Oregon Law Review
Spring, 2001 - Volume 80, Number 1
Cite as: 80 Or. L. Rev. 327 (2001)

COMMENT:
THE IMPLICATIONS OF *ECHAZABAL V. CHEVRON U.S.A., INC.* FOR EMPLOYERS AND FOR THE ADMINISTRATION OF WORKERS' COMPENSATION AND THE OCCUPATIONAL SAFETY AND HEALTH ACT

Katelyn S. Oldham*

In the spring of 2000, the Ninth Circuit Court of Appeals held in Echazabal v. Chevron U.S.A., Inc. n1 that employers may be liable under the Americans with Disabilities Act of 1990 n2 (ADA) if they take an adverse employment action against employees who pose a direct threat to themselves in the workplace. In arriving at its decision, the court explained,

[The ADA] does not permit employers to shut disabled individuals out of jobs on the ground that, by working in the jobs at issue, they may put their own health or safety at risk... . Congress concluded that disabled persons should be afforded the opportunity to decide for themselves what risks to undertake. n3

The Echazabal decision, while consistent with the spirit of the ADA, poses a challenge to employers' ability to provide safe workplaces. While Echazabal preserves the right of disabled employees to make employment decisions which affect their own health and safety, the ruling also conflicts with provisions of the [*328] Occupational Safety and Health Act of 1970 n4 (OSHA), may lead to increased workers' compensation premiums and confusion in claims administration, and exposes employers to limited tort liability. The tension between these laws arises from a desire to protect employees by regulating workplace conditions on the one hand, and an effort to discourage paternalistic behavior by employers toward disabled employees on the other.

This Comment analyzes the potential problems employers face in implementing policies to protect themselves from liability and the ways in which the ADA conflicts with laws aimed at protecting workers and regulating the workplace. Part I provides an overview of laws protecting workers and regulating the workplace, including workers' compensation law, OSHA, and the ADA. Part II analyzes the basis of the Ninth Circuit's Echazabal decision. Part III examines Supreme Court precedents in "risk doctrine" jurisprudence. Part IV surveys lower courts' interpretation of the risk doctrine. Part V studies the issue of genetic susceptibility to occupational disease as an illustration of some of the underlying policy concerns of Echazabal and the potential for employer liability. Part VI surveys some of the areas of conflict between the workplace regulatory system (workers' compensation and OSHA) and the ADA. Part VII addresses whether increased tort liability for employers is foreseeable under Echazabal. Part VIII suggests what employers can do to ensure compliance with Echazabal.

This Comment concludes that the Echazabal decision should have little, if any, impact on employers' liability or on increases of workers' compensation premiums. While there are some conflicts between the protective and the enabling employment legislation, these conflicts must be viewed as a result of the network of laws stitched together to ensure the safety of employees while prohibiting discrimination. The conflicts themselves can generally be resolved on an individual basis by the courts or by legislative action incorporating the enabling aspects of the ADA into protective legislation. Thus, when Echazabal is heard by the United States Supreme Court, the decision should be affirmed.

[*329]

I

Background of Workers' Compensation Law, Occupational Safety and Health Act, and the Americans with Disabilities Act

Workers' compensation laws, OSHA, and the ADA heavily influence employers' employment decisions. Both the workers' compensation system and OSHA promote the health and safety of the worker through injury prevention. The ADA emphasizes equal treatment for disabled persons in employment situations, regardless of the potential for most future health or safety issues that may arise as a result of the disability.

A. Workers' Compensation

Workers' compensation provides benefits to employees injured on the job. It has been enacted by all state legislatures and is continually revised and updated to fit the changing needs of the workplace, employers, and employees. The workers' compensation system was created to provide protection for workers injured in the course of employment. Before the dawn of workers' compensation legislation, employers did not owe a duty of care to their employees. n5 The impetus for workers' compensation laws began at the height of the Industrial Revolution as national awareness of dangerous working conditions mushroomed. n6 Until then, the recovery system was limited to bringing a tort claim on the theory of negligence, n7 requiring the worker to prove fault in order to recover for the injury. n8 For several reasons this system did not favor recovery, even for workers with meritorious cases. n9 [*330] The investigation into unsafe working conditions was another justification for reform. n10 It was out of this social context that workers' compensation legislation arose. First, "in 1908, Congress established a workers' compensation system for federal civil servants, basing coverage on the causal relationship of the accident to the worker's employment." n11 The system was implemented on a state-by-state basis, with New York being the first to pass legislation in 1910. n12 The workers' compensation system is a quid pro quo system. n13 Workers receive the right to a percentage of lost wages and all medical costs and, in exchange, employers receive certainty that their liability does not extend beyond the system. n14 Essentially, the workers' compensation system serves as the exclusive remedy for the injury. n15 If employees wish to opt out of the system, they may sue their employers, but must prove fault in order to recover. Employers pay premiums to their workers' compensation insurers and these premiums rise or fall [*331] with changes in the regulations, potential for liability in the particular field, and other dynamic factors. The insurance is primarily "experiential" which means that it is most heavily

influenced by the rate of accidents and injuries at the employment facility. As a result, riskier occupations demand higher premiums.

The economic justification for workers' compensation is "that the costs of industrial accidents and diseases 'should, like other costs of doing business, be borne by the enterprise that engendered them,' and ultimately by the consumer." n16 Three other goals of workers' compensation have been identified: (1) the replacement of uncertain remedies with certain remedies; (2) avoidance of the expenses and risks of tort litigation; and (3) the channeling of disputes through a presumably cheaper administrative system. n17 In general, the workers' compensation system provides a certain measure of security and stability to employers and employees in the workplace, even if its administration is at times confusing.

B. Occupational Safety and Health Act

OSHA n18 was enacted in 1970. Like workers' compensation laws, OSHA developed out of concern for the welfare of workers, n19 particularly in the industrial setting. One of its purposes was holding employers accountable for workplace accidents and injuries. n20 Indeed, future injury prevention through safer workplace promotion is the main focus of the Act, as opposed to workers' compensation's post-accident emphasis on mitigating [*332] economic loss due to disabling injury. n21 The Act's emphasis on prevention resulted partly from frustration with the inadequacies of the workers' compensation system in addressing occupational injuries and illnesses. n22 This deterrence component is expressed in OSHA's workplace safety mandates. These mandates are enforced by OSHA's regulatory agency and by sanctioning noncompliant employers and supervisors. OSHA oversees virtually every industry and dictates how workplaces shall operate to prevent injuries and accidents. Often, OSHA investigates a workplace accident and if the Act's health and safety mandates are found to have been violated, OSHA fines or otherwise penalizes the noncompliant employer or supervisor. n23 OSHA does not, however, provide a separate cause of action for injured employees. n24

C. Americans with Disabilities Act

The final statute employers consider in relation to workplace safety decisions is the ADA. The ADA was enacted in 1990 as an extension of the Rehabilitation Act of 1973. n25 The ADA extended coverage of the Rehabilitation Act's antidiscrimination legislation from federal employers and federal contracts or recipients of federal funds, to virtually all employers. n26 The ADA's [*333] purpose, like that of the Rehabilitation Act, is to facilitate the attainment of employment by persons who are able to work, regardless of disability. n27 The ADA is an antidiscrimination act, following in the footsteps of the Civil Rights Act of 1964 in envisioning a workforce that employs people regardless of externalities so long as the individual is qualified for the position.

As long as employees fit the definition of "disabled" in the statute, they fall within the ADA's protected class. Employers are required to make "reasonable accommodations" when needed (unless they fall within a statutory exclusion), can facially challenge the discrimination claim, or can demonstrate that the accommodations would create an undue hardship. n28

[*334] The recent Ninth Circuit decision in Echazabal v. Chevron U.S.A., Inc. is in line with the legislative history of the ADA in that it focuses on the individual and the importance of an environment that values people for their accomplishments and contributions regardless of disability.

n29 While it may appear to conflict with workers' compensation laws and OSHA, employers may ultimately be inconvenienced, but will not be unduly penalized by the Echazabal holdings. The following Part analyzes the case in detail, setting up a framework to look at Echazabal's interaction with workers' compensation laws and OSHA.

II

The Echazabal Decision

While Echazabal followed the spirit of the ADA, it also questioned prior jurisprudence on its statutory and regulatory definitions. This Part examines Echazabal by first setting out the relevant portions of the ADA and its pertinent regulations to assist in understanding the definitional controversies surrounding [*335] the Act. Then, Echazabal is viewed against this background. Finally, it reconciles the decision with earlier litigation on the risk doctrine.

A. Making a Case Under the ADA

In order to prove a prima facie case of discrimination under the ADA, plaintiffs must demonstrate that they have a disability, are qualified individuals, were subject to an adverse employment action, and were replaced by or treated less favorably than able-bodied individuals. n30 The defendant employer has the burden of rebutting the discrimination claim on its face or providing a statutory defense to the alleged discriminatory conduct under the ADA.

The ADA states that "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual." n31 Under the ADA, using criteria that tend to screen out the disabled is prohibited. "The term 'discriminate' includes ... using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities." n32 A "qualified individual with a disability" means an individual who can perform the essential functions of the particular job, with or without reasonable accommodation. n33 "'Essential functions' means the fundamental job duties of the job the employee with a disability holds or seeks. The term does not include marginal functions of the job." n34 The Supreme Court has also reiterated that the term "essential functions" does not include performing without being a threat to oneself. n35

Finally, the definition of "disability" under the ADA is broadly construed and may differ from the definition in other law, including workers' compensation classifications. n36 Under the ADA, [*336] the three prong test for determining if a person is disabled is whether there is evidence of: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." n37 This broad definition of disability has caused much of the criticism of the ADA, particularly as it impacts employers seeking compliance with the ADA. n38 However, the breadth of the ADA's disability definition does have a functional aspect.

This definition reflects the specific types of discrimination experienced by people with disabilities. "Accordingly, it is not the same as the definition of disability in other laws, such as state workers' compensation laws or other federal or state laws that provide benefits for people with disabilities and disabled veterans." n39 Instead, the ADA definition results from the ways in which persons with disabilities are discriminated against (which is often a matter of perception), not

whether they qualify for government or employer subsidies. As a result, the question of whether or not someone is disabled under the ADA can be said to be in the eyes of the beholder. That is, even if employees have no condition, illness, impairment, or medically recognized trait of disability, they will be considered disabled under the Act if their employers perceive a disability. n40 This has serious implications for employers, particularly in the case of workers who have suffered [*337] on-the-job injuries, but have since recovered and returned to work. n41 However, courts are construing the statute narrowly in its application, and in some instances, are even creating defenses to disability claims when such claims are based on the "regarded as disabled" prong. n42

In comparison to the ADA, other statutes construe "disability" more narrowly. Two examples are workers' compensation classifications n43 and the Social Security Administration's definition. n44 In Oregon's workers' compensation statute, "disabled" and "disability" are not explicitly defined, but two other relevant classifications, "compensable injury" and "disabling compensable injury," are:

A "compensable injury" is an accidental injury ... arising out of and in the course of employment requiring medical services or resulting in disability or death; an injury is accidental if the result is an accident, whether or not due to accidental means, if it is established by medical evidence supported by objective findings n45

A "disabling compensable injury" is an injury which entitles the worker to compensation for disability or death. An injury is not disabling if no temporary benefits are due and payable, unless there is a reasonable expectation that permanent disability will result from the injury. n46

Thus, under Oregon's workers' compensation statute, whether one is considered permanently or temporarily disabled is dependent on a medical diagnosis. n47 Different compensation schemes are available according to the extent of the injury. n48 Because of workers' copensation's purpose (providing financial support due to a medical inability to work) there is of course no "regarded as" disabled definition in the statute.

Even if employees are disabled within the meaning of the [*338] ADA, they will not be protected by the Act unless they are otherwise qualified. n49 A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act (Technical Assistance Manual), published by the Equal Employment Opportunity Commission (EEOC), suggests a two-step process for determining whether or not the employee meets this criteria.

(1) Determine if the individual meets necessary prerequisites for the job, such as: education; work experience; training; skills ... . This first step is sometimes referred to as determining if an individual with a disability is "otherwise qualified."... If an individual meets all job prerequisites except those that s/he cannot meet because of a disability, and alleges discrimination because s/he is "otherwise qualified" for a job, the employer would have to show that the requirement that screened out this person is "job related and consistent with business necessity." ...

(2) Determine if the individual can perform the essential functions of the job, with or without reasonable accommodation. This second step ... has two parts: [i] Identifying "essential functions of the job"; and [ii] Considering whether the person with a disability can perform these functions, unaided or with a "reasonable accommodation." n50

Thus for an employee to be an otherwise qualified individual with a disability she must be able to both meet the general employment criteria specified by the job and perform the essential functions of the particular job with or without reasonable accommodation.

A number of defenses to a discrimination suit are enunciated under the ADA. The first is a facial defense, entailing an attack on the plaintiff's prima facie case. This attack may challenge, for example, whether the plaintiff is actually disabled, or whether the plaintiff is an otherwise qualified individual with a disability.

The second type of defense is an affirmative statutory defense. There are two main affirmative defenses, n51 both relating to whether the employee is otherwise qualified. The first defense addresses the claim that the employer's qualification standards screen out individuals with disabilities. It asks whether (1) the qualification standard is consistent with business necessity, (2) [*339] the standard is job related, and (3) no reasonable accommodation can be made for the employee. n52 A second affirmative defense arises where the employee poses a "direct threat." Under the ADA, a qualification 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." n53 Although on its face the statutory exception only applies to threats to "other individuals," the EEOC has interpreted the legislative intent of this direct threat defense to include a direct threat to self. "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." n54 The Technical Assistance Manual provides factors that employers must meet for the "direct threat" defense to take effect when applied to their employee's own health or safety. Employers must demonstrate there is a significant risk of substantial harm; must identify the specific risk; it must be current, not speculative or remote; assessment of the risk must be based on objective factual evidence of the particular individual's condition; and employers must show that the risk cannot be reduced or eliminated through reasonable accommodation. n55 It is from this context, the difference between the statute's facial meaning and the rules' interpretation of the direct threat defense, that Echazabal arises.

