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Policy Brief Series: Righting the ADA

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Chevron v. Echazabal: The ADA's "Direct Threat to Self" Defense

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The Americans with Disabilities Act Policy Brief Series: Righting the ADA

Contents

I. Introduction

Encountering risk is an element of everyday life experience. Assessing and accepting risks within reason are basic elements of personal independence and the exercise of adult responsibility. Congress understood this and acknowledged in the Americans with Disabilities Act (ADA) that discrimination takes many forms, including paternalism and stereotyping.

Perhaps the most long-standing and insidious aspect of this type of discrimination is the assumption that people with disabilities are not competent to make informed, wise, or safe life choices. This myth is most apparent and damaging in the employment context. Thus, the exclusion of qualified people with disabilities from jobs, on the basis of an employer-determined risk of danger to themselves, is an impermissible act of paternalism.

Regulations to ADA Title I issued by the Equal Employment Opportunity Commission (EEOC), however, permit an employer to refuse to hire a person with a disability if the individual would "pose a direct threat to the health or safety of the individual." In 2002, the Supreme Court decided *Chevron v. Echazabal*, a case in which Chevron refused to hire an individual with asymptomatic Hepatitis C on the grounds that the workplace might exacerbate his condition. The Court ruled in favor of Chevron, endorsing the EEOC's definition of "direct threat," which includes a threat to one's own health or safety.

The ramifications of the *Chevron* decision are beginning to surface in lower federal court cases. The initial determinations confirm the concerns of people with disabilities that employers increasingly will use the "direct-threat" defense to deny employment to qualified people with disabilities.

Mario Echazabal personified the situation the ADA was intended to prevent – paternalism that results in exclusion and isolation. If Chevron could deny employment to Mario Echazabal, who had worked in Chevron's oil refineries for twenty years with no degradation to his health, the employment outlook may be worse for people with symptomatic disabilities who have not had an opportunity to demonstrate they can perform jobs safely.

This paper is divided into several parts. Part II provides a case synopsis. Part III sets out the legal disposition of the *Chevron* case: the facts, U.S. Supreme Court ruling, and issues on remand to the Ninth Circuit. Part IV examines the implications of the Supreme Court's *Chevron* decision for ADA law and disability policy and makes recommendations to align the definition of "direct threat" with Congressional intent. The paper concludes with a post-script describing the practical effects of the *Chevron* decision on Mario Echazabal and its ramifications for other individuals with disabilities.

II. Case Synopsis

During its 2000-2001 term, the U.S. Supreme Court decided *Chevron U.S.A. Inc. v. Mario Echazabal*. In *Chevron*, the Court deferred to EEOC ADA Title I regulations that permit an employer to deny a job to a qualified person with a disability if the job would be potentially harmful to that individual (that is, a "direct threat" to that individual). The *Chevron* decision thereby permits employers to exclude people with disabilities covered by the ADA from working at a job, even though they pose no safety threat to others and are qualified for the particular job.

In *Chevron*, however, the Supreme Court reaffirmed that the direct-threat determination must be founded on an individualized assessment of a current and significant risk of substantial harm based on objective medical evidence, and that the risk cannot be eliminated with reasonable accommodation. On this basis, the Supreme Court reversed the judgment of the U.S. Court of Appeals for the Ninth Circuit, remanding the case for further proceedings consistent with the Supreme Court's opinion.

Mario Echazabal successfully performed the essential functions of various jobs in Chevron's refinery coker unit for some twenty years without accident or injury to himself or anybody else. Echazabal was capable of making independent and informed decisions about his employment and medical treatment. Chevron was apprised and aware of Echazabal's health status during these years, through repeated medical evaluations submitted to Chevron's clinic physicians while Echazabal remained working at the refinery.

For thousands of Americans with disabilities like Mario Echazabal, who want to work and who are capable of working, the *Chevron* decision has created a wave of new uncertainties. After *Chevron*, a trial court in an ADA Title I case may find in favor of a defendant employer on summary judgment (i.e., without a trial) based only on the potential existence of a direct threat to self.

For instance, if an employer (or its workers' compensation insurance carrier) presents information showing that people who use wheelchairs, are blind, deaf, and so on, are twice as likely to be injured in their workplace (which, in fact, research suggests is not true), may that employer refuse to hire that person with a disability, even though the individual is qualified for the job? The *Chevron* decision would permit a trial court to reach that conclusion, and not address whether the plaintiff could perform the essential functions of the particular job with reasonable accommodation.

Post-*Chevron*, employers unilaterally may bar or dismiss from jobs qualified workers who do not pose a health or safety risk to others, but only to themselves. The result is to endorse the unjustified paternalism and stereotyping that Congress expressly sought to eliminate through the ADA.

III. Legal Disposition of *Chevron v. Echazabal*

On June 10, 2002, the U.S. Supreme Court decided the case *Chevron USA Inc. v. Echazabal*.[1] In *Chevron*, the Court ruled that Chevron could deny employment to a qualified individual with a disability, Mario Echazabal, whom the company believed might be harmed by exposure to their particular workplace environment. Chevron accomplished this goal by relying on a "direct threat to self" defense to discrimination charges, language set out in regulatory guidance by the Equal Employment Opportunity Commission ("EEOC").[2]

Echazabal argued that the threat-to-self defense was not present in the language of the ADA, was contrary to a plain and natural reading of the Act, and that it was inconsistent with the expressed intent of Congress. The threat-to-self defense, it was contended, allows employers to decide the degree of risk a qualified individual with a disability can and should accept in performing his or her job. The defense would allow employers unilaterally to bar or dismiss from jobs qualified workers who do not pose a health or safety risk to others, but perhaps only to themselves. In Echazabal's case, this determination was based on speculative and, at best, probabilistic medical criteria. The result, therefore, endorsed the unjustified paternalism and stereotyping that Congress expressly sought to eliminate when it enacted the ADA.

A. Case Facts

Mario Echazabal worked at Chevron's El Segundo, California oil refinery for some twenty years. During this time, he worked as a laborer, helper, and pipefitter for various maintenance contractors, primarily in the coker unit. In 1992, Echazabal applied to work directly for Chevron at the refinery's coker unit as a pipefitter/mechanic. He again applied in 1995 for the position of plant helper. On both occasions, Chevron determined that Echazabal was qualified for the job and could perform its essential functions based on his past work history, and extended Echazabal job offers contingent on his passing a physical examination.[3]

After examination and review, Chevron's physicians concluded that Echazabal should not be exposed to the solvents and liver-toxic chemicals in the refinery and Chevron withdrew its offer to hire him. They reached this conclusion even though Echazabal's physicians had not issued any restrictions precluding him from working in the refinery.[4]

Chevron's decision was based on a medical assessment—which Echazabal contested was not grounded in current medical knowledge or the best available objective evidence—of the ability of Echazabal's liver to cleanse itself of the chemicals to which he had been, and would continue to be, exposed in the refinery. In late 1993, Echazabal was diagnosed as having chronic active Hepatitis C, which has remained asymptomatic since first diagnosed.

In February 1996, Chevron wrote to Irwin Industries, Echazabal's then employer at the refinery. Chevron requested that Irwin remove Echazabal from the refinery or place him in a

position that eliminated his exposure to liver-toxic solvents and chemicals. This action was taken even though Echazabal's liver condition never caused injury or accident to himself or anyone else at the refinery.

