determination that an individual with a disability will pose a direct threat to others must be made on a case-by-case basis and not be based on generalizations, misperceptions, ignorance, irrational fears, patronizing attitudes, or pernicious mythologies").

direct risk to others is a matter for the trier of fact to determine after weighing all the evidence about the nature of the risk and the potential harm." Rizzo v. Children's World Learning Centers, Inc., 84 F.3d 758, 764 (5th Cir. 1996) ("Rizzo I").[23] Thus, courts have struck down safety-based blanket exclusions of insulin-dependent diabetics that the employers had attempted to defend under the direct threat provision precisely because no individualized assessment was conducted. See, e.g., EEOC v. Chrysler Corp.; Bombrys; Sarsycki; see also Stillwell (no individualized assessment of one-handed person's ability to perform the essential functions of the job of a security guard); Krocka (no individualized assessment where police officers taking Prozac were automatically placed under a special monitoring program).[24]

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[23] But see EEOC v. Exxon Corp., 203 F.3d 871 (5th Cir. 2000) (holding that an employer did not have to conduct any individualized assessment of the risk presented by its employees' former substance abuse). That later case is distinguishable from this one in at least two ways. First, the panel opinion in Exxon indicates that the Court may have reached a different conclusion with respect to the blanket exclusion at issue in this case, evidenced by its assumption (disproved by this case) that, unlike substance abuse, mental disorders are not typically the subject of a blanket exclusion. Id. at 874 (noting that the ADA's "legislative history's examples of direct threat...– contagious illnesses, mental disabilities, and mental illnesses – continue the focus on situations in which an employer might impose a safety standard in an individual's particular case separate from the general qualification standards required for the position.") (citations omitted). Secondly, the defendant in that case had relied heavily on its claim that it was impossible to conduct ongoing, often daily individualized assessment of alcoholic employees who work in remote locations. By contrast, in this case, individuals are already required to undergo psychological examination and interviewing, by which a "qualified professional" may determine whether the individuals are psychologically able to perform the essential functions of the job of police officer. See Tenn. Code Ann. §38-8-106(9). Because it is customary to subject police officers to psychological evaluation, Defendants cannot argue that it is impossible to conduct a proper individualized assessment.

[24] The Fifth Circuit, which previously broke with its fellow circuits when it determined that "drivers with insulin-dependent diabetes pose a direct threat as a matter of law," see Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993) and Daugherty v. City of El Paso, 56 F.3d 695 (5th Cir. 1995), is currently debating the "continued viability" of this judge-created "tacit exception to [the ADA's] case-by-case approach," finding that "the time has come for a reevaluation of the facts that supported our previous per se holdings." Kapche v. City of San Antonio, 176 F.3d 840, 844,

In a case involving another of the qualification standards for police officers mandated by the same statute at issue in this case, the Sixth Circuit recently reaffirmed that it is this basic principle of individualized assessment that "lies at the heart of the ADA." Holiday v. City of Chattanooga, 206 F.3d 637, 643 (6th Cir. 2000).[25] The Court explained that:

> The ADA mandates an individualized inquiry in determining whether an employee's disability or other condition disqualifies him from a particular position. In order to properly evaluate a job applicant on the basis of his personal characteristics, the employer must conduct an individualized inquiry into the individual's actual medical condition, and the impact, if any, the condition might have on that individual's ability to perform the job in question.

Id. at 646-7 (citations omitted).[26]

In Holiday, the Court was not presented with the question of whether the statutory requirement itself – which merely requires that persons pass a physical exam to be police

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847 (5th Cir. 1999). That case is currently on appeal to the Fifth Circuit for the second time.