B. The Echazabal Decision

In 1972, Mario Echazabal began working for a contractor in a coker unit n56 at a Chevron oil refinery. n57 In 1992, he applied for a Chevron job where he would do the same work, only directly for Chevron, instead of a contractor. n58 Chevron extended an offer of [*340] employment contingent on his passing a physical examination. n59 The examination revealed that Mr. Echazabal's liver was producing [*341] higher levels of enzymes than was normal. n60 As a result, Chevron rescinded the job offer, concluding that exposure to solvents and chemicals present in the coker unit could damage Mr. Echazabal's liver, exposing Chevron to potential liability. n61 Although he was denied employment directly with Chevron, Mr. Echazabal continued to work for the contractor in the coker unit. n62 He was informed of his liver's abnormal functioning and upon consulting with other doctors learned that he had Hepatitis C. n63 None of these doctors advised him to stop working at the refinery. n64 In 1995, Mr. Echazabal again applied for a position with Chevron in the coker unit. n65 Once again he was extended a conditional job offer contingent on favorable physical examination results and again his liver showed abnormal enzyme levels. n66 This time, however, Chevron not only rescinded their job offer, but asked Mr. Echazabal's

employing contractor to remove him from the refinery and place him in a position where he would not be exposed to solvents or chemicals. n67 After his removal from the refinery, Mr. Echazabal filed a complaint with the EEOC and a suit in state court, alleging that Chevron had discriminated against him in violation of the ADA. n68 The Ninth Circuit agreed that Mr. Echazabal had been discriminated against and held that it was not the employer's but the employee's right to decide whether to assume the risks of the workplace. n69

Chevron's refusal to hire based on the results of Mr. Echazabal's physical examination was discriminatory, unless shown to be job-related and consistent with business necessity, n70 or otherwise defensible under the Act. One of Chevron's arguments [*342] was that tolerance to solvents was an "essential function" of the job, and that because Hepatitis C caused Mr. Echazabal to be intolerant to solvents, he was a threat to himself if exposed, and so was not otherwise qualified. The ADA states, "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." n71 Whether to include or exclude a "threat to self" n72 in the "threat to others" n73 affirmative defense was the deciding factor before the court. A majority of the judges disagreed with the EEOC interpretive rules n74 and Chevron's reliance therein, instead holding that the interpretive rules construed the statute too broadly. n75 The Echazabal court determined that the statutory language of the ADA did not include a direct threat to the health or safety of the disabled individual himself, nor was it intended to. Expressio unius est exclusio alterius.

The ADA's direct threat defense means what it says: it permits employers to impose a requirement that their employees not pose a significant risk to the health or safety of other individuals in the workplace. It does not permit employers to shut disabled individuals out of jobs on the ground that ... they may put their own health or safety at risk. n76

The definitional section of Title I of the ADA and its legislative history support the Court's interpretation of the statutory language. Title I states that "the term 'direct threat' means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." n77 Nowhere in the legislative history of the Act did the court find that "direct threat" referred to threats to oneself; always it accompanied threats to others. n78

[*343]

It is important ... that the ADA specifically refers to health and safety threats to others. Under the ADA, employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health. For example, an 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 the concern that should rightfully be dealt with by the individual, in consultation with his or her private physician. n79

This quote emphasizes that risk-taking by employees is not normally within the province of employers' regulatory powers, even if acting in their employees' best interest. n80

The Echazabal opinion is consistent with the ADA and with federal antidiscrimination law generally by discouraging paternalism by employers. The Court cited Dothard v. Rawlinson, n81 as

a precedent of anti-paternalism cases. Rawlinson was a Title VII sex discrimination case where, though the court held sex was a bona fide occupational qualification for guards in a maximum security male penitentiary, it did so only narrowly. Additionally, the court found "in the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself." n82

The Echazabal court did not explicitly address the issue of Chevron's secondary argument for the EEOC interpretation; namely tort liability to the employer. It did, however, note that [*344] UAW v. Johnson Controls, Inc., n83 "strongly suggested that state tort law would be preempted to the extent that it interfered with federal antidiscrimination law." n84

The court then turned to Chevron's next argument which directly challenged whether Mr. Echazabal was a "qualified individual with a disability" n85 within the meaning of the statute. Chevron argued that Mr. Echazabal was unable to perform an "essential function[ ]" of the job by being more sensitive to toxins than another person. The court found, however, that performing a job without posing a threat to one's own health or safety is not an "essential function" n86 of the job, even when the employer describes the ability to tolerate chemicals and solvents in the job description. n87 The Court found that because this aspect of the job description did not assess Mr. Echazabal's actual job performance, it was inappropriately exclusionary. n88 This reasoning is in line with the general prohibition on adverse employer action on the basis of some future consequence that may never occur. n89 However, some courts have found that an ability to tolerate substances is part of the essential function of certain [*345] jobs. n90 But in those cases the employee had a present condition which made them completely unable to perform essential duties of the job, with or without reasonable accommodation. In its determination that Mr. Echazabal was a qualified individual, the court took as probative the fact that he had worked at Chevron's refinery, primarily in the coker unit, for more than twenty years without any appearance of adverse health effects. Chevron even extended a job offer to him twice, illustrating that he was able perform the essential functions of the job. In addition, the court relied on testimony that Mr. Echazabal's doctors did not tell him to cease working at the coker unit. The court held that this evidence tended to show he was a "qualified individual with a disability."

The vigorous dissent of Judge Trott argued that the majority's opinion glossed over the immediacy and severity of potential health effects to Mr. Echazabal if he continued to work at the refinery. n91

Dr. Bridge agreed with Dr. McGill's and Dr. Bailey's assessments that Mr. Echazabal could not safely work as a plant helper in the coker unit at the refinery. Not a single doctor disagreed with this conclusion... .

... He now brings to court facially competing information, but this information was not in Chevron's hands when they made the decision he now claims is actionable. n92

The dissent argued that because of the immediacy and severity of harm brought on by Mr. Echazabal's exposure to toxins, he was not otherwise qualified for the job. He went on to criticize the majority opinion for its abandonment of OSHA and other protective legislation for workers. n93 However, Judge Trott ignored the fact that Mr. Echazabal, knowing the risks to his health of

remaining in the coker unit, chose to continue working. In addition, his presence in the coker unit posed no risk to third parties who did not consent to such risk. The only instance the ADA clearly mandates that the employer should make an employment decision based on a threat to the employee, is where [*346] the risk of harm is actually interfering with the employee's ability to do the job, n94 or where the harm is not just to the employee, but may spill over to others who have not chosen to expose themselves to risk. n95

It should be up to individuals to choose for themselves what personal risks in employment to take. If courts leave these decisions to employers, there is the danger of undue interference with employees' autonomy. n96 The Echazabal ruling can be read to say that employers in the Ninth Circuit may not take paternalistic action, even if the action's purpose and effect is to protect employees from harm in the workplace. This is in line with a pattern of decisions that can be referred to as "the risk doctrine" cases.

C. Reconciling Echazabal: The Risk Doctrine

The Supreme Court has held that it is up to the employee, not the employer, to determine the level of acceptable risk to themselves in all but the most exceptional circumstances. n97 Essentially, the risk doctrine allows employees to determine whether they are willing to engage in an activity that may harm them, instead of leaving that decision to employers.

[*347]

III

Supreme Court Precedents: UAW v. Johnson Controls, Inc. n98 and Dothard v. Rawlinson n99

Johnson Controls illustrates the Supreme Court's application of the risk doctrine. The case was a Title VII suit alleging sex discrimination based on the employer's policy of excluding female employees (unless sterile) from working in part of the plant that had high lead concentrations. The employer's defense was that the purpose of its policy was to protect any potential fetus of female employees. The Court rejected this defense, holding that "with the [Pregnancy Discrimination Act], Congress made clear that the decision to become pregnant or to work while being either pregnant or capable of becoming pregnant was reserved for each individual woman to make for herself." n100 That is, it is not for the employer to calculate some future risk to an employee's potential fetus, but for the employee to decide whether she is willing to take the risk. n101

Rawlinson, however, illustrates that there are some limited circumstances under which employees may not be allowed the freedom to risk their health or safety for employment. The Rawlinson Court held that excluding women from positions as security guards at a maximum security Alabama prison for men was acceptable due to the risk of injury not only to female guards, but to inmates as well. n102 The ruling was justified by the probability of an attack on a female guard, which the court found substantial in light of the fact that twenty percent of the prisoners were sex offenders who were not separated from the prison population. n103 The Court went on to explain that an essential qualification [*348] of the position was to maintain security and that the presence of females in this male penitentiary, notorious for its "jungle atmosphere," was not compatible with that requirement. n104 The Rawlinson decision, however, relied on a very narrow

bona fide occupational qualification, and indicated that in the usual case, an employee would be allowed to choose which employment risks are acceptable. n105

Finally, a court in the Seventh Circuit disregarded the interpretation of direct threat in the EEOC rules in favor of the plain meaning of the statute, prior to the Ninth Circuit Echazabal decision. In Kohnke v. Delta Airlines, Inc., n106 a district court concluded that the direct threat defense did not apply to threats to oneself. n107 The court's analysis was similar to that of the Ninth Circuit in that the court found no need to turn to the rules because there was clear statutory intent. n108

When Echazabal is viewed in light of Johnson Controls and Rawlinson, it is consistent with the Supreme Court's application of the risk doctrine. Additionally, at least one other circuit prior to the Ninth has relied on the plain statutory meaning of direct threat, instead of going to the interpretive rules. The Echazabal [*349] holding that the risk of some future harm to an individual employee is an impermissible reason for removal is also consistent with the ADA's mandate of a case-by-case analysis. n109 In essence, the risk doctrine cases emphasize the right of individuals to determine their own futures, except in those circumstances where such determination is contrary to an essential function of the position or where it affects the safety of others.

IV

Conflicting Lower Court Interpretation of the Risk Doctrine

While there are lower court decisions that have gone against this line of reasoning, they can be distinguished from Echazabal, Johnson Controls, and Rawlinson in a number of ways. First, the ADA instructs that each case should be analyzed on an individual basis. n110 So this split may be explained in part by the different limitations of individual disabilities and the unique workplace dangers of some positions.

A second difference between the cases appears to be the gravity [*350] and immediacy of the risk of harm, and its linkage to an essential function of the position. The ADA's interpretive rules list the following factors for determining the nature of the risk of harm: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. n111 Prior to Echazabal, the Ninth Circuit in Stratton v. Hawaii Electric Light Co. n112 affirmed a summary judgment ruling in favor of the employer where the employee was highly susceptible to ammonia fumes. The decision was based on a doctor's testimony that the position would cause the employee's disability to worsen due to the fact that she would "constantly handle blueprints treated with ammonia." n113 Thus, the Stratton court identified a very immediate and probable harm to Ms. Stratton's health due to her occupation, unlike the tenuous harm to Mr. Echazabal the majority found in Echazabal. n114 Most importantly, the Stratton court found no reasonable accommodation could be made for Ms. Stratton and that she was thus not able to fulfill an essential function of the job (handling blueprints), whereas Mr. Echazabal did not require any accommodation from Chevron. The Stratton decision is in line with jurisprudence indicating it is not a reasonable accommodation to restructure a job so that it no longer contains its "essential functions." n115 That is, if employees cannot perform the essential functions of a job with or without accommodation then they are not otherwise qualified individuals under the ADA. If Ms. Stratton was so affected that the only accommodation was the removal of blueprints, the content of her job as planner would be changed and one of its "essential functions" (being able to look at blueprints) eliminated. Unlike Mr. Echazabal, who was able to do his job and

had not suffered any debilitating health effects that required an accommodation which [*351] would have affected the content of the job, Ms. Stratton could not perform the "essential functions" of the job even with reasonable accommodation and was, therefore, not an "otherwise qualified individual with a disability."

Gardner v. Morris, n116 decided under the Rehabilitation Act, is another pre-Echazabal decision that deserves examination. In Gardner, the court ruled for the employer on procedural grounds, but suggested a favorable employer ruling on substantive grounds because of the significant workplace risk to the employee. There are two ways this case can be distinguished from Echazabal. First, it was decided under the Rehabilitation Act, the ADA's precursor, and so did not have a "direct threat to others" defense per se. Instead the defense was incorporated as part of the "otherwise qualified" criteria. n117 However, this is essentially the same substantive criteria as the ADA's risk to others defense, just placed differently within the statute. n118 Second, and more importantly, the employee had a mental illness which some courts seem to treat not only as a threat to self, but a threat to others n119 and which has generally been prone to less scrutiny [*352] than other disabilities. n120 The plaintiff, Mr. Gardner, had been diagnosed as a manic depressive and required medication and psychiatric and medical monitoring of his condition and the effects of medication. n121 He was employed with the Army Corps of Engineers and applied for a job in a relatively isolated area of Saudi Arabia where he would not have been able to receive the psychiatric or medical monitoring the court felt necessary for safety reasons. n122 In light of the undue hardship that existed in accommodating Mr. Gardner, the court found no reasonable accommodation. n123 Thus, Gardner can be distinguished from Echazabal not only by the immediacy of risk to Mr. Gardner's health, but particularly by his potential to become aggressive if he experienced a manic episode (which could be construed as a "direct threat to others").