B. Legal Background

After losing his position at the refinery, Echazabal filed a complaint with the EEOC. He subsequently filed a complaint in state court (which was removed to federal court) alleging, among other claims, discrimination on the basis of a disability in violation of the ADA, the Rehabilitation Act, and California's anti-discrimination statutes.

The federal district court granted summary judgment in favor of Chevron. The Ninth Circuit reversed, holding that the direct-threat defense contained in the ADA did not permit employers to exclude from employment qualified individuals with disabilities who pose a risk only to themselves and not others; and that the risk that Echazabal posed to his own health did not affect whether he was a qualified individual for purposes of the Act.[5] The Supreme Court accepted the case for review.

C. U.S. Supreme Court Decision

1. Deference to EEOC Direct threat to self Defense Regulations

In its decision, the Supreme Court acknowledged that ADA Title I creates an affirmative defense for employers based on a qualification standard that is job-related and consistent with business necessity. The standard may include "a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace" if the individual cannot perform the job safely with reasonable accommodation.[6]

The EEOC's regulation, however, allowed an employer to screen out an individual with a disability not only for potential risks that he would pose to others in the workplace, but also for risks on the job to his own health or safety.[7] Chevron argued that Echazabal's refinery job would pose such a "direct threat" to his health.

The Supreme Court concluded that Congress included the harm-to-others provision as merely one example of a legitimate qualification standard that may be job-related and consistent with business necessity. These "defensive categories," it reasoned, were intended to allow the EEOC reasonable discretion in establishing permissible qualification standards.[8]

However, the Court's conclusion did not mean that the defense provisions place no limit on EEOC rulemaking, as some regulations are precluded by the Act's specification that the direct-threat defense not include "indirect" threats of "insignificant" harm."[9] Thus, the Supreme Court did not decide whether all safety-related qualification standards need to satisfy the ADA's direct-threat standard.[10] Rather, the Court concluded that Echazabal failed to show that Congress intended to omit the direct threat to self-defense from the affirmative defense category.[11]

2. Direct Threat to Self Defense as Job-Related and Consistent with Business Necessity

Under Title I, the direct-threat defense envisions qualification standards that are "job-related and consistent with business necessity."[12] Chevron contended that the job-related and business necessity reasons for upholding the EEOC's regulation were that it must "avoid time lost to sickness, excessive turnover from medical retirement or death, litigation under state tort law, and the risk of violating the national Occupational Safety and Health Act of 1970 ("OSHA")."[13]

In its decision, the Supreme Court focused primarily on the concern with OSHA[14] in upholding the EEOC regulation.[15] The Court noted that the intent of OSHA is to assure "safe and healthful working conditions," and for an employer to furnish a "place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[16] Although the Court acknowledged that it is not clear whether an employer would be liable under OSHA for hiring an individual with a disability who consented to the particular dangers of a job, it reasoned that:

> there is no denying that the employer would be asking for trouble: his decision to hire would put Congress's policy in the ADA, a disabled individual's right to operate on equal terms within the workplace, at loggerheads with the competing policy of OSHA, to ensure the safety of "each" and "every" worker.[17]

In the Court's view then, the EEOC's direct threat to self-guidance was a reasonable balance between OSHA's objectives of workplace safety and the ADA's rejection of employer paternalism.[18] As the Court held:

> [T]he EEOC has taken this to mean that Congress was not aiming at an employer's refusal to place disabled workers at a specifically demonstrated risk, but was trying to get at refusals to give an even break to classes of disabled people, while claiming to act for their own good in reliance on untested and pretextual stereotypes.[19]

The Court concluded that the EEOC's regulation "disallows just this sort of sham protection, through demands for a particularized enquiry into the harms the employee would probably face."[20] In remanding the case to the Ninth Circuit, the Court reaffirmed its previous holding in *Bragdon v. Abbott* [21] that the direct-threat defense must be based on a reasonable medical judgment using current knowledge or objective evidence, predicated on an "individualized assessment" of the individual's present ability to safely perform essential job functions, while considering the likelihood of the risk and severity of the harm.[22]

In sum, the Court found that the EEOC acted within reason "when it saw a difference

between rejecting workplace paternalism and ignoring specific and documented risks to the employee himself, even if the employee would take his chances for the sake of getting a job."[23] The Court did not decide the parameters of an impairment that would allow an employer to disqualify a job applicant or employee with a disability, as a trial court must make this determination on a case-by-case basis.

D. Remand to the U.S. Court of Appeals for the Ninth Circuit

The question on remand to the Ninth Circuit was whether Chevron's decision to exclude Echazabal, because he allegedly posed a direct threat to himself, was based on an individualized inquiry as required by Title I and the EEOC regulations interpreting the Act.[24] On remand, Echazabal, and the EEOC as amicus curiae, contended that the Ninth Circuit should reverse the district court's grant of summary judgment to Chevron because no such individualized assessment was made. Echazabal and the EEOC amicus argued it was reversible error for the district court to have held that Chevron's direct-threat determination process (i.e., its reliance on the medical opinions of physicians non-expert in the areas of hepatitis/liver disease and toxicology) was sufficient under Title I.[25]

Before excluding Echazabal as a direct threat, Chevron was required under EEOC regulations to show that it had made an individualized assessment of his then current ability to perform essential job functions. This evaluation was required to have been derived from current medical knowledge and objective evidence.[26]

The EEOC regulations, which were upheld in *Chevron*, set forth four factors for determining whether a direct threat exists: (1) the potential duration of the threat; (2) the nature and severity of the threat; (3) the likelihood that the threat will occur; and (4) the imminence of the threat.[27] The Supreme Court found this approach reasonable because it supports a particularized analysis of the harm to the employee.[28]

Proper risk assessment, therefore, required Chevron to consider the particular risk to Echazabal. For instance, the company needed to review the level and degree of toxicity to which Echazabal was exposed, an evaluation Chevron did not conduct.

Likewise, Chevron was required to ensure that the medical advisors on whom the company relied implemented the proper blood tests to evaluate whether Echazabal was at risk, an evaluation Chevron did not conduct. Moreover, Chevron's generalized concern that Echazabal might be injured in the future, without more, was not a proper basis for concluding that a direct threat existed. Under the EEOC regulations, Chevron bore the evidentiary burden of establishing the existence of a direct threat, a burden Echazabal claimed that the company did not meet.[29]

The individualized determination of direct threat also required Chevron to prove that possible accommodations were examined and found not to exist within reason.[30] According to Echazabal, Chevron should not be permitted to prevail on summary judgment because the company failed to engage in good faith in the consultative "interactive" process mandated by

Title I and the EEOC.[31]

On remand, the Ninth Circuit could find that Chevron's conclusion that Echazabal posed a direct threat to himself failed to comport with the ADA's individualized assessment process.[32] Other issues may provide a basis for the Ninth Circuit to reverse the district court's grant of summary judgment. In *Chevron*, the Supreme Court did not determine whether the ADA places on the employee the evidentiary burden of proving as part of his claim that he is qualified or capable of performing the job where his disability also may constitute a direct threat.[33] Rather, the Supreme Court remanded that issue to be considered only if the Ninth Circuit first concluded that Chevron's decision to exclude Echazabal was based on the individualized medical inquiry required by the ADA.