[25] In Holiday, the City of Chattanooga had refused to hire a police officer with asymptomatic HIV, claiming that he was "a health and safety threat to others." Id. at 641. By the time the case reached the Sixth Circuit, however, the City had "abandoned its prior assertion that Holiday's HIV status rendered him a direct threat to the health or safety of others," and now asserted that it could not hire Holiday because the doctor administering the state-mandated physical examination had concluded that he was simply "not strong enough to withstand the rigors of police work," and therefore he "did not fulfill an essential requirement of the position: that he pass the physical examination mandated by state law." Id. at 641-42. Consequently, the City argued, he "was not 'otherwise qualified' for the position" of police officer, and the only reason he was not hired was that he "did not fulfill the statutory requirements." Id. This is the same argument made by Defendants in this case. See Defendants' Memorandum of Law, p. 13 ("Plaintiff cannot, as a matter of law, be considered a 'qualified individual with a disability,' since he cannot satisfy the requirements of Tenn. Code. Ann. §38-8-106.")

[26] This language tracks directly with the regulation describing what must be proven in order to establish that a person poses a "direct threat." See 29 C.F.R. §1630.2(r) (such determination "shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job").

officers[27] – was valid, but whether the City had violated the ADA by the manner in which it had purportedly interpreted the requirement – essentially, by reading into it a blanket qualification standard that police officers "be free" of HIV. The Sixth Circuit rejected the City's attempt to hide behind the statute, holding that the plaintiff had presented sufficient evidence to permit a jury to conclude that

> [the City had] failed to undertake the individualized determination that the ADA requires and instead disqualified [the plaintiff] because of his HIV status – without any indication that [his] condition actually impeded his ability to perform as a police officer[, that the City's claim] that [the plaintiff] was not hired for the non-discriminatory reason that he did not fulfill the statutory requirements...is mere pretext[, and] that the City in fact withdrew its employment offer because of its fears that [the plaintiff] would transmit HIV on the job.

Id. at 644, 646-7.[28] Just as the ADA prohibited the City employer in Holiday from relying upon

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[27] Section (7) of the statute requires individuals employed as police officers to "[h]ave passed a physical examination by a licensed physician." Tenn. Code Ann. §38-8-106.

[28] The Sixth Circuit's reasoning in the Holiday case is fully consistent with the ADA's prohibition against blanket exclusions that cannot meet the direct threat standard. By contrast, in EEOC v. Exxon Corp., 203 F.3d 871 (5th Cir. 2000), a panel of the Fifth Circuit recently departed from the Court's own precedents on the issue, ruling that the direct threat analysis does not apply to "across-the-board rules," but only to "standard[s] imposed on a particular individual." Id. at 873. See, e.g., Rizzo v. Children's World Learning Centers, Inc., 173 F.3d 254, 259-260 (5th Cir. 1999) ("Rizzo II") (holding that "with respect to safety requirements that screen out or tend to screen out" people with disabilities, the burden is on the "employer [to] demonstrate that the requirement, as applied to the individual, satisfies the 'direct threat' standard."); Rizzo v. Children's World Learning Centers, Inc., 213 F.3d 209, 213 (5th Cir. 2000) (en banc) ("Rizzo III") (finding no error in that holding).

In Exxon, the Court considered the oil company's policy of removing from certain minimally supervised "safety-sensitive" positions (constituting about ten percent of its positions) any employee that has ever received treatment for substance abuse, a policy that it had implemented following the 1989 Exxon Valdez incident. Exxon argued that given the relapsing nature of alcoholism and substance abuse, it was impossible to individually monitor such employees. Conceding that its blanket policy screened out people with disabilities, Exxon argued, and the Court agreed, that it only had to establish that the policy was job-related and

an unsubstantiated medical conclusion that a person with HIV was unable to serve as a police officer, and instead required the City to conduct an individualized assessment of the actual impact of the plaintiff's disability on his ability to safely perform the essential functions of the job, the ADA must also prohibit the blanket exclusion of people with any "apparent mental disorder" in this case.