The Eleventh Circuit recently authored two decisions, Moses v. American Nonwovens, Inc. n124 and LaChance v. Duffy's Draft [*353] House, Inc., n125 which allowed the "risk to self" affirmative defense to prevail in cases involving epileptic plaintiffs. n126 However, neither decision rationalized why the court followed the interpretive rules over the plain language of the statute. n127 The Echazabal court looked at Moses and found the lack of justification troubling. n128 In addition, courts have given epileptic cases somewhat less scrutiny than other disability discrimination cases. n129

Another important line of cases that can be distinguished are [*354] those, like Rawlinson, that bundle together a "risk to self" with a "risk to others." One example of this line of cases is where the plaintiff is employed as a law enforcement officer. n130 In these cases, an argument can be made that in a position where public safety is an essential function, if employees' disabilities prevent them from being as reliable as non-disabled persons, then they are not otherwise qualified individuals with a disability. The individual application of the four objective criteria of the interpretive rules (which essentially measure the gravity and probability of the harm) has also led some courts to apply a "direct threat to self" analysis when the position is categorized as work inherently dangerous to persons with certain impairments. n131 Most courts, however, are fairly cautious when the "threat" is in the future, particularly if it is unlikely to occur. n132

While these cases suggest that the ADA, and particularly its definitional section, remains an emerging body of law whose finer points are yet to be determined, some issues are clearly in need of judicial resolution. The direct threat defense requires such resolution. Some circuits are clearly relying on the EEOC's more expansive reading of the statute, while others are reading the statute's

construction on its face. It remains to be seen how this issue of direct threat will ultimately play out. When it does come before the Supreme Court, the Ninth Circuit's reasoning should prevail, allowing individuals to continue deciding for themselves what risks to take. This result is justified by prior jurisprudence on the risk doctrine. n133

[*355]

V

Echazabal Compared to Genetic Susceptibility Cases and Writings

An interesting parallel to the Echazabal case, which illustrates the public policy concerns underlying employment decisions based on future outcomes, is where an applicant is genetically susceptible to a particular illness or injury. The quandary for the employer, like Chevron, is in hiring applicants who may increase liability risks, possibly raise workers' compensation premiums, and have the potential for more absenteeism, if their "future" condition manifests and becomes present disability.

Cases and articles addressing conditions which have not yet manifested are generally consistent with the reasoning in Echazabal. n134 That is, employers may not restrict employees' work choices because of future risks to them when the risks have not manifested into a present, disabling condition. n135 Thus, once informed of the risk it is up to the individual, not their employer, to decide whether the risk is acceptable.

Employers may also not discriminate based on potential cost increases of insurance premiums. This is so even though employers' workers' compensation premiums are "experience based" meaning that employers will pay more if their workplaces experience [*356] more injuries. n136 Thus, for some employers it makes good economic sense to eliminate workers who are deemed likely to become ill in the course of employment. n137 However, at least in the Ninth Circuit, it is no longer legal to discriminate against employees in this way. If an employee has a condition which is asymptomatic, she may still be considered disabled so long as her condition substantially limits a major life activity. n138 In addition, if an employer is found to regard the employee as disabled, or to have relied on the employee's record of disability, the disability prong of the prima facie case is met, even if the employee is presently in good health. This is consistent with the legislative intent of the ADA and other antidiscrimination legislation. n139

Examining both the ADA and the Rehabilitation Act it is clear that costs to employers are not to be considered unless the costs are so prohibitive as to constitute an undue hardship. At least one court has specifically addressed the issue of an adverse employment action arising from fears an employee will be absent more frequently due to disability. In Bentivgna v. United States n140 the Ninth Circuit made clear that allowing "remote" concerns of the employer, such as absenteeism due to the employee's disability, would defeat the purpose of the Rehabilitation Act, and that "such considerations cannot provide the basis for discriminatory job qualifications unless they can be connected directly to 'business necessity or safe performance of the job.'" n141 Therefore, employers may generally not base employment decisions [*357] on whether they think an employee will be ill or otherwise absent from work on a more frequent basis than other employees. n142 While absenteeism can be a burden on employers, unless it can be shown to be an "essential function" of the job and enforcement applies to all similarly situated employees, courts are not

likely to find absenteeism a legitimate non-discriminatory reason for adverse employment actions. Furthermore, most courts would find unconscionable and discriminatory any action based on an employer's suspicion that a particular employee will be absent more often due to a disability.

Authorities on the ADA have similarly found that increased insurance costs are not allowed as part of the employment consideration.

With regard to increased insurance costs, the EEOC stated that the determination of whether one is qualified is to be made without concern for a potential of increased health insurance costs. Furthermore, the House Labor Report emphasized that "an employer could not deny a qualified applicant a job ... because of the increased costs of the insurance. n143

While an employer may decline to hire an applicant who does not have an existing condition, if the employer "regards the individual as disabled," it is likely the employer has violated the ADA. Under the third prong of the ADA test for disability, many more people are coered, including people with susceptibilities to future illnesses, if the employer is aware of, and acts because of the susceptibility. n144 However, the person must prove that they have an ADA-classified disability, n145 and the only way [*358] that they can do this is to prove that the employer regarded them as disabled or possibly proving a record of disability (upon which the employer acted). However, because this prong of the ADA test has been narrowly construed by courts, the ADA's coverage of employees who may develop disabilities in the future is limited. n146

Some articles on genetic susceptibility in employment have argued that employment action based on genetic testing will become the norm for larger American employers, presenting public policy concerns. n147 There are at least two critiques of these authorities. First, they ignore cost-benefit analysis - that is, most employers already carry workers' compensation insurance, which would cover most (future) injuries, and genetic testing and medical examinations are an additional and not inconsequent cost to employers. But because workers' compensation premiums are also experiential, and absenteeism can be expensive, knowing an employee's predisposition to occupational illness or injury may be seen as a positive by some employers. However, the second critique supplies another reason that genetic testing will not become the norm. This critique is that these authorities ignore prior jurisprudence protecting the privacy rights of individuals, including the right to keep one's genetic information and medical condition private. n148 In addition, one article investigating genetic [*359] testing and other types of medical monitoring found that they harbored difficulties for employers. n149 Some of the specific problems identified were that disabled employees could then use any tests as evidence to fulfill causation portions of claims; false positives and false negatives could be produced; the techniques themselves could have adverse impacts on employee health (particularly X-rays); and the monitoring could invite unwanted government scrutiny from OSHA. n150 Thus, while genetic testing may be used to a limited degree, it will never be broadly extended unless the cost issues associated with testing are resolved and, more fundamentally, privacy rights jurisprudence moves in a completely different direction.

Finally, genetic susceptibility articles give rise to the question of who is harmed when employees are allowed access to jobs, which may adversely affect their health, due to their own hypersusceptibility. The answer is that no one but these employees are harmed. So long as employees are made aware of workplace dangers, employers are in compliance with general safety

standards for the industry, and there is no spillover risk to third parties, no one but these employees, who have chosen to take the risk, should be affected by their presence in the workplace. n151

VI

Conflict Between the Goals of the Americans with Disabilities Act, Workers' Compensation, and the Occupational Safety and Health Act

The conflict between the ADA's enabling directive and the [*360] protective aspects of workers' compensation laws and OSHA is analyzed below. The ultimate issue is not simply whether the ADA can co-exist peaceably with workers' compensation and OSHA, but also how it can enrich them.

A. Workers' Compensation Laws

Employers' duties to their employees have changed significantly over time. Prior to the twentieth century, employers owed very little to their employees, not even a duty of care. n152 As noted in Part I, modern employers are required not only to compensate their employees for work done, but must also provide a safe working environment and pay insurance premiums in the event a worker is injured and must rely on workers' compensation. Other duties are imposed on employers as well, including the duty not to discriminate against members of a protected class. With the advent of the ADA and particularly its requirement of reasonable accommodation, however, new duties have arisen that conflict with employers' workers' compensation obligations. Particular areas of conflict include: the treatment of an employee injured on the job who returns to work; compensation for workplace accidents and injuries (for which the employer will have to pay higher insurance rates due to the experiential nature of workers' compensation); and the employer's limited liability status in exchange for participation in the workers' compensation system.

The workers' compensation system and the ADA accomplish different goals regarding an employee's ability to work.

The workers' compensation system focuses on the extent to which an injured worker cannot perform his or her job as a result of an on-the-job accident. The ADA, in contrast, is designed to obtain the highest possible productivity a disabled individual can offer. "The conflict in the systems is obvious: an [injured worker] receives maximum workers' compensation benefits by proving that he or she is totally disabled, but receives maximum protection under the ADA by establishing that he or she can perform the essential functions of his or her job." n153

Courts have estopped employees from claiming to be so disabled [*361] that workers' compensation, social security, or other benefits are required, while simultaneously claiming to be capable of performing the essential duties of the job and therefore a "qualified individual with a disability" under the ADA. n154 However, if we place events along a time-line it is possible for employees to access both workers' compensation and, later, to successfully bring a discrimination suit under the ADA. The following hypothetical illustrates how this can occur.

Sue, an employee, while helping to unload a truck at her place of employment sustains a back injury. In order to have her medical care paid for and to receive a percentage of lost wages while

recovering, she files for workers' compensation. Sue must prove that she is unable to work (i.e. that she is totally disabled) in order to receive the maximum benefits. When she has recovered, she can return to work. If her employer tries to discriminate against her based on the prior injury and suspicions about future performance, he has violated the ADA by regarding her as "disabled," so long as she can prove that she is still able to perform the essential functions of the job with or without reasonable accommodation. n155

At least one court has concluded that having a policy barring a worker from returning to the workplace until he was fully healed was a violation of the ADA. n156 As this hypothetical illustrates, it [*362] is apparent that the ADA and workers' compensation serve different goals, but that each in their own way promote security for employees in the workplace.

Workers' compensation has sometimes been viewed as social insurance, protecting employees in the event of injury and deterring employers from harboring unsafe workplaces, even though this comparison may not be exactly correct. n157 As previously explained, in exchange for automatic compensation for the injury, the employee agrees that workers' compensation is the exclusive remedy. n158 However, some authors have noted that there are now multiple judicial and statutory exceptions to this exclusivity rule. n159 These exceptions are said to impinge on the exclusivity doctrine in that they provide remedies beyond the system's coverage. The reasonable accommodation aspect of the ADA can be viewed as such an exception. Regardless of workers' compensation's [*363] lack of exclusivity, its viability still generally provides the sole remedy for work related injuries.

Workers' compensation pays for all medical expenditures incurred due to the injury, but only pays a percentage of the lost wages. n160 "The benefits available under workers' compensation are intended as a mere income supplement and, by design, create an incentive to return to work." n161 Within workers' compensation, there is an apportionment system, often called "dual causation." n162 This system provides that if the injury is partly the result of a preexisting condition, or if the extent of an injury was partly made worse by a preexisting condition, workers' compensation pays for only that portion directly caused by the workplace. n163 However, the apportionment itself may be difficult to determine particularly without the employee's medical records, collection of which may be prohibited under the ADA. For policy reasons the apportionment doctrine itself may be weakly applied. "Courts in some jurisdictions are abandoning application of apportionment statutes in dual causation cases to find an employer wholly liable should conditions of employment play a part, no matter how minor, in an illness of any kind." n164 This abandonment of apportionment is consistent with the long-held principle that you take the worker as you find him. n165 It is this principle and its application in workers' compensation proceedings which creates the potential for greater liability for employers and to increase insurance premiums as a result. Most states have realized that the goals of the ADA (employing the disabled) are incompatible with dual apportionment statutes (because they would limit the employer's incentive to hire such individuals). As a result, apportionment statutes are largely ineffectual in most states, because the preexisting condition has been statutorily or judicially [*364] exempted. n166 However, if the disability is considered to be a "patent prior condition," it is still apportionable in most states. n167 A "patent prior condition" is a medically diagnosed condition that the employer had notice of when offering employment and which continues to be a factor in the disability even after an occupational injury or disease is sustained. n168

Other types of occupational illnesses, such as lung cancer from exposure to certain chemicals, are not apportionable even if the employee had been a heavy smoker. The justification is that "since employers take their employees as they find them absent notice of the handicap, the legislation is deemed not to apply." n169 Therefore, this notice requirement could operate to encourage employers to protect their interests by requiring physicals for more hazardous professions. However, as noted previously, such examinations and adverse employment actions based on them, appear to be restricted by the ADA. n170

As a result, the continuing inability to apportion occupational diseases for which there is no clear, diagnosed dual cause may adversely impact workers' compensation premiums by increasing potential liability. Unfortunately for employers the ADA discourages economic factors in the analysis of reasonable accommodation and courts are consequently reluctant to take insurance premiums into account when deciding ADA cases. n171 In line with this, the Echazabal court declined to follow the undue hardship defense raised by Chevron that workers' compensation [*365] premiums would increase beyond a reasonable level if employers were unable to exclude employees who presented threats to themselves. n172 Instead, Echazabal held that so long as employees are not a danger to others, they cannot be excluded from the workplace if qualified, even though their presence may increase liability and thus workers' compensation premiums. Premiums for insurance tend to go up as liability is increased. n173 Therefore, if Echazabal is viewed by insurers as increasing potential employer liability, it may cause premiums to increase beyond a reasonable level.