IV. Implications

A. Importance of Personal Choice in Employment

Congress acknowledged in the ADA that discrimination takes many forms, including paternalism and stereotyping.[34] Perhaps the most long-standing and insidious aspect of this type of discrimination is the assumption that people with disabilities are not competent to make informed, wise, or safe life choices. This myth is most apparent and damaging in the employment context.[35]

In its 1986 report to the President and the Congress, and relied upon by Congress in its consideration and passage of the ADA, the National Council on Disability (NCD), emphasized the importance of access to employment as central to the independence of individuals with disabilities:

> As for most other Americans, a major prerequisite to economic self-sufficiency for individuals with disabilities is a job. Employment is an essential key to successful adult integration into community life. Various forms of work are associated with greater independence, productivity, social status, and financial security. Success and quality of life are often measured in terms of paid employment.[36]

In part in response to these concerns, Congress passed the ADA and set forth findings about the pervasive nature of discrimination against persons with disabilities. The findings included discrimination resulting from over-protective rules and policies, as well as intentional discrimination that relegated individuals with disabilities to lesser and inferior jobs and foreclosed their employment opportunities.[37] The resultant loss to this nation in economic productivity was estimated to be in the billions of dollars.[38]

In light of these findings, Congress enacted Title I, prohibiting discrimination against a "qualified individual with a disability" on the basis of myths, stereotypes, and misperceptions

about job capabilities.[39] Congress defined a "qualified individual with a disability" as a person with a disability "who, with or without reasonable accommodation, can perform the essential functions" of the job – thereby requiring any employer assessment to begin with the individual's qualifications.[40]

Title I is calibrated carefully to balance the interests of employers and individuals with disabilities, and requires that issues be addressed in an ordered and tiered sequence.[41] The threshold determination is whether an individual is qualified to perform the job, with or without reasonable accommodations. Then, and only then, may the defense of direct threat to others be evaluated. When employers are permitted to deny employment to qualified individuals with disabilities, who are capable of performing essential job functions, on the basis of beliefs about the potential harm to the individual with a disability, hiring decisions often are based on myths, stereotypes, and misperceptions, instead of on individual qualifications.

B. Ramifications of the Medical Model in Employment

The ADA marked a watershed in civil rights for persons with disabilities and the abandonment of the prior "medical model" of disability. The medical model focused on the individual, whose disability was viewed as an infirmity that precluded participation in the economy and in society.

The medical model posited that the government directs resources to rehabilitation programs that would assist individuals with disabilities to overcome their impairments.[42] In the employment realm, it relegated people with disabilities to a subordinate role in their encounters with employers and medical professionals who aimed to help individuals with disabilities adjust to a workplace structured around the convenience and outlook of the non-disabled, or not work at all.[43]

Because the medical model never questioned the physical and social environment in which people with disabilities were forced to function, it countenanced their segregation and marginalization in employment. Because prior policy aimed to address the "needs" of people with disabilities rather than to recognize their civil rights, the medical model led to governmental policies that viewed economic assistance for people with disabilities as a species of welfare.[44]

By enacting the ADA, Congress committed the Federal Government to the protection of the civil rights of individuals with disabilities, and refuted a prior focus on social programs that tended to isolate those individuals.[45] The civil rights model that began to influence government policy in the 1970s proposes that disability is a social and cultural construct. The civil rights model focuses on the laws and practices that subordinate persons with disabilities and insists that government secure the equality of people with disabilities by eliminating the legal, physical, economic, and paternalistic barriers that preclude their full involvement in society.[46]

The implications of the Supreme Court's reliance in *Chevron* on a medical approach to guide employment decisions go beyond people with current disabilities, to people who might

develop disabilities in the future. Chevron's physicians were not willing or able to calculate the risk of harm that might befall Echazabal at any time in the future. They were aware only that, sooner or later, his working at the refinery could possibly damage his liver. Chevron defended its decision not to hire Echazabal on the ground that any risk to Echazabal, no matter how far in the future and how speculative, would be unacceptable in light of the company's aversion to risk.

Reliance on a medical opinion that is based on future possibilities, and that seeks to "protect" an individual such as Echazabal from himself, is precisely what Congress intended to prevent. As Representative Major Owens stated:

> [A]n employer could not use as an excuse for not hiring a person with HIV disease the claim that the employer was simply protecting the individual from opportunistic diseases to which the individual might be exposed. That is a concern on which the individual should consult with his or her private physician and make decisions accordingly.[47]

With advances in medical technology, including genetic screening, there also is the potential for excluding large numbers of pre-symptomatic individuals (i.e., "the healthy ill") on the basis of potential health or safety risks to themselves in the future. As one commentator suggested, the problem with the use of genetic testing to exclude workers is that "an individual's risk of injury or illness from exposure can be elevated relative to the average because of genetic inheritance, because of acquired characteristics, or ... because of a combination of genetic and environmental influences."[48]

A regulation, policy, or Court decision such as *Chevron* that denies employees with disabilities the right to decide whether to accept the risks posed by a job embeds into law the notion that all individuals with a disability are incapable of engaging in basic decisionmaking.[49] The same paternalistic approach is not applied to persons without disabilities. How many thousands of Chevron workers, if subjected to an individualized assessment, would be at risk of harm to themselves or others from working in the refinery? Does consuming alcoholic beverages or smoking greatly increase the risk of harm-to-self for Chevron's workers without Hepatitis C, or result in a higher risk-to-self than Echazabal's?

Researchers have found that by the 1980s approximately 10 percent of the U.S. population between 18 and 64 years of age had a work limitation.[50] Over the following years, given the aging of the American workforce, the proportion of those with work limitations rose.

Despite the high prevalence of Americans with work limitations, workers with disabilities do not show an elevated risk for occupational injuries. In a national study of occupational injuries across industries, Zwerling and his colleagues find that only 3.5 percent of occupational injuries are explained by the individual's prior disability.[51] This finding does not support the exclusion of qualified workers with disabilities because of a slightly elevated risk, and certainly not in the absence of consideration of reasonable accommodations.

C. Maintaining the Structural Integrity of Title I

Under Title I's tiered analysis, once a determination is made that an individual has a disability under the Act, a determination must be made as to whether the individual is qualified to perform the duties of the job applied for or held, with or without reasonable accommodations. As mentioned, only then may the direct-threat defense be evaluated.

The first question in the sequence is whether a person is a qualified individual with a disability.[52] That term means "a person who, with or without reasonable accommodation, can perform the essential functions of the employment position."[53] There are three embedded considerations: (1) whether the individual has a "disability;" (2) whether the person can perform the essential job functions; and (3) whether reasonable accommodations are possible.

Congress constructed with care the definition of a qualified individual with a disability.[54] The statutory definition is written in the present tense--an individual who can perform the essential functions--to denote that present ability, not future ability, to perform the job is the primary, if not exclusive, consideration.[55]

The decision about whether an individual is qualified must be made "at the time of the job action in question; the possibility of future incapacity does not by itself render the person not qualified."[56] In *Chevron*, timing alone demonstrated that Echazabal was a qualified individual with a disability. After having worked at the Chevron facility for years without incident, at the time of the dispute Echazabal could safely tolerate chemical exposure even if, ultimately, he might not be able to continue to do so sometime in the future.

The intention of Congress with respect to the term "essential functions" also is clear: "job tasks that are fundamental and not marginal."[57] Employers have considerable discretion in determining those job tasks that are essential.[58] Title I is not meant to second guess employers' decisions, for instance, regarding production standards.[59] Congress was equally clear, however, that an individual's present ability is to be the central focus of inquiry:

> The ADA adopts a framework for employment selection procedures which is designed to assure that persons with disabilities are not excluded from job opportunities unless they are actually unable to do the job. The requirement that job criteria actually measure the ability required by the job is a critical protection against discrimination based on disability.[60]

Title I (as well as its legislative history and EEOC interpretive regulations) does not provide that health and safety factors are to be part of the determination of whether a person is a "qualified individual."[61] To address such issues, Title I incorporates several employer defenses to a charge of discrimination against a qualified individual with a disability.