II. Statutory Provisions Mandating a Discriminatory Employment Qualification Standard Are Preempted by the ADA and Have No Legal Force or Effect

"It is well settled that under the Supremacy Clause a state statute which conflicts with a federal statute cannot stand." EEOC v. County of Allegheny, 705 F.2d 679 (3rd Cir. 1983) (state age limit on police officers preempted by ADEA), citing Jones v. Rath Packing Co., 430 U.S. 519, 525-526 (1977); EEOC v. State of Illinois, 69 F.3d 167 (7th Cir. 1995) (state school retirement code preempted by ADEA); Oconomowoc Residential Programs, Inc. v. City of Greenfield, 23 F.Supp.2d 941 (E.D. Wis. 1998) (discriminatory state zoning statutes preempted

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consistent with business necessity, and did not have to establish that every employee affected by the policy posed a direct threat. Id. at 875. However, the Court qualified its holding by specifically interpreting the "job-related and consistent with business necessity" requirement to require proof of an actual safety threat:

In so holding, we note that direct threat and business necessity do not present hurdles that comparatively are inevitably higher or lower but rather require different types of proof. Direct threat focuses on the individual employee, examining the specific risk posed by the employee's disability. In contrast, business necessity addresses whether the qualification standard can be justified as an across-the-board requirement. Either way, the proofs will ensure that the risks are real and not the product of stereotypical assumptions...In evaluating whether the risks addressed by a safety-based qualification standard constitute a business necessity, the court should take into account the magnitude of possible harm as well as the probability of occurrence.

Id. Thus, while holding that Exxon's policy did not have to meet the direct threat standard, it imputed to the "job-related and consistent with business necessity" test the same factors that would be used to assess the existence of a direct threat. See 29 C.F.R. §1630.2(r).

by ADA); Coleman v. Casey County Board of Education, 510 F.Supp. 301, 303 (W.D. Ky. 1980) (safety regulation preventing man with one leg from driving school bus preempted by Rehabilitation Act); T.E.P. v. Leavit, 2 A.D. Cases (BNA) 1299 (D. Utah 1993) (holding that the ADA preempted a state domestic relations law).[29] Preemption "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." Gade v. National Solid Wastes Management Ass'n, 112 S.Ct. 2374, 2383 (1992). In the instant case, preemption is both express and implied.

Express preemption occurs when a statute or its legislative history actually states that the statute is intended to preempt laws. Id. Implicit preemption occurs when "compliance with both federal and state regulations is a physical impossibility," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941); Felder v. Casey, 487 U.S. 131, 138 (1988); Perez v. Campbell, 402 U.S. 637, 649 (1971). In deciding whether federal law implicitly preempts state law, the Court's task is simply "to determine whether state regulation is consistent with the

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[29] Early preemption cases in the employment discrimination context involved state laws that regulated the work hours and rest periods of female employees in violation of Title VII. See, e.g., Kreitner v. Bendix Corp., 501 F.Supp. 415 (W.D. Mich. 1980); Homemakers, Inc., Los Angeles v. Division of Industrial Welfare, 356 F.Supp. 1111 (N.D. Cal. 1973), affirmed, 509 F.2d 20 (9th Cir. 1974); General Electric Co. v. Young, 3 FEP Cases 560 (W.D. Ky. 1971); Garneau v. Raytheon Co., 323 F.Supp. 391 (D.C. Mass. 1971); Vogel v. Trans World Airlines, 346 F.Supp. 805 (W.D. Miss. 1970); see also Spirt v. Teachers Insurance and Annuity Ass'n, 691 F.2d 1054, 1065 (2nd Cir. 1982) (invalidating state statute permitting use of sex-based mortality tables); Local 246, Utility Workers Union of America, AFL-CIO v. Southern California Edison Co., 320 F.Supp. 1262 (D.C. Cal. 1970) (invalidating state statute imposing lifting restriction on female employees).

structure and purpose of the [federal] statute." Gade, 112 S.Ct. at 2383. When an inconsistency exists, state law must yield, even if the state law involves an area that has traditionally been a subject of state regulation. Id.[30]

Express statements made in the ADA and its legislative history make clear that Congress intended to preempt state laws when they impair the employment opportunities of persons with disabilities. Section 501(b) of the ADA, 42 U.S.C. §12201(b), addresses preemption in the following terms:

> Nothing in [the ADA] shall be construed to invalidate or limit the remedies, rights and procedures of any Federal law or law of any State...that provides greater or equal protection for the rights of individuals with disabilities than are afforded by

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[30] There is no presumption against finding an implied preemption of state law. As one court explained:

> There are two important differences between the analysis we employ in determining whether a state law is expressly preempted by federal law and that which we use in approaching questions of implied preemption. First, in contrast to the strong presumption against preemption that we apply in determining whether the language of a federal statute or regulation expressly preempts state law, no such presumption is applicable in deciding whether state law conflicts with federal law, even where the subject of the state law is a matter traditionally regarded as properly within the scope of the states' rights. "'[T]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'"
>
> The second difference between express and implied preemption analysis is that in implied preemption analysis it is possible to infer preemptive intent solely from effects. Even where the preemptive intent behind the federal regulatory scheme is unclear from its statutory language or legislative history, the federal law nevertheless preempts the state law to the extent that the ordinary application of the two laws creates a conflict.

Taylor v. General Motors Corp., 875 F.2d 816, 826 (11th Cir. 1989) (emphasis added), quoting Felder, 108 S.Ct. at 2306 and Free v. Bland, 369 U.S. 663, 666 (1962).

this Act.

By providing an express exemption from preemption for those state laws that provide an equal or greater level of protection, Congress plainly expressed its intent that all laws that conflict with the ADA are preempted. Title I also contains an express limitation on the ADA's preemption of state laws regarding food handling and persons with communicable diseases:

> (3) Construction. Nothing in this Act shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation...

42 U.S.C. §12113(d). If Congress had not intended the ADA to preempt conflicting state laws, there would be no need for either of these explicit provisions.[31] See also EEOC Technical Assistance Manual for Title I of the ADA at §4.6(2) ("An employer may not rely on the existence of a state or local law that conflicts with ADA requirements as a defense to a charge of discrimination.") Therefore, because the statutory provisions at issue in this case conflict with

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[31] The ADA's legislative history makes this even clearer:

> [I]f a state or locality has a disease control law, or any other public health law, which places certain requirements on certain employees, employers, or businesses but which does not discriminate against people with disabilities, such laws would not be affected by or preempted in any way by the ADA.... In addition, if a state...has a disease control law or any other public health law, which applies to certain people with disabilities (for example, if a state has a law which required people with certain contagious diseases, such as tuberculosis, to take certain precautions), that law would also not be preempted by the ADA as long as the requirements of that state or local law were designed to protect against individuals who pose a direct threat to the health or safety of others.

H. Conf. Rep. No. 101-596, 101st Cong., 2d Sess. 84 (1990), reprinted in 1990 U.S.C.C.A.N. 593 (emphasis added).

the ADA, they are preempted and have no legal force or effect.

A. Employers May Not Rely Upon the Statutory Provisions as a Defense to a Claim of Unlawful Discrimination Under the ADA

In an attempt to make an end-run around the ADA's preemption of conflicting state statutes, Defendants argue that "the ADA does not require an employer to accommodate a person's disability by ignoring duties imposed by state or federal statute." See Defendant's Memorandum of Law, p. 13. Defendants make no argument and cite only two cases for this proposition, neither of which provide any support for the claim that Defendants were even permitted (much less bound) to comply with the blanket exclusion mandated by the statutory provision at issue in this case rather than the ADA.

First, Defendants appear to confuse the question presented in this case – involving the validity of a state statutory provision that directly violates the ADA – with the issue presented in cases involving certain federal regulations which the ADA specifically permits employers to implement. Defendants cite Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999), in which the Supreme Court held that an employer could implement federal DOT vision standards applicable to commercial truck drivers without violating the ADA. Id. at 577-78. However, that case and similar cases upholding the validity of federal regulations are wholly inapposite to the instant case. The ADA specifically permits compliance with other federal laws:

> Conflict with other Federal laws. It may be a defense to a charge of discrimination...that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required...

29 C.F.R. §1630.15(e).[32] However, neither this provision nor Albertson's has anything to say about compliance with conflicting state laws, since such laws are preempted.