In addition, because of the statutory and judicial exceptions to workers' compensation, the "exclusive remedy doctrine" of workers' compensation may no longer be exclusive. n174 This may itself have the effect of exposing employers to greater tort liability resulting from injury or death, though tort liability has been overemphasized by some authorities. n175

Another type of tort employers are exposed to is action for discrimination. When work-related injuries qualify employees as disabled under the ADA, employers may be exposed to tort liability if they are deemed to have discriminated on that basis. n176 This could happen, for example, if an employer refuses to reinstate an employee returning from workers' compensation leave to her prior position for fear of exacerbating the injury of the employee. Some argue that the ADA's largest impact on workers' compensation will be this "requirement that employers retain workers injured on the job, even when the worker may no longer be able to perform all the duties of that job." n177 However, both the EEOC and the courts have interpreted reasonable accommodation narrowly where that accommodation includes some sort of reassignment to a "light duty" position or where the job function itself is changed. For employees to be otherwise qualified under the ADA they must still be able to perform the [*366] essential functions of the job. Both the EEOC regulations and case law have indicated that, unless employees are able to perform the essential functions of the job, they are not entitled to protection against discrimination under the ADA. n178 In addition the Technical Assistance Manual states that "the ADA does not require an employer to create a 'light duty' position unless the 'heavy duty' tasks an injured worker can no longer perform are marginal job functions which may be reallocated to co-workers as part of the reasonable accommodation of job-restructuring." n179

Therefore, the only clear areas employers will consistently be penalized for by the ADA's impact on workers' compensation are in the areas of insurance premiums and employee absenteeism. The ADA and all its authorities have provided that economic consideration should not

normally be taken into account as an undue hardship. Echazabal is in conformity with this general rule.

B. Occupational Safety and Health Act

The primary goal of OSHA is to ensure the health and safety of workers. This goal is somewhat in conflict with the ADA's implicit acceptance of the risk doctrine, which allows employees to determine for themselves whether to risk their health and safety for employment. n180 The Senate report on the ADA notes [*367] this potential conflict: "This legislation could be construed to be in conflict with other laws governing spaces or worksites, for example OSHA requirements. The Committee expects the Attorney General to exercise coordinating authority to avoid and eliminate conflicts." n181

Congressional and senate hearings on OSHA illustrate the protective intent of the Act.

A particularly urgent concern repeatedly brought out during [OSHA] hearings is the frequent exposure of many workers to a great variety of toxic materials or harmful physical agents. They are often unaware of the nature of such exposure or of its extent. In some cases, the consequences of overexposure may be severe and immediate; in other cases, effects may be delayed or latent. n182

As a result of these conditions, OSHA legislators designed a monitoring system where not only workplaces, but employees were to be monitored for ill effects. n183

The legitimacy of this medical screening and testing, particularly "corrective measures" based on such monitoring, is suspect under the ADA. One scholar has viewed the conflict this way: "Either OSHA's promotion of employer-conducted workplace medical examinations as a vital part of its safety and health programs may be determined to fit within the 'job-related'/'business necessity' exception or the goals of OSHA may well be frustrated and compromised by these ADA restrictions." n184 Presumably, one type of "corrective measure" is the removal of the employee [*368] from the offending position, and, if necessary, from the workplace altogether. Under the jurisprudence of Johnson Controls, Rawlinson, and Echazabal, this type of adverse employment action would normally be impermissible. This is so because the removal is instigated by exposure, not by an actual injury. Johnson Controls, Rawlinson, and Echazabal indicate that even if real health risks are present, it remains the choice of employees to continue working unless the exposure has an actual impact on their ability to perform the essential functions of the job.

During the legislative process, critics of OSHA argued employers would be unjustly penalized for risks taken by their employees. "Almost every occupation entails some risk of injury and there are many which are inherently hazardous, in which the danger is a permanent part of the job and an employee cannot escape regular exposure to the hazard for 'the period of his working life.'" n185 OSHA supporters argued that there were proper restraints in place: "the Federal Government would merely see to it that certain minimum requirements were met and that beyond those the health and safety of most workers would be left to those States." n186

In a way, Echazabal empowers individuals to make their own choices about the dangers they will undertake, free from governmental interference and paternalism. n187 But it must be an informed decision. That is, where there is a risk, employees should be informed of it and if possible, employers should receive their consent. The OSHA regulations continue to act as a baseline for

workplace safety after Echazabal. Employers may still require employees to exercise reasonable care in the workplace and to take preventive action. Employers may not, however, exclude an employee they feel is a risk due to a disability, unless they can rely on a statutory defense.

The role of government in protecting workers differs from that [*369] of the employer. Employer-implemented protections may have greater potential to overreach and be paternalistic, as illustrated by Johnsons Controls, n188 and there is some sense that government safeguards may provide fairer protections due to government's comparative neutrality.

Finally, many of the fears expressed by critics have not come to pass. Only in the rarest circumstances does OSHA actually shut a business down. Generally, a business is only required to pay fines and implement safer procedures. It remains extremely unlikely that implementation of safer procedures would routinely include the violation of federal antidiscrimination law. n189 While an argument can be made that the EEOC interpretive rules' inclusion of "threat to self" could partly result from a desire to align the ADA with OSHA, the fact that Congress did not include a "threat to self" in the legislation's defenses and the legislative history's statements against paternalistic impulses makes a strong argument that the ADA should supercede OSHA in most situations, allowing employees to choose for themselves what risks are acceptable. While one author notes that OSHA contains the caveat that if there is a conflict of laws "the Secretary of Labor must employ the standard that assures employees the greatest protection," n190 federal antidiscrimination law, especially when combating paternalism and stereotyping, may be given more deference by the Supreme Court. n191

[*370]

VII

Echazabal Has Limited Effect on Employers' Tort Liability

In the event that an employer complies with Echazabal and employs an individual who is more susceptible to injury due to disability, absent negligence, it is unlikely that the employer will be any more liable in tort. It is a well-known principle of law that if one consents to participation in a potentially dangerous activity one has accepted the risk of the activity and waived one's right to sue for damages resulting from it. n192 In addition, Johnson Controls indicates that federal antidiscrimination law would achieve primacy in such a situation: "if state tort principles did allow for recovery when the injury is caused by compliance with Title VII ... the state law then would be preempted." n193 Therefore, if implementing a non-discrimination policy under the ADA requires employers to hire disabled workers and those workers are more likely to become injured or develop an occupational illness as a result of the workplace, employers will not be liable outside the workers' compensation system as long as their employees were informed of the risk. Exceptions exist where expressly contracting to take the risk is against public policy, n194 or where the plaintiff did not fully comprehend the nature of the risk. n195 In addition, the Johnson Controls decision itself has been critiqued for its reliance on assumption of risk, where the unborn child of the employee has not given consent. n196

[*371] The assumption of the risk doctrine originally grew out of employment law cases. n197 Twentieth-century statutes, such as workers' compensation, have superceded or limited assumed risk defenses in the employment context. n198

Many states, including Oregon, have statutorily abolished implied assumption of the risk. n199 In Oregon, workers' compensation is only required to pay for employees' injuries that are not due to their own willful or negligent conduct. n200 Accepting employment, itself, however is not ordinarily viewed by the courts as assuming the risk of employment, where those risks are due to employer negligence. n201

Many people will choose risky employment situations even if such employment may adversely impact their health in the long term. n202 Although it could be construed as against public policy for an employer to even ask an employee to consent to working conditions that may harm them, knowing that the employee will be strongly motivated by economic incentive, the comments to the Restatements limit the employer's duty in this instance, explaining that even if the employee is motivated by a desperate personal situation to assume the risk, the employer will not be [*372] liable. n203 Additionally, so long as a workplace complies with OSHA and the safety standards in the industry, employees should not be penalized by being excluded from the workplace solely because they have an illness or injury which makes them more susceptible than their peers. While concern for hypersusceptible individuals' safety is a valid government interest, if they are excluded solely on that basis, their autonomy is violated.

One situation which bears examination is where the employer does not do medical examinations or inquiries on applicants (still allowed under the ADA in limited circumstances) and the work environment proves to be harmful for employees with certain preexisting conditions. If employees are informed of the workplace risks and give their consent, then, presumably the employer would be covered against tort claims in the case of disability arising out of such context. Thus, if employees have been informed of the risks involved and the employer has not been negligent or reckless, it is likely that the duty of the employer to its employees, and also its duties to comply with the ADA and OSHA, have been fulfilled. So, if employees file tort claims in this scenario, they should be unsuccessful. n204

If an employer chooses not to inform its employees of the risks associated with the work, then the picture becomes less clear although the "dual causation" case analysis appears to limit the liability of the employer to the workplace contribution, if ascertainable. n205 [*373] The difficulty arises when a separation of causes is impossible to determine due to the absence of a preemployment examination or inquiry, or where employees have no prior records of the illness. In that situation, it is likely that, absent other causal factors, the employer will pay for the injury through its workers' compensation obligation.

VIII

Action Employers Can Take to Ensure Compliance with the Americans with Disabilities Act and Still Protect Workers

There are a number of steps employers can take to comply with the recent Echazabal ruling. These steps should ensure that they are in compliance with OSHA, and should limit liability for workplace injuries to the workers' compensation system.

The first action employers should take when hiring employees is to adequately inform them of the risks associated with the work. Because it may not always be possible to identify applicants who may be more susceptible, and identification of a susceptible individual exposes employers to

liability for a discrimination claim arising from having "regarded the employee as disabled," employers should inform all their employees of workplace hazards and, preferably, gain their written consent. Johnson Controls and Echazabal indicate that if employees consent to workplace risks, tort liability is circumscribed unless there is evidence of negligence, recklessness, or intentional wrongdoing.

Generally, an employer will also want to draft job qualification standards pertinent to the skills a successful applicant must possess for the work. The Technical Assistance Manual provides that the qualifications may include education, skills, work experience, licenses or certification, physical or mental abilities, and health and safety requirements. n206 Any physical or mental qualification standard must, however, be job-related and consistent with business necessity. n207 While some courts have given deference [*374] to employment qualifications which include safety standards, in light of Echazabal, health and safety requirements based on presumptions of employees' direct threat to themselves, without more, are suspect in the Ninth Circuit. n208

Employers may need to ascertain whether employees with a work-related injury or illness are disabled under the ADA. However, if employers treat their employees differently because they regard them as disabled, even if not disabled under workers' compensation law or by medical standards, the employees may qualify as disabled under the Act, entitling them to protection against discrimination. Part of the determination of whether the employee is covered under the ADA is the nature and extent of the injury or illness and whether it would, in fact, qualify the employee as disabled. The issue of whether a "temporary" impairment qualifies as a disability under the ADA is still not completely settled. The Technical Assistance Manual provides that:

> The basic question is whether an impairment 'substantially limits' one or more major life activities. This question is answered by looking at the extent, duration, and impact of the impairment. Temporary, non-chronic impairments that do not last for a long time and that have little or no long term impact usually are not disabilities. n209

> Thus it is an individual inquiry into the limitations of the particular disability.

Employers may also determine whether there is any "threat to others" wrapped up in the threat to the employees' own safety. If so, then the statutory defense is still available. For example, if an employee who is susceptible to a medical emergency (such as a seizure) which would cause the employee to be out of commission on the job, works in a position where such an emergency [*375] posed a risk to others, then the employee may be considered a threat to others. The main consideration is whether the action results from paternalism informed by stereotypes, or whether there is a legitimate safety or health concern resulting from the employee's particular disability.

Employers should also determine what, if any, reasonable accommodation is required. To be "an otherwise qualified individual with a disability" an employee must be able to perform the essential functions of the job with or without reasonable accommodation. Many workplaces should have no difficulty providing reasonable accommodation, and many disabilities will require no accommodation. However, if accommodations change the very character of the job, then it is no longer reasonable. n210 Thus, "reasonable accommodation" should not over burden the employer.

If the accommodation does not change the essential function of the job, but appears to be an undue hardship, the employer will want to determine whether there is a possible business necessity

exemption. Under the ADA, using selection criteria that tends to screen out applicants with disabilities is prohibited, unless the criteria is shown to be job-related and consistent with business necessity. n211 If criteria which tends to screen out applicants with disabilities is shown to be job-related and consistent with business necessity, then the applicant is not an "otherwise individual with a disability." Belk v. Soutwestern Bell Telephone [*376] Company n212 is a recent illustration of the successful use of this defense. The plaintiff in Belk had less leg strength and used a brace as a result of contracting polio. He applied for a job where he would be climbing, bending, and squatting while carrying additional weight. The employer administered a set of strength tests to all applicants. The plaintiff failed to pass the tests and was denied a position. He argued that he was entitled to, but had been denied reasonable accommodation during the testing. While the plaintiff won at trial, the appellate court vacated the judgement and remanded on the grounds that the strength tests may have been consistent with business necessity and the defendant was entitled to a business necessity instruction.

In general, so long as employers inform their employees of the risks inherent in the workplace and also of the legitimate job expectations at the time of hiring, they should avoid liability for workplace negligence and discrimination. By employing persons more prone to accident or injury, employers may not be able to entirely avoid increases in workers' compensation premiums, but society will have gained greater participation in the workforce and employers too will have gained a larger pool of qualified applicants to choose from.

In addition state legislatures can help to ensure compliance by incorporating the ADA's enabling effect into its employment legislation. For example, Oregon has incorporated the ADA's antidiscrimination policy into its workers' compensations provisions and created an additional chapter enumerating discriminatory employment practices. n213

Conclusion

The Echazabal decision provides employers in the Ninth Circuit with a clear message that paternalism will not be tolerated in employment decisions. Instead, employees have the right to decide for themselves what risks to take in employment, so long as those risks are not associated with an essential function of the job and do not spill over onto others who have not chosen to take the risk. The narrow reading of the ADA direct threat defense, excluding "threat to oneself" from the "threat to others" defense should have little impact on employers' liability, under tort law [*377] or OSHA, even when employing individuals who may be more at risk to occupational injury or disease, as long as employees are informed of the risks and employers do not act on the basis of stereotypes. However, workers' compensation rates may be adversely impacted as well as employer costs in the form of absenteeism, but neither higher insurance premiums nor inconvenience to employers have ever been viewed as undue hardships under the ADA.