One such defense is that the job applicant does not meet qualification standards and

selection criteria that are job-related and consistent with business necessity.[62] The direct-threat-to-others defense is a subset of the qualifications defense, carved out by Congress to meet the health and safety aspects of the more general defense.[63] Another defense is that a proposed workplace accommodation would impose an "undue hardship" on the business.[64]

Despite the clear structure of Title I, in *Chevron* the company argued that an individual with a disability who poses a threat-to-self cannot be considered "qualified" under the ADA. In other words, Chevron contended that Echazabal's ability to perform the functions of the particular job safely should be an essential function of the position. However, the legislative history that speaks to the focus of job tasks and the ability to do the job does not support incorporating a health and safety analysis into the question of whether a person is a qualified individual with a disability. Under Title I, health and safety concerns are determined under employer defenses, and, specifically, under the direct-threat defense.

As an aspect of an employer's defenses,[65] health and safety issues can be considered. Qualification standards are "personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements" necessary for an individual to be eligible for the position.[66] As such, health and safety standards are properly considered only in the context of the employer's defenses.[67] Congress placed the burden on the employer to demonstrate that such qualification standards are job-related and necessary to business functioning.[68]

Beyond the express intent of Congress, there are sound policy reasons the business necessity defense in general, and the direct-threat defense in particular, should be proven by the employer. Congress has incorporated consideration of the employer's judgment with regard to the essential functions of the job.[69] With respect to business necessity and direct threat, the employer often will have superior information and knowledge about workplace requirements and operations.[70]

Moreover, making certain that business necessity and direct threat are subject to employer proof allows the mandated tiered analysis to go forward in an orderly fashion. The careful step-by-step process of analyzing job placement issues is short-circuited when defenses and essential functions are conflated or merged. Collapsing the issues or truncating the process renders decisions susceptible to the type of myth and paternalism that gave rise to the civil rights model and the ADA.

D. Redefining the Direct-threat defense

As discussed, Title I permits defenses based on qualification standards that are job-related and consistent with business necessity.[71] One defense is that an employee not pose a direct threat to others in the workplace.[72] Again, direct threat is "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[73]

Title I does not define direct threat as a risk-to-self. There is no reference in the Act or its

legislative history denoting that a threat to the disabled employee himself is a defense for the employer to refuse to hire that employee. Nevertheless, the EEOC issued regulations that expanded the direct-threat defense beyond the language of the statute to be a significant risk of harm to the individual or others that cannot be addressed by reasonable accommodation.[74]

The EEOC's expansion of the direct-threat defense is fundamentally inconsistent with the text and purpose of the statute. Congress could have used the phrase "direct threat to the health or safety of the individual or other individuals in the workplace," but it did not. That omission must be viewed as deliberate, given the fundamental importance of this phrasing in accomplishing the goals of the statute.

Congress recognized that employer assessment of the risk to the employee historically served as a reason for the unwarranted exclusion -- well meaning or otherwise -- of qualified individuals from work. Congress drafted the ADA to leave the assessment of personal risk to the employee in consultation with his treating physician. The ADA prohibits employers from considering the effect on health or safety, unless and until the individual's condition or behavior imperils the health or safety of others in the workplace, or the individual fails to meet specific health or safety standards imposed by federal authorities on all workers.[75]

Congress chose to draft the definition of direct threat narrowly. Where Congress has spoken clearly, the natural and direct meaning of the Act should control over any interpretation placed on it by an administrative agency. The EEOC regulations extending the direct-threat defense to individuals who pose a substantial health or safety risk to themselves should not have been entitled to deference by the Supreme Court.

E. Post-Script: Personal and Legal Posture

1. Effects of the *Chevron* Decision on Mario Echazabal

In 2002, the Honorable John Noonan, Senior Judge of the Court of Appeals for the Ninth Circuit, and Professor of Law at the University of California at Berkeley, eloquently described the dismal plight of civil rights plaintiffs like Mario Echazabal appearing before this U.S. Supreme Court. Noonan writes:

> For the Supreme Court, proceeding as it appears to proceed in these cases with an agenda, the facts are of minor importance and the persons affected are worthy of almost no attention. The court is focused on the large questions of constitutional law and on grand conceptions, such as sovereignty. The people and their problems that have been the grist for the constitutional mill are incidental.[76]

And, on the Supreme Court's "destructive" approach to the ADA, Noonan continues:

> Almost complete indifference to the individual plaintiffs has been

> accompanied in these cases by an absence of interest in the number of persons negatively affected by the court's rulings. The plaintiffs, rightly of significance themselves, were also surrogates for wider groups whose cause was lost with theirs. … When the court, however, has adopted a methodology that seeks to quantify the evil Congress is seeking to remedy, it is indefensible to ignore the size of the protected class.[77]

What then of Mario Echazabal and others like him? Since losing his job at the Chevron refinery in February of 1996, Mario has earned little if any steady income. He worked sporadically for Irwin Industries (contractors for Chevron) during 1997.[78] In the fall of 1998, Mario was hired by a school district contractor as a part-time bus driver. When he started this job, Mario was earning about $7.00 per hour. As of fall 2002, Mario earns about $10.40 per hour (based on a 30-hour work week) with no benefits.

While Mario worked for Irwin Industries, he earned an hourly wage of $11.50 based on a 40-hour workweek plus overtime and benefits. Chevron's December 1995 job offer would have provided him with an hourly wage of $17.29, based on a 40-hour workweek plus overtime and benefits. At a minimum, Mario has experienced an annual loss of income, not including benefits, of approximately $16,000.

For Mario Echazabal, the litigation has been upsetting and unsettling. He has been deprived of his economic livelihood and lost his position in his chosen trade as a welder and mechanic due to unfounded fears about potential liability.

2. Effects of the *Chevron* Decision on Others

For many negatively affected by the Supreme Court's ruling, the *Chevron* decision has created a wave of new uncertainties. NCD has solicited stories from people around the country to learn how they are being affected by the *Chevron* decision.

In one case, a mother described that when her deaf son turned eighteen he wanted to work summers for his father's demolition company. The company's workers' compensation insurance provider refused to cover her son as a laborer because they considered him a safety risk. In another case, a deaf nurse received bilateral cochlear implants and began working at a hospital's in-patient psychiatric unit. The other nurses on her shift filed a grievance claiming their safety is at risk because of her impaired hearing.

It is too early to measure the impact of the lower court decisions flowing from *Chevron*. In a case similar to *Chevron*, *Martell v. Sparrows Point Scrap Processing*,[79] the plaintiff Martell experienced a hearing loss in childhood, but used hearing aids in both ears as an adult to regain significant auditory function. Martell had been employed as a crane operator for more than 20 years and applied for a job as a crane operator with defendant Sparrows Point Scrap.

After initial pre-employment interviews, Martell was offered the job subject to a physical examination. After the examination (in which Martell's hearing was described as "abnormal"), Sparrows Point withdrew the job offer on the ground that Martell's hearing impairment, largely corrected through the use of hearing aids, would pose a significant danger to himself and others in the performance of the essential functions of the job of crane operator.