Secondly, Defendants confuse the concept of a job's essential functions, or "job duties," with what is at issue in this case – an employment qualification standard that categorically excludes a class of individuals with disabilities – and imply that they are the same thing. Defendants cite Brickers v. Cleveland Board of Education, 145 F.3d 846 (6th Cir. 1998), in which the Sixth Circuit ruled that lifting was an "essential function" of a state school bus attendant position, despite the fact that it may only be required during emergencies, and relied in part on the fact that a state statute outlining qualification standards for bus attendants required that such employees have the "[p]hysical capability of appropriately lifting and managing handicapped pupils when necessary." Id. at 850; see Ohio Admin. Code §3301-83-06(D)(1).[33]

Defendants' citation of the Brickers case as support for their claim that the blanket exclusion at issue in this case must be honored simply because the state mandates it belies their fundamental misunderstanding of the ADA's requirements regarding employment qualification standards. Brickers concerned the proper definition of an "essential function" under the ADA,

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[32] The EEOC's Interpretive Guidance for this regulation confirms the limitation of the exception to federal, not state, regulations: "There are several Federal laws and regulations that address medical standards and safety requirements. If the alleged discriminatory action was taken in compliance with another Federal law or regulation, the employer may offer its obligation to comply with the conflicting standard as a defense." 29 C.F.R. §1630.15(e), App. See also EEOC Technical Assistance Manual for Title I of the ADA at §4.6(1) (emphasis added) (providing that "[t]he ADA does not override health and safety requirements established under other Federal laws. If a standard is required by another federal law, an employer must comply with it and does not have to show that the standard is job-related and consistent with business necessity.")

[33] In that case, a school bus driver with a lifting restriction had requested a transfer into the position of school bus attendant, which were used only on "special education" buses, transporting only students with disabilities. Id.

which is a purely analytical, fact-based exercise designed to determine what specific functions are so essential to a job that an employer may require all employees to perform them, regardless of disability, with or without reasonable accommodation. In other words, as long as a given job function is "essential," employers may require all employees to perform that function notwithstanding the fact that imposition of such a requirement may screen out certain individuals with disabilities who cannot perform the function even with reasonable accommodation. The ADA provides a list of several factors to be considered in determining whether a given job function is "essential," and specifically gives consideration to the employer's judgment in this regard. See 42 U.S.C. §12111(8). In Brickers, the Court simply concluded that state law – which is tantamount to the employer's judgment where the state is the employer – was relevant to its determination whether the actual job function of lifting was, in fact, "essential" to the performance of the position of bus attendant.

The Court's analysis of the "essential functions" question in Brickers has no bearing on this case, which involves the validity, not of an employer's claim that a given function of one of its jobs is "essential," but of an employment qualification standard imposed upon the employer by the state – a standard which, by its nature, is imposed as a threshold requirement prior to any consideration of the individual's ability to perform any particular job function. Thus, the Court's holding in Brickers provides no support for Defendants' claim that they were obliged to comply with conflicting state law rather than the ADA. Because the requirements of the statutory provisions conflict with the requirements of ADA, the statutory provisions are preempted and have no legal force and effect. Consequently, as an invalid employment qualification standard, the existence of Tenn. Code Ann. §38-8-106(9) can have absolutely no bearing on the question

whether Plaintiff is a "qualified individual with a disability" and thus covered by the ADA, see Defendants' Memorandum of Law, p. 13, and Defendants are estopped from relying upon the statute as any kind of defense to Plaintiff's claim of unlawful discrimination.[34]