Now that Echazabal has been granted certiorari by the Supreme Court, it should be affirmed. The decision expresses not only the spirit of the ADA, but the letter of the law and its legislative intent. Mario Echazabal's condition, Hepatitis C, posed no threat to others, nor did it impact his ability to perform the essential functions of the coker unit position. The only possible threat was to himself and, after being informed of the risks, he chose to continue pursuing the work he had done for twenty years. The Ninth Circuit's reasoning is consistent with the Supreme Court jurisprudence of Johnson Controls and Rawlinson. In the area of employment, the purpose of the ADA, like other antidiscrimination laws, is to provide access to all qualified individuals, prohibiting employment

decisions based on paternalism and stereotyping. The Echazabal decision clearly articulates this purpose without unduly burdening employers.

FOOTNOTES:

* Third-year law student, University of Oregon School of Law; Articles Editor, Oregon Law Review, 2001-2002. The author wishes to thank Melinda Grier for her suggestions and guidance, Jennifer Marston for reading the first painful draft, and her family for all their patience and support.

n1. 226 F.3d 1063 (9th Cir. 2000), cert. granted, 69 U.S.L.W. 3619 (U.S. Oct. 29, 2001) (No. 00-1406).

n2. 42 U.S.C. 12101 (1994).

n3. Echazabal, 226 F.3d at 1072. The decision has been positively cited by other courts. E.g., Kalskett v. Larson Mfg. Co., 146 F. Supp. 2d 961, 982 (N.D. Iowa 2001).

n4. 29 U.S.C. 651-678 (1994).

n5. See Ellyn Moscowitz, Outside the "Compensation Bargain:" Protecting the Rights of Workers Disabled on the Job to File Suits for Disability Discrimination, 37 Santa Clara L. Rev. 587, 595 (1997).

n6. 1 Arthur Larson, The Law of Workmen's Compensation, 5.00-.20 (1993) (tracing the roots of the modern workers' compensation system to a radical German system at the turn of the century). News of the system made its way to the United States and was adopted as the model: "a full account of the German system... was published as the Fourth Special Report of the Commission of Labor [and] legislators all over the country seized upon it as a clue to the direction which efforts at reform might take." Id. 5.20.

n7. See Ellen R. Peirce & Terry Morehead Dworkin, Workers' Compensation and Occupational Disease: A Return to Original Intent, 67 Or. L. Rev. 649, 651 (1988).

n8. Moscowitz, supra note 6, at 593.

n9. The system was riddled with problems, including the inherent difficulties of finding an attorney to take a case, paying the attorney, making a case which could link the cause of the injury to the employer, and there was evidence of bribes used by employers and other prejudices against the worker. See Moscowitz, supra note 6, at 593-94 (1997); see also Joan T.A. Gabel et al., The New Relationship Between Injured Worker and Employer: An Opportunity for Restructuring the System, 35 Am. Bus. L.J. 403, 405-06 (1998) (discussing reasons why employees rarely pressed cases and often lost even when they did).

n10. Investigations into the working conditions of many professions began in the early 1900s and continued through the 1920s. See Larson, supra note 7, 5.20-.30.

n11. Peirce & Morehead, supra note 8, at 652.

n12. Judith Richter, Taking the Worker as You Find Him: The Quandary of Protecting the Rights as Well as the Health of the Worker with a Genetic Susceptibility to Occupational Disease, 8 Md. J. Contemp. L. Issues 189, 193 (1997).

n13. Nat'l Comm'n on State Workmen's Compensation Laws, Compendium on Workers' Compensation 23 (1973) [hereinafter Compendium on Workers' Compensation].

n14. Jean Macchiaroli Eggen, Toxic Reproductive and Genetic Hazards in the Workplace: Challenging the Myths of the Tort and Workers' Compensation Systems, 60 Fordham L. Rev. 843, 859-60 (1992).

n15. The liability of every employer who satisfies the duty required by [this statute] is exclusive and in place of all other liability arising out of injuries, diseases, symptom complexes or similar conditions arising out of and in the course of employment that are sustained by subject workers, the workers' beneficiaries and anyone otherwise entitled to recover damages from the employer on account of such conditions or claims resulting therefrom, specifically including claims for contribution or indemnity asserted by third persons from whom damages are sought on account of such conditions, except as specifically provided otherwise in this chapter ... . The rights given to a subject worker ... are in lieu of any remedies they might otherwise have ... except to the extent the worker is expressly given the right under this chapter to bring suit against the employer of the worker for an injury, disease, symptom complex or similar condition.

Or. Rev. Stat. 656.018 (1999).

n16. Gabel et al., supra note 10, at 406.

n17. Id. at 407.

n18. 29 U.S.C. 651 (1994).

n19. Representative John Dent noted:

During the past 4 years more Americans have been killed where they work than in Vietnam.

If we only had an uprising of the youth on the campuses today demanding places of safety for their parents to work, places of reasonable security in which to do their share in maintaining the economy of this country, we would have very little trouble today in writing a safety law.

116 Cong. Rec. 38,385 (1970).

n20. See 29 U.S.C. 651 (outlining the legislative findings and purposes of the Act). "The Congress declares it to be its purpose and policy, through the exercise of its powers ... to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources ... ." Id. 651(b).

n21. "The primary goal [of OSHA] is to prevent accidents." 116 Cong. Rec. 38,386 (1970) (statement of Rep. Dent).

n22. Senator Fred Harris stated:

A problem which further substantiates the need for the pending bill is the fact that workmen's compensation benefits do not appear to have kept pace with increasing wage levels and the rising cost of living. As a result the benefits usually replace only a small fraction of the income of workers with disabilities.

116 Cong. Rec. 37,345 (1970).

n23. 29 U.S.C. 657 (1994) (outlining procedures for inspection by OSHA).

n24. E.g., Pratico v. Portland Terminal Co., 783 F.2d 255, 266 (1st Cir. 1985) (The Act does not "create a private right of action for injured workers which would allow them to bypass the otherwise exclusive remedy of workers' compensation.").

n25. 29 U.S.C. 791 (1994).

n26. 42 U.S.C. 12111(5) (1994) provides:

(A) In general. The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions. The term employer does not include -

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

n27. Congressional hearings on the ADA revealed:

After extensive and exhaustive study and review that Americans with disabilities face discrimination in almost every aspect of their lives ... .

... .

... 82 percent of the people with disabilities said that they would relinquish their Government benefits in favor of a full-time job. That is a basic value that we all share as Americans. We are, in most cases, defined by our work.

Americans with Disabilities Act of 1990: Hearing on H.R. 2273 Before the House Comm. on Small Business, 101st Cong. 5 (1990) (statement of Rep. Hoyer).

When Congress enacted the Rehabilitation Act of 1973, it found that:

(2) the benefits and fundamental rights of this society are often denied those individuals with mental and physical handicaps; ... (4) it is of critical importance to this Nation that equality of opportunity, equal access to all aspects of society and equal rights guaranteed by the Constitution of

the United States be provided to all individuals with handicaps; ... (7) all levels of Government must necessarily share responsibility for developing opportunities for individuals with handicaps ... .

E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1098 (D. Haw. 1980) (quoting White House Conference on Handicapped Individuals Act, Pub. L. No. 93-516, 88 Stat. 1631, 1631 (1974); see also 42 U.S.C. 12101(a)-(b) (1994) (setting out Congress's findings regarding and the purposes of the ADA).

n28. There was only limited concern about what "reasonable accommodation" meant in the context of dangerous or risky undertakings. See The Americans with Disabilities Act of 1989: Joint Hearing on H.R. 2273 Before the Subcomms. on Employment Opportunities and Select Education of the Comm. on Education and Labor, 101st Cong. 59-61 (1989) [hereinafter Education and Labor Hearings] (statement of Paul Wharen, Project Manager for Thomas P. Harkins, Inc.). Mr. Wharen managed a general contracting firm in Maryland and expressed concerns that accommodating disabilities could impact the ability to maintain a safe construction site. Id. The focus of his testimony was not on general safety per se of the disabled employee, but on the actual costs of accommodating certain disabilities such as making a construction site wheelchair accessible and freedom not to employ an alcoholic or drug addict. Id. Some of the testimony in support of the ADA's passage argued that the costs of reasonable accommodation were far less than the costs to society of not employing the disabled who can be accommodated. See id. at 27-28 (statement of Jay Rochlin, Exec. Director, President's Comm. on Employment of People with Disabilities). Mr. Rochlin explained that at least half of all accommodations will not cost the employer a thing and expounded on the fact that, without providing for employers to reasonably accommodate those with disabilities, more people would continue to receive government assistance, be unable to work, or even support their families due to social prejudice factoring in to an inability to find employment. Id. He also emphasized the untapped potential of the disabled as consumers and employees:

Mr. Chairman, just as a business looks at the bottom line, so must we all. As I see it the bottom line in passage of comprehensive civil rights legislation for people with disabilities is: For business, access to a qualified labor force and to a largely untapped group of consumers.

For individuals with disabilities: dignity, pride, and an improved quality of life, and, finally, independence. And for the Nation, a renewal of our commitment to equality for all and a contribution to the human spirit.

Id. at 29.

n29. Not only has there been a change in people's attitudes about the disabled and their ability to perform, but medical technology has also provided more mechanisms that allow the disabled to work with minimal or no accommodation by the employer. This is a significant change from even two decades ago. For example, persons formerly unable to communicate verbally due to paralysis, illness, or disease are now able to use a computer to express their ideas. Steven Hawking's phenomenal utilization of technology and his public renown comes to mind as an illustration of how far society has progressed, both technologically and culturally.

n30. 42 U.S.C. 12101.

n31. Id. 12112(a).

n32. Id. 12112(b)(6).

n33. Id. 12111(8).

n34. Ranko Shiraki Oliver, The Impact of Title I of the Americans with Disabilities Act of 1990 on Workers' Compensation Law, 16 U. Ark. Little Rock L.J. 327, 365 (1994).

n35. UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991).

n36. See Pamela S. Karlan & George Rutherglen, Disabilities, Discrimination, and Reasonable Accommodation, 46 Duke L.J. 1 (1996). Karlan and Rutherglen argue that the ADA definition of disability is more inclusive than in other law and that the remedies provided by the ADA are broader than those under other antidiscrimination statutes. This is in part because a "qualified individual" is one who may perform the job (1) without, or (2) with reasonable accommodation. Id. at 8. The ADA's explicit focus on individuals instead of a class also makes its application broader and more flexible. Id. at 19; see also Anne E. Beaumont, Note, This Estoppel Has Got to Stop: Judicial Estoppel and the Americans with Disabilities Act, 71 N.Y.U. L. Rev. 1529, 1547 (1996). For an overview of reasonable accommodation and the defense of undue hardship, see generally Jeffrey O. Cooper, Comment, Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act, 139 U. Pa. L. Rev. 1423 (1991).

n37. See 42 U.S.C. 12102(2) (1994); Oliver, supra note 35, at 336.

n38. Beaumont, supra note 37, at 1543.

n39. U.S. Equal Employment Opportunity Comm'n, A Technical Assis-tance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act 2.2 (1992) [hereinafter Technical Assistance Manual].

n40. See Oliver, supra note 35, at 361; see also Beaumont, supra note 37, at 1547-48 (arguing that the definition of disability for the ADA is quite different than the approach used by both the workers' compensation system and the Social Security Act). But see Taylor v. Pathmark Stores, Inc., 177 F.3d 180 (3d Cir. 1999); Kriskovic v. Wal-Mart Stores, Inc., 948 F. Supp. 1355 (E.D. Wis. 1996) (both cases illustrating that courts are narrowly constructing the "regarded as disabled" classification).

n41. This issue is addressed in Part IV.A.

n42. See Kriskovic, 948 F. Supp. at 1365 ("A claim of perceived disability requires some element of misperception or prejudice."); Taylor, 177 F.3d at 193 (judicially constructing a defense to a regarded as disability claim: "if the employer is factually mistaken about the extent of an employee's impairment, and the employee or his agent is responsible for the mistake, the employer is not liable under the ADA").

n43. See also Beaumont, supra note 37, at 1547 (comparing the Montana workers' compensation language with that of the ADA).

n44. Beaumont, supra note 37, at 1547-49.

n45. Or. Rev. Stat. 656.005(7)(a) (1999).

n46. Or. Rev. Stat. 656.005(7)(c).

n47. See Or. Rev. Stat. 656.210, 656.212, 656.214.

n48. See id.

n49. 42 U.S.C. 12111(8) (1994).

n50. Technical Assistance Manual, supra note 40, 2.3.

n51. In addition there is a religious exemption allowing employer religious organizations to give a preference for employees of a certain religion. 42 U.S.C. 12113(c) (1994).

n52. Id. 12113(a) ("It may be a defense ... that an alleged application of qualification standards, tests, or selection criteria that screen out ... 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.").

n53. Id. 12113(b) (emphasis added).

n54. 29 C.F.R. 1630.2 (1996); see also Technical Assistance Manual, supra note 40, 4.5.

n55. Technical Assistance Manual, supra note 40, 4.5.

n56. The coker unit is the part of the refinery where crude oil is further processed and refined for use. "'The job' at the coker unit is to extract usable petroleum products from the crude oil that remains after other refining processes." Echazabal v. Chevron U.S.A., Inc., 226 F.3d 1063, 1071 (9th Cir. 2000), cert. granted, 69 U.S.L.W. 3619 (U.S. Oct. 29, 2001) (No. 00-1406).

n57. Id. at 1065.

n58. Id.

n59. Id. Under the ADA, medical examinations and inquiries may only occur in limited circumstances.

(1) In general. The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

(2) Preemployment.

(A) Prohibited examination or inquiry. Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry. A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination. A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if -

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that -

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this Act shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this title.

(4) Examination and inquiry.