The district court found that Martell was not substantially limited in the major life activities of hearing and working.[80] In granting summary judgment for defendant, however, the district court accepted the company's contention of the potential safety risks, even though it noted that "[i]t may well be that Sparrows Point's risk assessment is poorly calibrated, i.e., that it has erroneously measured the potential for harm if it allowed Martell to work as a crane operator."[81]

In these real-life stories, insidious aspects of employment discrimination may be at work, though after *Chevron* it may not be possible for these individuals to vindicate their ADA rights. That is because after *Chevron* a district court in a Title I case properly may conclude that summary judgment is appropriate based on the existence of a direct threat to self or others, and therefore not reach the issue of whether a plaintiff could perform essential job functions with or without accommodation.[82]

3. Remand to the U.S. Court of Appeals for the Ninth Circuit

After the U.S. Supreme Court remanded *Chevron*, the Ninth Circuit heard oral argument in San Francisco on September 19, 2002. The appeals court panel was comprised of Judges Reinhardt, Trott, and Toshima. Judge Toshima was substituted for Judge Bright, who sat on the initial three-judge panel before the Supreme Court agreed to review the case.

During oral argument, Judge Trott inquired as to whether Echazabal would have a cause of action in tort against Chevron for causing injury to his liver or for an exacerbation of his injury if Chevron were required to hire him. In response, Echazabal's counsel referenced the Ninth Circuit's earlier decision in which the court concluded that this cause of action was preempted. In other words, the Ninth Circuit had recognized that state tort law would not apply to the extent that it interfered with a federal antidiscrimination law such as the ADA.[83]

Judge Toshima inquired as to whether Chevron conducted the individualized assessment that the statute requires.[84] Judge Toshima also questioned Chevron's counsel as to why the company did not engage a medical expert, as did Echazabal. Judge Toshima pressed Chevron's contention that, under the individualized inquiry requirement, an employer may rely on the reasonable views of competent physicians, even where those opinions are not consistent with knowledge in the medical community regarding the particular condition at issue.

Chevron's position was that its employment decision regarding Echazabal satisfied the required individualized inquiry process, and was not based on stereotypes or paternalism about Echazabal's condition. Chevron contended that its physician and medical director conducted a

review of Echazabal's medical history and liver condition in consultation with his treating physician.[85] To proceed beyond this review process, Chevron argued, is inconsistent with the ADA's requirements and practical realities. To establish the direct-threat defense, "employers must be able to rely on the facially reasonable opinions of competent physicians, including company-retained physicians or the employee's own physician."[86]

It is unclear whether the Ninth Circuit will vacate or let stand its earlier conclusion that Echazabal was a "qualified individual with a disability." The Ninth Circuit may comment further on that issue. However, it also is unclear whether an employer may shift the direct threat burden of proof from the defendant, an affirmative defense under Title I and EEOC regulations, to the plaintiff to prove as part of his prima facie case that he is a qualified individual. This issue is of central importance to future direct threat cases under Title I.

On remand, the Ninth Circuit heard argument that Chevron did not engage in the required interactive process to determine the possibility of accommodation.[87] Chevron contends that accommodation within reason was not possible for Echazabal in that every job at the refinery for which Echazabal may be qualified involved exposure to hepatoxins.[88] Echazabal argued that, as there had been no change in his condition despite years of exposure, a medical monitoring system could be implemented easily, and at low cost, to reflect a change in his condition before injury could or did set in, and therefore, constituted a reasonable form of accommodation.

Other Supreme Court decisions likely will affect the final outcome in *Chevron*. When the case was first argued before the district court, Chevron did not dispute for purposes of its summary judgment motion that Echazabal was disabled under the ADA.[89] Since that time, in cases such as *Toyota v. Williams*[90] and *Sutton v. United Airlines*,[91] the Supreme Court has restricted who may be considered a person with a disability under the ADA.

For instance, the Supreme Court has excluded from coverage under Title I individuals who are not substantially limited in their ability to work in a broad range or class of jobs or those who have mitigated their impairments. When *Chevron* again is before the district court, Echazabal may be found not disabled under the ADA because his Hepatitis C is asymptomatic, not withstanding that he was denied employment because of his condition, and he was not limited in performing a class of jobs.

The Supreme Court's cases narrowing the definition of disability under the ADA make it more difficult for future plaintiffs with disabilities to overcome a direct-threat defense because they will have to first pass the threshold issue of whether they are covered by the law. Employers that otherwise may not want to use a direct-threat defense, now may be less hesitant to do so knowing their decision likely will not be subject to review by a court.

4. *Echazabal v. Chevron*: Disability Discrimination under the California Fair Employment and Housing Act

In addition to Echazabal's claims of employment discrimination under the ADA and

Section 504 of the Rehabilitation Act, his complaint includes an employment discrimination claim under the California Fair Employment and Housing Act (FEHA).[92] Although the federal district court has not yet examined whether Echazabal's condition constitutes a disability, it is instructive to examine California's definition of disability against the backdrop of the Supreme Court's interpretations of disability under the ADA and the Rehabilitation Act.

A case recently decided by the California Supreme Court, *Colmenares v. Braemar Country Club Inc.*,[93] held that "a plaintiff seeking to establish physical disability under the **FEHA** had to show: (1) a physiological disease or condition affecting a body system; and (2) the disease or condition limited (as opposed to substantially limited, as required under federal law) the plaintiff's ability to participate in major life activities." The FEHA rejects the ADA and Rehabilitation Act definition of disability as a "substantial limitation" on a major life activity, as interpreted by the U.S. Supreme Court in *Toyota v. Williams*, [94] and *Sutton v. United Airlines*.[95] Thus, if the definition of disability becomes an issue on remand, Echazabal will have a much stronger claim under FEHA than he will have under the ADA or the Rehabilitation Act.

In accord with the ADA's intended approach, the Ninth Circuit has interpreted the FEHA's "danger to self/no reasonable accommodation" defense narrowly, requiring an employer to "offer more than mere conclusions" and a showing that the employee faces "imminent and substantial degree of risk" in performing the essential job functions.[96] Under the FEHA, Chevron would be required to show by competent medical evidence that Echazabal's condition rendered him presently unable to safely perform the essential job functions in the plant and that serious injury or death was imminent.[97]

The legal posture of Echazabal's case is uncertain. Echazabal's FEHA and other state claims that were dismissed by the district court were reinstated by the Ninth Circuit. That decision was then vacated by the U.S. Supreme Court and remanded to the Ninth Circuit. We await the decision to see whether the Ninth Circuit will reinstate any of Echazabal's claims.

Should the Ninth Circuit decide on remand that Chevron failed to engage in the individualized inquiry, it is likely that Chevron's direct-threat defense will fail and the Ninth Circuit will send the case back to the district court to re-examine Echazabal's claims. If that were to occur, it is likely that Chevron will argue that Echazabal is not a person with a disability for purposes of the ADA (e.g., using *Toyota* logic) or the FEHA. If that approach proves unsuccessful, Chevron may, depending on the breadth of the Ninth Circuit's decision, be in a position of arguing that even if Echazabal is a person with a disability for purposes of the ADA and FEHA, he is not a "qualified individual" with a disability because he could not perform the essential job functions safely.

If the district court were to adopt the conclusion that Echazabal was not a "qualified individual," it is possible that the case again could proceed to the Ninth Circuit and perhaps to the U.S. Supreme Court. The issue, yet to be decided by the Supreme Court, is whether health and safety may be considered as a part of a Echazabal's obligation to prove he is a "qualified individual" for purposes of the ADA or whether that determination is properly relegated, as is the

view of Echazabal and NCD, only to the direct-threat defense showing by a defendant.