B. Employers May Be Held Fully Liable for Their Violations of the ADA Notwithstanding the Statutory Provisions

Numerous cases have held that employers are liable for violating federal civil rights laws regardless of the fact that they may have been acting pursuant to state law, where the state law conflicted with and was therefore preempted by the federal statute. As the Seventh Circuit put it, such employers may feel "compelled to follow the directive from the state, but the Supremacy Clause of the Constitution requires a different order of priority. A discriminatory state law is not a defense to liability under federal law, it is a source of liability under federal law." Quinones v. City of Evanston, 58 F.3d 275, 276 (7th Cir. 1995) (emphasis added), citing Williams v. General Foods, 492 F.2d 399, 407-08 (7th Cir. 1974) (reliance on state statute improper defense to Title VII action). In Quinones, the Seventh Circuit affirmed the district court's denial of the city's motion for summary judgment in an ADEA case, based on the court's conclusion that "a political subdivision of a state is not shielded from liability for employment discrimination in violation of [federal law] merely because its actions were mandated by contrary state law." Quinones v. City

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[34] Defendants also argue that they were bound to comply with Tenn. Code Ann. §38-8-106(9) in order to avoid criminal liability under Tenn. Code Ann. §38-8-105. This argument is without merit, as the invalidity of a statutory provision renders it a nullity, and there can be no liability for failing to comply with a law that doesn't exist. In addition, the Supreme Court has made clear that an employer cannot be held liable under state law for doing what is required under federal employment discrimination laws: "[W]e have not hesitated to abrogate state law where satisfied that its enforcement would stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Int'l Union, United Auto Workers v. Johnson Controls, Inc., 499 U.S. 187, 209-10 (1991) (citations omitted).

of Evanston, 829 F.Supp. 237, 240 (N.D. Ill. 1993).

Other circuit courts have reached the same conclusion. See, e.g., EEOC v. County of Allegheny, 705 F.2d 679, 682 (3rd Cir. 1983) (holding that a county could not invoke its reliance upon a state statute as a defense to its refusal to allow individuals over 35 years old to take the police examination in violation of the ADEA, since "reliance on [ ] an unconstitutional statute cannot justify employment discrimination"); Rosenfield v. Southern Pacific Co., 444 F.2d 1219, 1227 (9th Cir. 1971) (state requirement did not excuse company's discriminatory policy); see also Kober v. Westinghouse Elect. Corp., 480 F.2d 240, 245-46 (3rd Cir. 1973) ("conclud[ing] that it is now the law that discrimination based on reliance on conflicting state statutes is an intentional unfair employment practice" and collecting cases); and Davis v. City of Camden, 657 F.Supp. 396, 402-04 (D.N.J. 1987) (collecting cases in related areas). Therefore, because the statutory provisions violate and conflict with the ADA, they are facially invalid and preempted under the Supremacy Clause. Just as Defendants may not violate the ADA by implementing the blanket exclusion mandated by the invalid statutory provisions, they also may not invoke them as a defense to a claim of unlawful discrimination under the ADA.

CONCLUSION

For the foregoing reasons, the United States urges this Court to make the following findings as a matter of law, and to rule on Defendants' Motion for Summary Judgment accordingly: (1) Tenn. Code Ann. §38-8-106(9) and other statutory provisions mandating the blanket exclusion from employment of all persons with "any apparent mental disorder" violate the ADA, and are therefore facially invalid, and (2) Tenn. Code Ann. §38-8-106(9) and other

statutory provisions mandating the blanket exclusion from employment of all persons with "any apparent mental disorder" conflict with and thus are preempted by the ADA, and employers who implement this invalid statutory provision have violated the ADA and may not invoke the statute as a defense to liability for such violations.

Respectfully submitted,

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Dated: December ____, 2000

CERTIFICATE OF SERVICE

Pursuant to Local Rule 7.2, I, M. Christine Fotopulos, declare:

I am over the age of 18 and not a party to the within action. I am employed by the U.S. Department of Justice, Civil Rights Division, Disability Rights Section. My business address is 1425 New York Avenue, Suite 4039, Washington, D.C. 20005.

On December 4, 2000, I served a true and correct copy of the attached document

UNITED STATES' BRIEF AS *AMICUS CURIAE* IN RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

on each person or entity named below by enclosing a copy in an envelope addressed as shown below and depositing the same with Federal Express for priority overnight delivery.

Date and Place of Service: December 4, 2000, Washington, D.C.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: December 4, 2000, at Washington, D.C.

_____
M. Christine Fotopulos