(A) Prohibited examination and inquiries. A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries. A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement. Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

42 U.S.C. 12112(d) (1994).

n60. Echazabal, 226 F.3d at 1065.

n61. Id.

n62. Id.

n63. Id.

n64. Id. However, there was some dispute about this between the majority judges and the lone dissenter. Judge Trott, in dissent, argued that Mr. Echazabal's doctors, while perhaps not explicitly saying he could not work at the refinery did agree that his continued work at the refinery endangered his health and ultimately his life. See id. at 1073-74; infra notes 92-93 and accompanying text.

n65. Echazabal, 226 F.3d at 1073-74.

n66. Id.

n67. Id.

n68. Id.

n69. Id. at 1072.

n70. 42 U.S.C. 12112(b)(6) (1994). "Qualification standards or selection criteria that screen out or tend to screen out an individual with a disability on the basis of disability must be job-related and consistent with business necessity." Technical Assistance Manual, supra note 40, 4.2.

n71. 42 U.S.C. 12113(b) (1994).

n72. 29 C.F.R. 1630.2 (1999).

n73. 42 U.S.C. 12113(b) (emphasis added).

n74. 29 C.F.R. 1630.15(b)(2); 29 C.F.R. 1630.2(r).

n75. Echazabal v. Chevron U.S.A., Inc., 226 F.3d 1063, 1072 (9th Cir. 2000), cert. granted, 69 U.S.L.W. 3619 (U.S. Oct. 29, 2001) (No. 00-1406).

n76. Id. (emphasis added).

n77. 42 U.S.C. 12111(3) (1994).

n78. Echazabal, 226 F.3d at 1067 ("The term 'direct threat' is used hundreds of times throughout the ADA's legislative history - in the final conference report, the various committee reports and hearings, and the floor debate... . Not once is the term accompanied by a reference to threats to the disabled person himself."). The court also cited to legislative history of the Act that referred to School Board of Nassau County v. Arline, 480 U.S. 273 (1987), for the proposition that Congress's intent was to accord the direct threat defense only in cases where there was a direct threat to others. Echazabal, 226 F.3d at 1067. In Arline, the claimant, a school teacher, had an infectious disease (tuberculosis) which resulted in her discharge. The Court determined that, in order for her to be discharged, there must be findings that she was not otherwise qualified. Part of this inquiry under the Rehabilitation Act included whether she was a threat to others due to the potential for contagion. But the Court never stated that part of the otherwise qualified inquiry was whether she was a threat to her own health. Arline, 480 U.S. at 288-89. On remand, the district court found that she posed no risk to school children and that there was therefore no risk of harm, and so she was otherwise qualified to teach. Arline v. Sch. Bd. of Nassau County, 692 F. Supp. 1286, 1291-92 (M.D. Fla. 1988).

n79. Echazabal, 226 F.3d at 1067-68 (emphasis added) (quoting Sen. Kennedy, a co-sponsor of the ADA).

n80. See UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991). But see Dothard v. Rawlinson, 433 U.S. 321 (1977) (illustrating a narrow example of when employer regulation of risk may be permissible).

n81. 433 U.S. 321 (1977).

n82. Id. at 335.

n83. 499 U.S. 187 (1991).

n84. Echazabal, 226 F.3d at 1070; see also Richter, supra note 13. This topic is covered in greater depth in Part VI.

n85. 42 U.S.C. 12111(8) (1994).

The term ... means 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. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

Id.

n86. See id.; see also Sch. Bd. of Nassau County v. Arline, 480 U.S. 273 (1987) (discussed supra note 79).

n87. Echazabal, 226 F.3d at 1070.

n88. Id. ("An employer may not turn every condition of employment which it elects to adopt into a job function, let alone an essential job function, merely by including it in a job description. Job functions are those acts or actions that constitute a part of the performance of the job.").

n89. See Mark A. Rothstein, Genetics and the Work Force of the Next Hundred Years, 2000 Colum. Bus. L. Rev. 371. Where an individual has a genetically increased risk of a future occupational illness ... "employers should be required to reveal the nature of the risk, including the existence of any genetically increased risks, and to allow the individual the option of accepting or declining the position, an employer would not be justified in excluding such an individual." Id. at 398-99; see also Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985) (providing a helpful framework for analyzing the "future harm" issue under the Rehabilitation Act).

n90. See, e.g., Stratton v. Hawaii Elec. Light Co., Nos. 95-16142, 95-17262, 1996 U.S. App. LEXIS 33151 (9th Cir. Dec. 13, 1996) (decision without published opinion); Gerdes v. Swift-Eckrich, Inc., 949 F. Supp. 1386 (N.D. Iowa 1996).

n91. See Echazabal, 226 F.3d at 1073 (Trott, J., dissenting).

n92. Id. While these medical opinions clearly conflict with those that made their way into the majority opinion, ultimately Mr. Echazabal, knowing the risks, chose to continue working.

n93. Id. at 1074.

n94. See, e.g., Stratton, 1996 U.S. App. LEXIS 33151 (decision without published opinion). The employee's disability must actually interfere with his or her ability to perform the essential functions of the job, it must not be based on speculation about future inability to perform or on stereotypes.

n95. See, e.g., Dothard v. Rawlinson, 433 U.S. 321 (1977); see also infra note 191 (critiques of the Johnson Controls decision).

n96. While the dissent raises some important issues as to potential conflicts with OSHA and other safety regulations that employers are bound to comply with, by adhering to federal antidiscrimination legislation and informing employees of the risks inherent in the workplace, employers should avoid liability. More interesting is the dissent's divergence from the majority as to what priority should be attached to the conflicting goals of autonomy for the disabled and workplace safety. The dissent clearly sides with workplace safety, finding that employing persons who may be unduly harmed by workplace exposure to toxins is an undue hardship for employers, and that "such a moral burden is unconscionable." Echazabal, 226 F.3d at 1074.

n97. See UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991); Dothard v. Rawlinson, 433 U.S. 321 (1977).

n98. 499 U.S. 187 (1991).

n99. 433 U.S. 321 (1977).

n100. Johnson Controls, 499 U.S. at 205 (emphasis added).

n101. But see infra note 191 and accompanying text (discussing critiques of the decision for ignoring potential liability issues if the child of a woman, harmed while a fetus, brings a suit against the woman's employer).

n102. 433 U.S. at 335.

n103. See id.; see also Bryan P. Neal, The Proper Standard for Risk of Future Injury Under the Americans with Disabilities Act: Risk to Self or Risk to Others, 46 SMU L. Rev. 483, 504 (1992).

The gender requirement was defended as a bona fide occupational qualification (BFOQ) adopted for safety purposes. The Court accepted the defense and upheld the gender requirement as a BFOQ. The Court did so, however, because of the potential risks of harm to the inmates and to other security personnel should attacks on the female guards occur. The Court rejected the argument that the risk to the female plaintiffs was sufficient.

Id.

n104. Rawlinson, 433 U.S. at 335 (At the time of the decision, this penitentiary was one of the most dangerous in the country. The Court's reference to its "jungle atmosphere" indicated a culture where the weak were routinely preyed upon by the strong and the guards had little control over the inmates.).

n105. Id. at 335.

n106. 932 F. Supp. 1110 (N.D. Ill. 1996).

n107. Id. at 1111-12.

The EEOC's interpretation of the "direct threat" language in the ADA is untenable because it renders certain words in the ADA meaningless. If the ADA referred to "a direct threat to health or safety in the workplace," then the EEOC's interpretation would make sense. However, the ADA clearly and unambiguously refers to "a direct threat to the health or safety of other individuals in the workplace." If the EEOC's interpretation were accepted, it would render entirely meaningless the phrase "of other individuals." Such an interpretation must be rejected in light of the general rule that "a court should not construe a statute in a way that makes words or phrases meaningless, redundant, or superfluous." This conclusion receives further support from the definitional section of the ADA, which states that "the term 'direct threat' means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." Again, the EEOC's interpretation would render meaningless the words "of others," and it must be rejected for this reason.

Id. (citations omitted).

n108. Id. at 1112.

n109. The ADA's case by case analysis allows the court discretion in examining all the evidence and determining whether the "direct threat" actually impinges on an essential function of the job, or whether that threat spills over into a risk of harm to third parties who have not consented to the risk.

n110. "Like other determinations under the ADA, deciding who is a 'qualified' individual is a case-by-case process, depending on the circumstances of the particular employment situation." Technical Assistance Manual, supra note 40, 2.1.

At least one court has set out factors to be used for the case by case analysis when looking at a disability claim. See E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Haw. 1980). Though the case was decided under the Rehabilitation Act, the factors are still relevant:

Factors that are important ... are the number and types of jobs from which the impaired individual is disqualified. And the focus cannot be on simply the job criteria or qualification used by the individual employer; those criteria or qualifications must be assumed to be in use generally... . In evaluating whether there is a substantial handicap to employment, it must be assumed that all employers offering the same job or similar jobs would use the same requirement or screening process... .

... The number of employers in the relevant area ... that the criteria are applicable to would have to be determined... .

Once it is determined how many employers would be affected by the criteria, it must be determined what types of jobs the rejection would apply to... .

... .

Finally, the individual himself must be considered. His own job expectations and training must be taken into account.

Id. at 1100-01.

n111. See 29 C.F.R. 1630.2(r)(4) (1999); see also 1 Barbara Lindemann & Paul Grossman, Employment Discrimination Law 321 (3d ed. 1996).

n112. Nos. 95-16142, 95-17262, 1996 U.S. App. LEXIS 33151 (9th Cir. Dec. 13, 1996) (decision without published opinion).

n113. Id. at 4.

n114. But see Echazabal v. Chevron U.S.A., Inc., 226 F.3d 1063, 1073-74 (9th Cir. 2000) (Trott, J., dissenting), cert. granted, 69 U.S.L.W. 3619 (U.S. Oct. 29, 2001) (No. 00-1406).

n115. See Wann v. American Airlines 878 F. Supp. 82 (S.D. Tex. 1994); Holbrook v. City of Alpharetta, 911 F. Supp. 1524 (N.D. Ga. 1995); McCollough v. Atlanta Beverage Co. 929 F. Supp. 1489 (N.D. Ga. 1996); Gerdes v. Swift-Eckrich, Inc. 949 F. Supp. 1386 (N.D. Iowa 1996).

n116. 752 F.2d 1271 (8th Cir. 1985).

n117. "The Rehabilitation Act itself does not expressly provide a health or safety defense at all, but the regulations define a 'qualified handicapped person' as someone who can work in a position

'without endangering the health and safety of the individual or others'." 1 Lindemann & Grossman, supra note 112, at 320; see also Neal, supra note 104, at 495-503.

n118. Neal, supra note 104, at 495.

Since the defense is a claim that a disabled person fails to meet a qualification standard established by an employer, the defense is an assertion that one is not qualified to perform the job. Although ... lack of risk to self or others is not an aspect of being qualified that the plaintiff will have to prove as part of his or her case.

Id.

n119. See, e.g., EEOC v. Exxon Corp., 203 F.3d 871 (5th Cir. 2000) (demonstrating the presumption for the employer where the policies affect formerly drug addicted employees (a protected class under the ADA) and holding that an employer who institutes a safety policy that applies to all employees of a certain class (formerly drug-addicted) does not even need to satisfy a showing that the policy was justified as a direct threat because the employer has not violated the ADA as the rule was justified as a business necessity); see also Stephanie Proctor Miller, Comment, Keeping the Promise: The ADA and Employment Discrimination on the Basis of a Psychiatric Disability, 85 Cal. L. Rev. 701, 727-41 (1997) (discussing various courts' applications of threat to others and also of the frequent application of threat to self as a reason for discharge in cases of mental illness). But see Doe v. Judicial Nominating Comm'n, 906 F. Supp. 1534, 1537 (S.D. Fla. 1995) (holding that a judicial nomination committee questionnaire violated the ADA because it was overly inclusive by asking about "any form of mental illness" or "hospital confinement"); Clark v. Va. Bd. of Bar Exam'rs, 880 F. Supp. 430, 446 (E.D. Va. 1995) (holding that a bar examination inquiry into mental illness violated the ADA because it was overly broad).

n120. One example of this is Supreme Court jurisprudence holding that if individuals are able to control their condition through medication or other means, they are no longer disabled under the ADA even when they continue to experience discrimination based on their disability. See, e.g., Sutton v. United Air Lines, 527 U.S. 471, 483 (1999). This impacts persons who have a range of mental illnesses, including bipolar disorder, schizophrenia, and depression. Another problem courts have faced when assessing cases of discrimination based on mental illness is where to draw the line between misconduct of the employee which justifies discharge and misconduct where it may be a symptom of the disease itself. See, e.g., Carrozo v. Howard County, 847 F. Supp. 365 (D. Md. 1994), aff'd, 45 F.3d 425 (4th Cir. 1995) (allowing discharge of bipolar employee as lawful where that employee was prone to verbal "outbursts" to his supervisor). But see Overton v. Reilly, 977 F.2d 1190 (7th Cir. 1992) (disallowing discharge of depressed employee whose medication caused him to occasionally fall asleep on the job, but whose performance was satisfactory in other ways); see also Miller, supra note 120, at 723-27, 740-41 (discussing the issue of employee misconduct and arguing that when the misconduct results from a mental illness the employer should be required to provide reasonable accommodation as long as it is not an undue burden).

n121. Gardner, 752 F.2d at 1274-75.

n122. The court was primarily concerned about the effect the extreme heat might have on the toxicity of lithium that was required as medication to keep the plaintiff's condition in check and with the unavailability of qualified medical personnel who could treat his condition. Id. The court

was also concerned that if Mr. Gardner experienced a manic episode he could become aggressive, and that transportation to the nearest hospital (thirteen hours by car) or by airlift (which could aggravate his manic episode) was unsafe. Id. at 1283. In the end, the court determined that reasonable accommodation for Mr. Gardner would pose an undue hardship. Id. at 1284.

n123. Id.

n124. 97 F.3d. 446 (11th Cir. 1996).