V. Conclusion

The EEOC's expanded definition of direct threat to self invites outcomes directly at odds with the ADA. The threat-to-self defense fosters the view that people with disabilities need to be protected from themselves and from their choices.

Chevron v. Echazabal is a case about who is best able to make those most personal of decisions, which involve encountering some possible future risk to one's health in the workplace. People without disabilities make such decisions for themselves. People with disabilities should be able to do the same. Legislative and regulatory amendments are needed to make it clear that a qualified individual with a disability, who poses no threat to the health or safety of others, cannot be denied employment on the grounds that he poses a threat to his own health or safety by working.

Acknowledgments

The National Council on Disability (NCD) wishes to express its appreciation to Peter Blanck for the development of this paper. Blanck is the Charles M. and Marion Kierscht Professor of Law, and Professor of Public Health and of Psychology, at the University of Iowa; and Director of the Law, Health Policy & Disability Center. Blanck was counsel of record to amicus curiae NCD in *Chevron v. Echazabal* and worked on the brief with Lisa Clay, Sarah Gayer, Diane Kutzko, Douglas Oelschlaeger, Leonard Sandler, and Mark Zaiger, along with other members of the firm of Shuttleworth & Ingersoll, P.L.C., Cedar Rapids, Iowa, and students at the University of Iowa College of Law. This paper draws from the NCD amicus brief. Several individuals provided most helpful advice including Maureen DeArmond, Larry Minsky, Helen Schartz, James Schmeling, and Bobby Silverstein.

VI. Endnotes

[1] 122 S. Ct. 2045 (2002).
[2] The EEOC is charged with enforcement of Title I of the ADA, 42 U.S.C. § 12101 et seq.
[3] The Supreme Court (and the Ninth Circuit) did not consider whether Echazabal was a "qualified individual" under Title I who could perform essential job functions. *Chevron*, 122 S. Ct. at 2047 n.1. As discussed *infra*, whether Echazabal was a "qualified individual" for purposes of Title I will be decided on remand should the Ninth Circuit conclude that Chevron excluded Echazabal from employment without conducting the individualized medical inquiry as required by the statute.
[4] Echazabal's physicians were available to him through the independent contractor's Health Maintenance Organization (HMO).
[5] Echazabal v. Chevron USA, Inc., 226 F.3d 1063, 1072 (9th Cir. 2000).
[6] The Court notes the EEOC's rule interpreting the Rehabilitation Act of 1973, 87 Stat. 357, as amended, 29 U.S.C. § 701 et seq., and that, like the ADA, the Rehabilitation Act does not specify covered threats to self that particular employment might pose. 42 U.S.C. § 12113(b).
[7] *Chevron*, 122 S. Ct. at 2049 ("qualification standard" may include an individual not pose direct threat to the health or safety of the individual or others in the workplace, *citing* 29 CFR § 1630.15(b)(2) (2001)).
[8] *Chevron*, 122 S. Ct. at 2050 (concluding that "discretion is confirmed" by provision that qualification standards within the limits of job relation and business necessity "may include" "a veto on those who would directly threaten others in the workplace.").
[9] The Court notes that the defense is a "direct" threat of "significant" harm, 42 U.S.C. § § 12113(b), 12111(3), intended to forbid qualifications that screen out by reference general categories pretextually applied.
[10] See Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 569-570, n.15 (1999).
[11] One reason was that administrative agencies besides the EEOC have interpreted the ADA's precursor, the Rehabilitation Act, not to include defenses for threats to self, suggesting there has been no standard interpretation of Congressional intent of the scope of the defense. A second reason was that the Court saw no basis that Congress, in specifying a threat-to-others defense, intended not to cover others whose safety could be considered inside and outside the workplace. The Court cites as example to 28 CFR § 42.540(l)(1) (1990) (Department of Justice), 29 CFR § 32.3 (1990) (Department of Labor), and 45 CFR § 84.3(k)(1) (1990) (Department of Health and Human Services). Thus, because Congress has not spoken equivocally on threats to a worker's own health, the Court concluded that the EEOC regulation survives under the agency deference rule in *Chevron*, 467 U.S., at 843.
[12] 42 U.S.C. § 12113(a).
[13] *Chevron*, 122 S. Ct. at 2052.
[14] 84 Stat. 1590, as amended, 29 U.S.C. § 651 et seq.
[15] Echazabal argued that there was no known instance of OSHA enforcement, or even threatened enforcement, against an employer who relied on the ADA to hire a worker willing to accept a risk to himself from his disability on the job. Brief of Respondent at 37-38.
[16] See § 651(b), § 654(a)(1).
[17] *Chevron*, 122 S. Ct. at 2053. The Court rejected Echazabal's contention that the Act's legislative history is to the contrary, noting that the ADA's legislative history decries paternalism, citing H.R.Rep. No. 101-485, pt. 2, p. 72 (1990), U.S.Code Cong. & Admin.News 1990, pp. 303, 354 ("It is critical that paternalistic concerns for the disabled person's own safety not be used to disqualify an otherwise qualified applicant."). However, the Court concluded that those comments express only the point that such justifications are rooted in generalities and misperceptions about disabilities. *Citing* H.R.Rep. No. 101-485, at 74, U.S.Code Cong. & Admin.News 1990, pp. 303, 356 ("Generalized fear about risks from the employment environment, such as exacerbation of the disability caused by stress, cannot be used by an employer to disqualify a person with a disability."). The Court also rejected Echazabal's analogy to its Title VII decisions in which employers adopted rules that excluded women from jobs that are seen as too risky. Automobile Workers v. Johnson Controls, Inc., 499 U.S. 187, 202 (1991). The Court distinguished those cases as concerned with paternalistic judgments based on the category of gender, and not on individualized risk assessments.
[18] *Chevron*, 122 S. Ct. at 2052-53 (noting that Congress viewed the paternalism, see § 12101(a)(5), in "overprotective rules and policies" as a form of discrimination under the ADA). But see Orr v. Wal-Mart Stores,

Inc., 297 F.3d 720 (8th Cir. 2002). *Orr* is a post-*Chevron* case holding that Wal-Mart pharmacist who was diabetic did not have an actual disability that presently and substantially limited a major life activity, and therefore, he was not disabled under the ADA. The Eighth Circuit noted in dicta that had the plaintiff established a prima facie case of actual disability under Title I, Wal-Mart could have raised the threat-to-self defense that working in a single-pharmacist pharmacy, which did not provide for uninterrupted meal breaks, posed a direct threat to plaintiff's health and Wal-Mart was justified in not continuing his employment (*citing Chevron*, 122 S. Ct. at 2045).

[19] *Chevron*, 122 S. Ct. at 2052.

[20] Id. at 2052-53.

[21] Bragdon v. Abbott, 524 U.S. 624, 649-50 (1998).

[22] *Chevron*, 122 S. Ct. at 2053 (*citing* 29 CFR § 1630.2(r) (2001)). See also Kapche v. City of San Antonio, 304 F.3d 493, 494-95 (5th Cir. 2002) (post-*Chevron* case discussing ADA direct-threat defense and individualized inquiry requirement). Id. at 495 (remanding the case to the district court for a "determination whether today there exists new or improved technology … that could now permit insulin-dependent diabetic drivers in general, and Kapche in particular, to operate a vehicle safely.").