n125. 146 F.3d 832 (11th Cir. 1998).

n126. In Moses, the plaintiff was an epileptic who was denied employment as a product inspector due to the employer's belief that he was a "direct threat" to himself. Part of the essential function of the job was surveying production equipment from a high platform. The employer believed that if he experienced an epileptic seizure, the plaintiff could fall from the platform and be injured or killed by the machines below. Moses, 97 F.3d at 447-48. Other epilepsy cases are defended on the basis of direct threat to oneself. See, e.g., Jansen v. Food Circus Supermarkets, Inc., 541 A.2d 682 (N.J. 1988) (judgment for the employee where there had not been a factual inquiry as to the specific probability of a seizure); Lewis v. Remmelle Eng'g, 314 N.W. 2d. 1 (Minn. 1981) (reversing in part summary judgment for employer where the employer failed to inquire as to the plaintiff's specific epilepsy and probability of seizure, but affirming in part on fact that evidence tended to show that the machinery plaintiff would be around coupled with the high probability of seizure indicated that a threat to self was evident); EEOC v. Kinney Shoe Corp., Civil Action No. 94-0069-H, 1995 U.S. Dist. LEXIS 20384 (W.D. Va. Sept. 19, 1995). Epilepsy continues experiencing negative stereotyping, even by courts and their deference as here to employers' decisions not to employ when the epileptic will be operating heavy machinery or simply be in its presence, even when the epileptic can demonstrate a low probability of seizure occurrence and is medicated. In LaChance, the plaintiff was also an epileptic. In that case, however, the severity of the epileptic condition (he had two seizures his first night of work) swayed the court to find for the employer where the employer raised a "threat to self" defense. 146 F.3d at 834. In LaChance, the court could have found for the employer in that the plaintiff was not an otherwise qualified individual because his frequency of seizures adversely impacted his ability to do the job with or without reasonable accommodation. See id. at 836. The same justification, for severe epilepsy, could be applied instead of the direct threat to self justification, and would in fact be more consistent with the ADA's intent.

n127. In 1996, Moses v. American Nonwovens, Inc., 97 F.3d. 446 (11th Cir. 1996), was decided for the employer, though as the Echazabal court noted in its decision declining to follow that case, there was no reason given as to why "risk to self" was read into the ADA statute. In 1998, La Chance v. Duffy's Draft House, Inc., 146 F.3d 832 (11th Cir. 1998), was decided for the employer because the employee was deemed not to have provided evidence that the he was not a risk to himself, though again there was no analysis supporting this reading of the statute.

n128. Echazabal v. Chevron U.S.A., Inc., 226 F.3d 1063, 1066 (9th Cir. 2000), cert. granted, 69 U.S.L.W. 3619 (U.S. Oct. 29, 2001) (No. 00-1406). ("The Moses court provides us with no guidance, however, because it gives no explanation for its holding. Instead, it simply asserts, without analysis, that the ADA's direct threat defense applies to threats to the disabled individual himself.").

n129. See supra note 127.

n130. Fussell v. Ga. Ports Auth., 906 F. Supp. 1561 (S.D. Ga. 1995); Yodice v. Metro. Dade County, No. 93-2493-CIV-MORENO, 1995 U.S. Dist. LEXIS 21872 (S.D. Fla. Jul. 26, 1995).

n131. Davis v. Meese, 692 F. Supp. 505 (E.D. Pa. 1988); EEOC v. Amego, Inc., 110 F.3d 135 (1st Cir. 1997); Turco v. Hoechst Celanese Corp., 101 F.3d 1090 (5th Cir. 1996); Moses v. Am. Nonwovens, Inc., 97 F.3d. 446 (11th Cir. 1996). Epilepsy in particular seems susceptible to this. See supra note 120.

n132. Mantolete v. Bolger, 767 F.2d 1416, 1423 (9th Cir. 1985). While the court agreed with prior decisions that in certain circumstances a job requirement that screens out "otherwise qualified individuals with disabilities" was acceptable where there was possible future injury, it narrowed that proposition by requiring that only "in light of the individual's work history and medical history, employment of that individual would pose a reasonable probability of substantial harm." Id.

n133. See, e.g., UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991); Dothard v. Rawlinson, 433 U.S. 321 (1977). Note that the Echazabal holding may also have been influenced by recent Supreme Court jurisprudence between Stratton and Echazabal where the Court questioned the EEOC interpretive rules' broad reading of certain ADA provisions. In Sutton v. United Air Lines, 527 U.S. 471, 483 (1999), the lead of a trio of cases, the court found that "the agency guidelines' directive ... runs directly counter to the individualized inquiry mandated by the ADA." The Sutton Court found two other problems with the EEOC guidelines approach. See id. at 484. The ADA requires each decision be made on a case-by-case basis, but the EEOC had provided a blanket interpretive rule applicable to all claimants. Id. The court was also troubled by the agency's interpretive guidance on the definition of disability as exceeding that mandated by the statute. Id. However, Sutton involved an issue that was outside the explicit purview of the rules, unlike Echazabal. Echazabal falls under Title I of the ADA, meaning that the EEOC has been granted the authority to promulgate rules for the statute. Thus the EEOC has some actual authority over the issues involved in Echazabal, whereas it did not have such a mandate over the issues in Sutton.

n134. See, e.g., Bragdon v. Abbott, 524 U.S. 624 (1998) (holding that the plaintiff, who had asymptomatic AIDS, was covered under the ADA as having a disability that substantially limited the life activity of reproduction, when her doctor refused treatment unless done at a hospital). Though the case was decided under Title II of the ADA and did not concern employment discrimination, the Court's reasoning clearly provides that if plaintiffs have a disabling condition, even if not currently "limiting a substantial life activity," they are protected under the ADA.

n135. See UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991); Renee L. Cyr, Note, The Americans with Disabilities Act: Implications for Job Reassignment and the Treatment of Hypersusceptible Employees, 57 Brook. L. Rev. 1237 (1992); Frances H. Miller, Biological Monitoring: The Employer's Dilemma, 9 Am. J.L. & Med. 387 (1984); Rothstein, supra note 90.

n136. Miller, supra note 136, at 395. Thus there is incentive to keep those premiums low. This was in fact part of the desired effect of the system itself. That is, the high cost of premiums in a workplace that experiences a lot of accidents will naturally make the employer attempt to create a safer workplace, so that those premiums decrease at the rate the accidents do.

n137. "When biological monitoring reveals a significant body burden of industrial toxins, medical prudence dictates that the worker leave the environment predicted to make him sick if it is either impossible or not feasible to reduce on the job exposure." Id. at 390.

n138. Bragdon v. Abbott, 524 U.S. 624 (1998).

n139. The "regarded as" prong was added to the Rehabilitation Act after its initial passage, and, as one court explained, this was consistent with other antidiscrimination legislation. "The new definition clarifies the intention to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped, just as ... the Civil Rights Act of 1964 prohibits discrimination on the ground of race, whether or not the person discriminated against is in fact a member of a racial minority." E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1097 (D. Haw. 1980).

n140. 694 F.2d 619 (9th Cir. 1982).

n141. Id. at 623.

n142. See Technical Assistance Manual, supra note 40, 9.3 (The only purposes for which the employer may use information regarding the employee's disability status are: "to verify employment history; to screen out applicants with a history of fraudulent workers' compensation claims; to provide information to state officials as required by state laws regulating workers' compensation and 'second injury' funds; to screen out individuals who would pose a 'direct threat' to health or safety of ... others, which could not be reduced to an acceptable level or eliminated by a reasonable accommodation."). Language including a "direct threat to themselves" has been removed.

n143. Neal, supra note 104, at 490-91.

n144. 42 U.S.C. 12102(2) (1994); see also Bragdon v. Abbott, 524 U.S. 624 (1998) (holding that an individual with asymptomatic AIDS who is discriminated against on that basis is covered by the ADA, even though the disease has yet to manifest); Cyr, supra note 136, at 1261 ("[While] there has been some debate as to the Rehabilitation Act's applicability to an individual who does not currently have a disability, but who is at risk of developing a specific disability in the future ... . The ADA, in contrast ... would cover such individuals.").

n145. Under 42 U.S.C. 12102(2), the test is whether the person had:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. 12102(2).

n146. See Taylor v. Pathmark Stores, Inc., 177 F.3d 180 (3d Cir. 1999); Kriskovic v. Wal-Mart Stores, Inc., 948 F. Supp. 1355 (E.D. Wis. 1996).

n147. See, e.g., Edith F. Canter, Note and Comment, Employment Discrimination Implications of Genetic Screening in the Workplace Under Title VII and the Rehabilitation Act, 10 Am. J. L. & Med. 323, 346 (1984) ("As genetic testing develops, it may simultaneously enhance employee safety and impede individual control over choice of employment. The technology thereby offers tangible health benefits while threatening social changes which raise complex philosophical and political issues. The increased availability of genetic information, for example, may facilitate

systematic placement of individuals in scientifically selected positions.); see also Miller, supra note 136, at 387.

n148. For a recent Supreme Court case on privacy rights in a medical context, see Ferguson v. City of Charleston, 532 U.S. 67 (2001) (holding that the city of Charleston could not test pregnant women for drugs even though there was a compelling state interest in protecting the life of the fetus). Another example is Oregon's Genetic Privacy Act, which provides that "genetic information is uniquely private and personal information that generally should not be collected, retained or disclosed without the individual's authorization." Or. Rev. Stat. 659.705(b) (1999). Genetic testing is allowed only in an employment context in Oregon when the test "is administered solely to determine a bona fide occupational qualification" and informed consent has been obtained. Or. Rev. Stat. 659.227(6). For an interesting depiction of employee privacy rights in this area prior to passage of the ADA, see Mark A. Rothstein, Employee Selection Based on Susceptibility to Occupational Illness, 81 Mich. L. Rev. 1379, 1469-75 (1983) (Employees hired in the private sector had no right to decline medical examinations, questions about lifestyle, and other invasive and not necessarily business related inquiries. In the public sector, however, due to the Rehabilitation Act, such inquiries were not permitted unless justified by business necessity.).

n149. Miller, supra note 136.

n150. Id. at 409-10.

n151. Note that there may be some limited economic costs to the employer in terms of increased absenteeism and possible workers' compensation increases, but that these considerations have never been justified as undue hardships under the ADA.

n152. See Moscowitz, supra note 6, at 595. The author provides a historical overview tracing the employers' changing relationship to the employee and the employee's increasing status and bargaining capacity for workplace rights.

n153. Gabel et al., supra note 10, at 415.

n154. But see Cleveland v. Policy Mgmt. Sys., 526 U.S. 795 (1999) (holding that the receipt of social security disability benefits for total disability does not automatically bar a claim of discrimination under the ADA if reasonable accommodation for the disability can be proven) (emphasis added); see also Feldman v. Am. Mem'l Life Ins. Co., 196 F.3d 783 (7th Cir. 1999).

Although Cleveland clarified that an ADA claim is not estopped simply because an individual applied for or received SSDI benefits, a plaintiff cannot avoid summary judgment merely by asserting that she is a qualified individual if she made prior statements, in applying for SSDI, regarding her disability that are squarely contradictory. A plaintiff may declare that she was totally disabled in her SSDI application, then declare that she was a qualified individual under the ADA, but she must show that this apparent inconsistency can be resolved with reference to variance between the definitions of "disability" contemplated by the ADA and SSDI. Thus, "a plaintiff's sworn assertion in an application for disability benefits that she is, for example, 'unable to work' will appear to negate an essential element of her ADA case - at least if she does not offer a sufficient explanation."

Id. at 791 (quoting Cleveland, 526 U.S. at 806).

n155. See, e.g., Dockery v. N. Shore Med. Ctr., 909 F. Supp. 1550 (S.D. Fla. 1995) (employee may be considered a qualified individual even if totally disabled at the time of her discharge, if reasonable accommodation of a leave of absence or reassignment would enable her to continue working at a later date).

n156. See Hiese v. Genuine Parts Co., 900 F. Supp. 1137 (D. Minn. 1995) (the court found the policy facially discriminatory as it did not allow for a case-by-case analysis of each employee's individual ability to perform the job's essential functions, with or without reasonable accommodation).

n157. See Richter, supra note 13. But see Larson, supra note 7, 3.00 (saying that workers' compensation is social insurance is not strictly accurate because of "its essentially private nature, in the question of qualification for and measure of benefits, in the allocation of the burden of payment, in its retention of some relation between hazard and liability, and in its mechanism of unilateral employer liability").

n158. See Compendium on Workers' Compensation, supra note 14; Eggen, supra note 15, at 859-60; Or. Rev. Stat. 656.018 (1999). Note, however that there was always at least one exception to the exclusivity doctrine. When it can be determined that the injury sustained was due to employer negligence, then the employee may bring a tort action.

n159. See Gabel et al., supra note 10, at 410-14 (citing examples of judicially created exceptions such as dual capacity and bad faith). On the statutory level, the authors cite to the ADA and the Family and Medical Leave Act (FMLA) as creating new "exceptions" to the exclusive remedy doctrine. See id. at 414-31. The authors' main issues with the ADA are its broad definition of disability and, particularly, its remedy of reasonable accommodation. However, the authors' view of the ADA as impinging upon workers' compensation remedies is not wholly accurate. For example, if injured workers cannot perform the physical demands of their pre-injury jobs, if those demands are an essential function of the job for which no reasonable accommodation can be made, the employees are not otherwise qualified and so do not need to be re-hired. See id. at 419. The authors also argue that the FMLA's remedies for injured workers exceed those envisioned by the workers' compensation system and are "out of sync with the quid pro quo." Id. at 427. The authors also cite the Health Insurance Portability and Accountability Act (HIPAA) as extending the original workers' compensation quid pro quo bargain. Id. at 429. "The Act protects people with pre-existing conditions, and allows people to change plans without fear of being denied the coverage that the new employer offers and cannot be charged higher premiums than the new employer already charges." Id. at 429-30 (citations omitted).