[23] *Chevron*, 122 S. Ct. at 2053.

[24] *Echazabal v. Chevron*, Supplemental Brief of the Equal Employment Opportunity Commission as Amicus Curiae, U.S. Court of Appeals for the Ninth Circuit, Docket No. 98-55551 (Aug. 8, 2002) [hereinafter "EEOC Ninth Circuit Brief on Remand"].

[25] Id. at 15.

[26] 29 C.F.R. § 1630.2(r).

[27] See 29 C.F.R. Pt. 1630, App. § 1630.2(r) (EEOC Interpretive Guidance stating that direct threat consideration "must rely on objective factual evidence").

[28] *Chevron*, 122 S. Ct. at 2053.

[29] Appellant Echazabal's Supplemental Brief on Remand, (Aug. 2002), citing Hutton v. Elf Atochem of North America Inc., 273 F. 3rd 884 (9th Cir. 2001); Morton v. United Parcel Service, Inc., 272 F. 3d 1249, 1258-1259 (9th Cir. 2001); Nunes v. Wal-Mart Stores, Inc., 164 F. 3d 1243, 1427 (9th Cir. 1999).

[30] Appellant Chevron's Post-Remand Supplemental Reply Brief (Aug. 27, 2002).

[31] Id. (citing Barnett v. U.S. Air, Inc., 228 F. 3d 1105, 1116 (en banc), rev'sd on other grounds, 122 S. Ct. 1516 (2002)). Echazabal contends that Chevron withdrew its offer of employment without engaging in the interactive process. In 2002, the Supreme Court in US Airways v. Barnett, 122 S. Ct. 1516, 1523 (2002), concluded that in most cases, the interests of a disabled worker who seeks reassignment to a position as a "reasonable accommodation" will not prevail over the interests of workers with superior rights under an employer's seniority system. The Court explained that the ADA specifies: "[P]references will sometimes prove necessary to achieve the Act's basic equal opportunity goal. The Act requires preferences in the form of 'reasonable accommodations' that are needed for those with disabilities to obtain the [same] workplace opportunities that those without disabilities automatically enjoy. … [T]he fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach." Id. at 1521.

[32] In addition, the Ninth Circuit might decide whether Chevron properly engaged in the interactive process to explore if there were accommodations within reason that would enable Echazabal to perform his job without substantial risk to himself.

[33] See 226 F.3d 1063, 1072 (9th Cir. 2000).

[34] See H.R. Rep. No. 485, pt. 2, at 74 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 356.

[35] The myth is apparent in employment given employers' assumption that many persons with disabilities, compared to those without disabilities, are more likely to be injured and thereby enhance exposure to tort liability. Cf. Peter Blanck & Glen Pransky*, Workers with Disabilities*, in 14(3) State of the Art Reviews in Occupational Medicine: Special Populations and Occupational Health, 581-93 (Hanley and Belfus Pub., Glenn Pransky & Howard Frumkin, eds.) (1999) (disputing such myths).

[36] See National Council on the Handicapped, *Toward Independence* 18-21 (1986).

[37] H.R. Rep. No. 485, pt. 2, at 28-29 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 310-11. For a review of the disability policy framework, see Peter Blanck & Helen Schartz, *Towards Reaching a National Employment Policy for Persons with Disabilities*, 1-10, in Emerging Workforce Issues: W.I.A., Ticket to Work, and Partnerships, R. McConnell (ed.), Switzer Seminar Monograph Series, National Rehabilitation Association (2001).

[38] 42 U.S.C. § 12101(a)(9).
[39] 42 U.S.C. § 12112(a).
[40] 42 U.S.C. § 12111(8)
[41] See *The Americans with Disabilities Act Policy Brief Series: Righting the ADA--A Carefully Constructed Law* (October 30, 2002), at http://www.ncd.gov/newsroom/publications/02publications.html (last visited Feb. 4, 2003) (concluding that "Congress went through a laborious, tedious, and intensive process of considering and revising the ADA, including numerous negotiations, compromises, and tweaking of the language, prior to passing the statute").
[42] See Peter Blanck & Michael Millender, *Before Disability Civil Rights: Civil War Pensions and the Politics of Disability in America*, 52 Ala. L. Rev. 1, 2-3 (2000) (discussing evolution from the medical model); Peter Blanck, Civil War Pensions and Disability, 62 Ohio St. L.J. 109 (2001) (same).
[43] See Harlan Hahn, *Changing Perception of Disability and the Failure of Rehabilitation*, in Social Influences In Rehabilitation Planning: Blueprint For The 21st Century. A Report of the 9th Mary E. Switzer Memorial Seminar. 53-55 (1985); Harlan Hahn, *Equality and the Environment: The Interpretation of "Reasonable Accommodations" in the Americans with Disabilities Act,* 17 J. Rehab. Admin. 1010, 103 (1993).
[44] See Blanck & Millender, *supra* note 42, at 2-3 (parts quoted herein, this section); Joseph Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* 41-64 (1993).
[45] 136 Cong. Rec. E1656-02, E1656 (daily ed. May 22, 1990) ("I agree with the National Council on Disability in its belief that the provisions of this legislation send persons with disabilities a clear message that their dream of equal civil rights protections will soon become a reality.") (statement of Rep. Gingrich).
[46] Blanck & Millender, supra note 42, at 2-4; Peter Blanck & Mollie W. Marti, *Attitudes, Behavior, and the Employment Provisions of the Americans with Disabilities Act*, 42 Vill. L. Rev. 345-408 (1997).
[47] See, e.g., 136 Cong. Rec. H4614-02, H4623 (daily ed. July 12, 1990).
[48] Edward J. Calabrese, *Pollutants in High-Risk Groups: the Biological Basis of Increased Human Susceptibility to Environmental and Occupational Pollutants* 192 (1978); Peter Blanck & Mollie W. Marti, *Genetic Discrimination and the Employment Provisions of the Americans with Disabilities Act: Legal, Empirical and Policy Implications*, 14 Behav. Sci. & L. 411-32 (1996). See also Pauline T. Kim, *Genetic Discrimination, Genetic Privacy: Rethinking Employee Protections For A Brave New Workplace*, 96 NW U.L. Rev. 1497, 1542 (2002) (noting that "the employee, not the employer, should decide whether to undergo testing for identified genetic vulnerabilities and, if the results are positive, whether or not to continue working despite the risks").
[49] See Olmstead v. L.C., 527 U.S. 581, 600 (1999) (explaining that unjustified institutional placement of disabled individuals perpetuates stereotypes regarding individual choice).
[50] See Craig Zwerling, Paul S. Whitten, Charles S. Davis, & Nancy L. Sprince, *Occupational Injuries among Workers with Disabilities: The National Health Interview Survey*, 1985-1994, 278 JAMA 2163 (1997).
[51] Id. at 2166 (citing EEOC guidance for determination of direct threat).
[52] 42 U.S.C. § 12112(a).
[53] 42 U.S.C. § 12111(8).
[54] For a review, see NCD, National Council on Disability, *The Americans with Disabilities Act Policy Brief Series: Righting the ADA, A Carefully Constructed Law*, Oct. 30, 2002, at http://www.ncd.gov/newsroom/publications/carefullyconstructedlaw.html (last visited on Feb. 4, 2003).
[55] 42 U.S.C. § 12111(8).
[56] H.R. Rep. No. 485, pt. 2, at 55 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 337.
[57] H.R. Rep. No. 485, pt. 2, at 55 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 337; see also 29 C.F.R. § 1630.2(n)(1) (2001).
[58] 42 U.S.C. § 12111(8).
[59] 29 C.F.R. § 1630, App. § 1630.2(n) (2001).
[60] H.R. Rep. No. 485, pt. 2, at 71 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 353.
[61] See 42 U.S.C. § 12111(8). In others words, health and safety factors are not a required aspect of the plaintiff's Title I showing that he is a qualified individual. However, not all federal courts of appeals have held that the defendant-employer should bear the burden of proof on the direct threat issue. See Hutton v. Elf Atochem North America, Inc., 273 F.3d 884, 893 (9th Cir. 2001) (noting that some federal courts of appeals "have placed the burden on the plaintiff to show that she does not pose risks to others as part of demonstrating her qualification for