n160. Theodore F. Haas, On Reintegrating Workers' Compensation and Employers' Liability, 21 Ga. L. Rev. 843, 846 (1987).

n161. Gabel et al., supra note 10, at 407.

n162. See Peirce & Dworkin, supra note 8, at 665-66; see also Or. Rev. Stat. 656.005(7)(a)(A)-(B) (providing that if an injury combines with a preexisting condition, it is compensable only to the extent that it is the major cause of the injury). An alternative term is "second injury fund." Oliver, supra note 35, at 353.

n163. See Oliver, supra note 35, at 353; see also Peirce & Dworkin, supra note 8, at 650-51.

n164. Peirce & Dworkin, supra note 8, at 650-51. Peirce and Dworkin also note that California led the way in limiting the effectiveness of apportionment statutes. Id. at 651 n.5.

n165. Id. at 665-66.

n166. As a result, "a majority of states passed apportionment statutes, which limited the employer's liability to that portion of the disability due solely to the workplace." Id. at 670. Other states achieved the same result through judicial decisions. Id. In Oregon, a recently decided case, Smothers v Gresham Transfer, Inc., 332 Or. 83, 127, 23 P.3d 333, 358 (2001), interpreted article I, section 10, of the Oregon Constitution as prohibiting the legislature from abolishing a common law cause of action without providing an adequate substitute remedial process for the injury. While Smothers is a very complex case, at a minimum its holding provides that if workers' compensation does not provide an adequate remedy for an injury that was cognizable at the time the Oregon Constitution was created in 1857, the court will look outside the workers' compensation system for relief that was available in 1857, essentially creating a new cause of action for injured plaintiffs. Thus, if workers' compensation does not provide relief because the origins of an injury are unclear, the court may bypass the system altogether.

n167. Peirce & Dworkin, supra note 8, at 670.

n168. Id.

n169. Id. (emphasis added).

n170. See 42 U.S.C. 12112(d) (1994); infra note 60 (illustrating the statutory limitations to medical examinations and inquiries).

n171. See supra note 143 and accompanying text.

n172. Echazabal v. Chevron U.S.A., Inc., 226 F.3d 1063, 1071 (9th Cir. 2000), cert. granted, 69 U.S.L.W. 3619 (U.S. Oct. 29, 2001) (No. 00-1406).

n173. In Oregon, a pertinent issue with regards to workers' compensation is the high premiums employers already pay. See Chess Trethewy, Senate Bill 369: Another Chapter in the Political Saga of Workers' Compensation in Oregon, 32 Willamette L. Rev. 217 (1996).

n174. See Gabel et al., supra note 10, at 409; Oliver, supra note 35, at 340; see also supra note 160 and accompanying text.

n175. See discussion supra Part V.

n176. Gabel et al., supra note 10, at 405.

n177. Oliver, supra note 35, at 349.

n178. See Technical Assistance Manual, supra note 40, 2.3; see also Johnson v. City of Port Arthur, 892 F. Supp. 835 (E.D. Tex. 1995) (employer not required to assign laborer to light duty because it was not a reasonable accommodation; rather it was assignment to a completely different job, changing the essential function of his employment); Howell v. Michelin Tire Corp., 860 F. Supp. 1488 (N.D. Ala. 1994) (When disabled employee is unable to perform his regular job, a light duty position does not have to be created for him. However, if such a position exists and is vacant, it would be a reasonable accommodation to put the employee there, but only on a temporary basis. Employer need not convert a light duty job into a permanent job and need not assign to the light duty job at all unless the disabled employee is otherwise qualified for the position.); Nguyen v. IBP,

Inc., 905 F. Supp. 1471 (D. Kan. 1995) (if company treats a light duty position to which employee had been moved following injury as temporary, permanent reassignment to that position is not reasonable accommodation).

n179. Technical Assistance Manual, supra note 40, 9.4.

n180. As a footnote, the ADA may also be somewhat in conflict with the FMLA for similar reasons. See Robert Belton & Dianne Avery, Employment Discrimination Law: Cases and Materials on Equality in the Workplace 715 (6th ed. 1999). The FMLA provides up to twelve weeks of unpaid leave for qualifying employees of covered employers. Id. "For example, an employee is eligible for FMLA leave because of a 'serious health condition that makes the employee unable to perform the functions of the position.'" Id. (citing 29 U.S.C. 2612(a)(1)(D) (1994)). Under the FMLA, the employer can require medical certification of the condition for which the employee is requesting leave. "It is possible that an employer's inquiry about the 'serious health condition' of an employee pursuant to the employee's request for a FMLA leave, might violate the restrictions on medical inquireies under the ADA for 'current or existing employees.'" Id. When the employee returns to work, he may also be required to obtain a fitness for duty statement. Id.

n181. S. Rep. No. 101-116, at 84 (1989).

n182. 116 Cong. Rec. 37,326 (1970) (statement of Sen. Williams).

n183. Id.

Our bill provides that standards dealing with toxic materials or harmful physical agents shall make suitable provision for the use of warning labels, the administering of appropriate medical examinations, and monitoring by the employer of the levels of employee exposure. In addition, employees would have access to the records of such monitoring and, whenever the level of exposure exceeded that permitted by the applicable standard, the employer would be required to notify the employees of this fact and of the corrective measures taken.

Id. (emphasis added).

n184. Richter, supra note 13, at 230.

n185. 116 Cong. Rec. 37,614 (1970) (statement of Sen. Dominick).

n186. Id. at 38,387 (statement of Rep. Gaydos).

n187. One note on the case argued: "Overprotective and paternalistic attitudes toward disabled people are forms of discrimination in their own right. Had the court allowed employers to protect employees from themselves, it would have been endorsing a form of discrimination that Congress intended to prohibit when it codified the ADA." Douglas C. Heuvel, Casenote, Employment Discrimination - Americans with Disabilities Act - Ninth Circuit Holds that the Direct Threat Defense is Not Available When an Employee Poses a Threat to His Own Health or Safety - Echazabal v. Chevron USA, Inc., 226 F.3d 1063 (9th Cir. 2000), 54 SMU L. Rev. 447, 447-48 (2001).

n188. 499 U.S. 187 (1991).

n189. But see infra note 191 and accompanying text (discussing the recent Supreme Court decision in Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999)).

n190. Richter, supra note 13, at 231-32.

n191. See, e.g., Johnson Controls, 499 U.S. 187. But see Kirkingburg, 527 U.S. at 577 (In this case, the plaintiff was unable to meet a visual acuity standard set by the federal department of transportation. He eventually received a waiver from the department, but Albertson's refused to rehire him as a mechanic/driver, claiming that he was not qualified to perform an essential function of the job because he did not meet the safety standard. The Court agreed, holding that an employer does not need to justify its enforcement of an otherwise applicable federal safety regulation solely because it may have been waived experimentally in an individual case, even if the regulation would have a disparate impact on the disabled. However, this case may be distinguishable from a case such as Echazabal in that the risk associated with a driver's lack of visual acuity may spill over onto others and so the purpose of the federal safety regulation in this circumstance was for the protection of others, not the individual. More importantly it can be distinguished in that, unlike Echazabal, the safety regulation was more directly tied to actual performance of the job function - being able to operate a vehicle safely).

n192. See Restatement (Second) of Torts 496A (1965) ("A plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm."); see also id. 496F ("If the defendant would otherwise be subject to liability to the plaintiff, the burden of proof of the plaintiff's assumption of risk is upon the defendant.").

n193. Neal, supra note 104, at 511; see also supra notes 190-91.

n194. Restatement (Second) of Torts 496B ("A plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct cannot recover for such harm, unless the agreement is invalid as contrary to public policy."); see also Dan B. Dobbs, The Law of Torts 211 (2000) (explaining the principles of the defense and illustrating that the defense has been increasingly subsumed by other defenses to negligence, but remains viable).

n195. Restatement (Second) of Torts 496D ("Except where he expressly so agrees, a plaintiff does not assume a risk of harm arising from the defendant's conduct unless he then knows of the existence of the risk and appreciates its unreasonable character.").

n196. See, e.g., Vanessa Merton, The Exclusion of Pregnant, Pregnable, and Once-Pregnable People (a.k.a. Women) from Biomedical Research, 19 Am. J. L. & Med. 369, 437-39 (1993); Yxta Maya Murray, Note, Employer Liability After Johnson Controls: A No-Fault Solution, 45 Stan. L. Rev. 453, 458-60 (1993). For the purposes of this Comment, however, the focus is on the ability of employees to consent to a risk limited to themselves, so there is no analysis of the situation where an employee is pregnant and there is a risk to others - her unborn child - conflated with the risk to herself.

n197. See Dobbs, supra note 195, 211, at 537-38. For a good example of the kind of language used by the courts in employment tort cases, see Wilson v. Lindamood Farms, Inc., 675 S.W.2d 187, 188 (Tenn. Ct. App. 1984) ("ordinary risks are assumed by an employee whether he is actually aware of them or not; for the dangers and risks that are normally or necessarily incident to his occupation are presumably taken into account in fixing his rate of wages").

n198. Dobbs, supra note 195, 211, at 538 (footnotes omitted).

n199. The Oregon legislature passed two statutes which had the effect of abolishing implied assumption of the risk as a distinct defense both as a counterpart to no duty and as a type of contributory negligence. Or. Rev. Stat. 18.475 (1999). Defendants may still raise arguments formerly allowed as affirmative defenses of implied assumption of the risk, however, such arguments are now placed into the comparative fault equation. See Blair v. Mt. Hood Meadows Dev. Corp., 291 Or. 293, 298, 630 P.2d 827, 830 (1981).

n200. See Or. Rev. Stat. 656.005(7)(b) (1999).

n201. Dobbs, supra note 195, 211, at 538.

n202. "For employees whom financial security may come at the expense of personal health, there is little difference whether paternalism or protectionism is the motivating factor behind employment decisions based on biological monitoring results." Richter, supra note 13, at 220.

n203. See Restatement (Second) of Torts 496E cmt. b ("The plaintiff's acceptance of the risk is to be regarded as voluntary even though he is acting under the compulsion of circumstances, not created by the tortious conduct of the defendant, which have left him no reasonable alternative. Where the defendant is under no independent duty to the plaintiff, and the plaintiff finds himself confronted by a choice of risks, or is driven by his own necessities to accept a danger, the situation is not to be charged against the defendant.").

n204. See Haas, supra note 161. In Johnson Controls, the court concluded that state courts will not be able to award tort damages to the extent that the damages were sustained as the result of following a federal anti-discrimination mandate. 499 U.S. at 209-10; see also Neal, supra note 104, at 510. Neal noted that, in the absence of employer negligence a tort recovery would be highly unlikely.

In most cases, a disabled employee who is injured on the job would be able to, and in fact required to, recover for the injuries through the workers' compensation system. Workers' compensation schemes generally cover aggravation of pre-existing injuries as any other on-the-job injury ... . Even if the injured disabled employee was not restricted to recovery under workers' compensation, it is highly unlikely that recovery could be obtained in tort, absent some employer negligence.

Neal, supra note 104, at 510.

n205. See Oliver, supra note 35; see also Peirce & Dworkin, supra note 8, at 650-51.

n206. Technical Assistance Manual, supra note 40, 4.4.

n207. Id. "Blanket" exclusions, however, that exclude a whole class of people with disabilities tend to be viewed as over-inclusive and in violation of the ADA's mandate to analyze each case individually. Id. (For example, requirements that no person with epilepsy will be hired.) An employer does not have to show that the standards themselves are job-related or consistent with business necessity unless they are alleged to screen out individuals with disabilities. Id.

n208. The Technical Assistance Manual had provided that the employer would have to show that there is significant risk of substantial harm, identify the specific risk, the risk must be current, not speculative, assessment of the risk must be based on objective medical or other factual evidence regarding the individual and even if the harm exists whether the risk can be eliminated or reduced by reasonable accommodation. Id. 4.5. Now, however, these guidelines may no longer be

permissible under Echazabal. Echazabal seems to say that because the legislative intent itself excluded any threat to self consideration, this type of inquiry is altogether impermissible.

n209. Id. 2.1(a)(iii).

n210. See, e.g., Johnson v. City of Port Arthur, 892 F. Supp. 835 (E.D. Tex. 1995) (employer not required to assign laborer to light duty because it was not a reasonable accommodation, rather it was assignment to a completely different job, changing the essential function of his employment); Howell v. Michelin Tire Corp., 860 F. Supp. 1488 (N.D. Ala. 1994) (When a disabled employee is unable to perform his regular job, a light duty job does not have to be created for him. However, if such a position exists and is vacant it would be a reasonable accommodation to put the employee there, but only on a temporary basis. The employer need not convert a light duty position into a permanent position and need not assign the injured employee to the position at all, unless the employee is otherwise qualified.); Nguyen v. IBP, Inc., 905 F. Supp. 1471 (D. Kan. 1995) (if the employer treats a light duty position to which the employee had been moved following injury as temporary, permanent reassignment to that position is not a reasonable accommodation); Stratton v. Hawaii Elec. Light Co., Nos. 95-16142, 95-17262, 1996 U.S. App. LEXIS 33151 (9th Cir. Dec. 13, 1996) (decision without published opinion) (affirmed in favor of the employer because there could be no reasonable accommodation when the employee was highly susceptible to ammonia fumes and an essential function of the job was handling blueprints treated with ammonia).

n211. 42 U.S.C. 12112(b)(6) (1994).

n212. 194 F.3d 946 (8th Cir. 1999).

n213. See Or. Rev. Stat. ch. 659 (1999) ("Civil Rights; Unlawful Employment Practices; Genetic Privacy").