employment," citing, e.g., EEOC v. Amego, Inc., 110 F.3d 135, 144 (1st Cir.1997); Moses v. Am. Nonwovens, Inc., 97 F.3d 446, 447 (11th Cir. 1996) (per curiam).
[62] 42 U.S.C. § 12112(b)(6); 42 U.S.C. § 12113(a).
[63] 42 U.S.C. § 12113(a-b).
[64] 42 U.S.C. § 12112(b)(5)(A).
[65] 42 U.S.C. § 12113(a-b).
[66] 29 C.F.R. § 1630.2(q) (2001).
[67] 42 U.S.C. § 12113(a). In general, health and safety considerations are a critical component of the Act's tiered analysis, but are not to be confused with essential job functions or qualifications, except in extremely limited circumstances. There are instances where essential functions implicate issues of safety; for instance, a firefighter who could not "carry an unconscious adult out of a burning building," 29 C.F.R. § 1630, App. § 1630.2(n), would not be qualified to perform the essential functions of the position and would be unsafe. In such instances, the essential functions are not analyzed in terms of safety but, rather, the inability to perform job tasks. General consideration of such issues from a health or safety perspective confuses the essential job functions analysis.
[68] See 42 U.S.C. § 12112(b)(6) ("unless" the standard is "job related ... [and] consistent with business necessity ..."); see also 42 U.S.C. § 12113(a); H.R. Rep. No. 485, pt. 3, at 42 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 465 ("[A] facially neutral qualification standard, employment test or other selection criterion that has a discriminatory effect on persons with disabilities ... would be discriminatory unless the employer can demonstrate that it is job related and required by business necessity."). See also Ann Hubbard, Understanding and Implementing the ADA's Direct-threat defense, 95 Nw. U. L. Rev. 1279, 1339-42 (2001).
[69] 42 U.S.C. § 12111(8).
[70] Blanck & Pransky, supra note 35, at 586-87.
[71] 42 U.S.C. § 12113(a).
[72] 42 U.S.C. § 12113(b).
[73] 42 U.S.C. § 12111(3).
[74] 29 C.F.R. § 1630.2(r) (2001). See also 29 C.F.R. § 1630.15(b)(2) (2001).
[75] *Albertsons*, 527 U.S. at 555.
[76] John T. Noonan, Jr., Narrowing the Nation's Power: The Supreme Court Sides with the States 144 (2002).
[77] Id. at 145.
[78] The information in this section and the one following is derived in part from conversations with Larry Minsky, Counsel for Mario Echazabal, and from Chevron's Post-Remand Supplemental Reply Brief, Echazabal v. Chevron, (Aug. 20, 2002, 9th Cir.).
[79] Martell v. Sparrows Point Scrap Processing, 214 F. Supp. 527, 528 (D. Md. 2002).
[80] Id. at 529.
[81] Id. at 530.
[82] In accord, see, e.g., Hutton v. Elf Atochem North America, Inc., 273 F.3d 884, 893 (9th Cir. 2001).
[83] Echazabal v. Chevron USA, Inc., 226 F.3d 1063, 1070 (9th Cir. 2000) (citing U.S. Supreme Court in accord in related case and stating "given that the ADA prohibits employers from refusing to hire individuals solely on the ground that their health or safety may be threatened by the job, state tort law would likely be preempted if it interfered with this requirement.").
[84] Cf. *Kapche*, 304 F.3d at 493 (noting that the Supreme Court's decision in *Sutton* acknowledges that "individualized inquiries are mandated by the ADA.)," and citing 527 U.S. at 482-84, 119 S.Ct. 2139, in Bragdon v. Abbott, 524 U.S. 624, 641-642 (1998) that whether a person has a disability under the ADA is an individualized inquiry, and in Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) that "an individualized assessment of the effect of an impairment is particularly necessary when the impairment is one [whose] symptoms vary widely from person to person... .").
[85] Chevron's Post-Remand Supplemental Reply Brief, *supra*, at 3-4 (noting medical evidence by Echazabal's medical experts presented subsequent to Chevron's employment decision).
[86] Id. at 10-11 ("The requirement of an 'individualized inquiry' cannot mean that all medical experts must agree or that an employer must fund cutting-edge research just to make a lawful employment decision."). See also Brief Amicus Curiae for the American College of Occupational and Environmental Medicine, the Western Occupational and Environmental Medical Association, and the California Society of Industrial Medicine and Surgery in Support

of Appellee and in Favor of Affirmance, at 8, Echazabal v. Chevron, Aug. 21, 2002 (9th Cir.) (contending that "where an employer obtains facially reasonable medical opinions based on an individualized assessment by competent medical professionals, no legitimate purpose [under the ADA] is served by subjecting the employer to litigation and potential liability for relying on such opinions.").

[87] The majority of federal courts of appeals have endorsed the interactive process. See *Barnett*, 122 S.Ct. 1516 (Stevens, J., concurring) (noting that the Ninth Circuit's holding with respect to interactive process was "correct" and "is untouched by the Court's opinion.").

[88] Chevron's Post-Remand Supplemental Reply Brief, *supra*, at 14 (contending that Echazabal neglected his obligation to request a specific accommodation other than general medical monitoring).

[89] There is dispute over whether Echazabal requested, and Chevron or Irwin Industries could have made, a reasonable accommodation to enable him to work at the plant. On remand to the Ninth Circuit, Echazabal argued that Chevron failed to prove that reasonable accommodation was not viable, including the possibility of medical monitoring and protective devices. Appellant's Post-Remand Supplemental Reply Brief, *Echazabal v. Chevron*, U.S. Court of Appeals, Ninth Circuit, Aug. 27, 2002.

[90] 122 S.Ct. 681 (2002).

[91] 527 U.S. 471 (1999). For a review, see Peter Blanck, Lisa Schur, Doug Kruse, Susan Schwochau, & Chen Song, Calibrating the Impact of the ADA's Employment Provisions, Stan. L. & Pol'y Rev. (forthcoming 2003).

[92] FEHA, Cal. Gov't Code, § 12900 et seq. (2003).

[93] Colmenares v. Braemar Country Club, Inc., No. S098895, 2003 WL 359739 (Cal. Feb. 20, 2003).

[94] 122 S.Ct. 681 (2002).

[95] 527 U.S. 471 (1999).

[96] See Jimeno v. Mobil Oil Corp., 66 F.3d 1514, 1534 (9th Cir. 1995) (citing Ackerman v. Western Elec. Co., 860 F.2d 1514, 1519 (9th Cir.1988)).

[97] See Appellant's Post-Remand Supplemental Reply Brief, *Echazabal v. Chevron*, U.S. Court of Appeals, Ninth Circuit, Aug. 27, 2002), at 3.