Psychiatric Disabilities, the Americans with Disabilities Act, and the New Workplace Violence Account

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I. INTRODUCTION

A new video game recently hit computer stores, promising killing "[s]o freakin’ real, your victims actually beg for mercy and scream for their lives!" The game is called "Postal" and is based on a disgruntled, psychotic postal worker arming himself to the teeth and systematically shooting his way through several different scenarios, including a school yard, a construction site, and a marching band. The victims, primarily innocent, unarmed bystanders, do not die immediately. Instead, the player must decide whether to let victims beg for mercy or execute them immediately. The disgruntled postal worker periodically complains, "only my weapon understands me."

The makers of the game did not create this image out of whole cloth. The image of the disgruntled postal worker who explodes in senseless, random violence had already entered the popular culture, symbolizing the potential lethality of the psychotic worker. So embedded in popular discourse is this account that newspapers, television programs, movies, attorneys and school children refer to episodes of unexplained, individual violence as "going postal." The threat of occupational injury or death, once represented by dangerous machinery or hazardous environments, has now become discursively located in conceptions of the "pathogenic worker," lurking unnoticed in the workplace, poised to explode in lethal violence against his supervisors or co-workers. We might refer to the set of stories, images, attributions and prescriptions associated with this imagery as the "new workplace violence account."

This new workplace violence account, we will argue, plays a role in attempts to delegitimize the Americans with Disabilities Act ("ADA"). Deploying vivid

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1. Postal, Ripcord Games (Running with Scissors 1997).
media representations of volatile, psychotic employees, ADA critics suggest that
the Act has deprived employers of the ability to protect employees from criminal
assault by dangerous co-workers. Riding the coattails of this account, and in
circular fashion both lending authority to, and deriving epistemological authority
from it, is a burgeoning workplace violence prevention industry composed of
employment defense law firms, security experts, and consultants who counsel
employers on how to identify and remove potentially violent workers in the
“hands-tied” era of the ADA.3 This rapidly expanding violence prevention
industry advances bold claims about the enormity and severity of the problem,
reinforcing a key premise of ADA critics that the ADA unreasonably subordinates
public safety interests to the “special rights” of the disabled.

This fear-inducing account is predicated on two assumptions: first, that
worker-on-worker violence is a significant problem; and second, that it can be
reduced or prevented through the identification and exclusion of “high risk”
workers. Significantly, however, data collected on workplace violence and
empirical research on prediction of violence contradict both of these
claims.4 The incidence of worker-on-worker violence is infinitesimally small.5 Violent acts by
“pathogenic” employees are trivial contributors to workplace morbidity and
mortality, in stark contrast to injuries and deaths caused by environmental
conditions, from which attention is diverted by the new workplace violence
account.6

Undeterred by a lack of empirical support for the claim that worker-on-worker
violence constitutes an important social problem, the workplace violence industry
advertises its technical prowess in identifying potentially dangerous workers.7 In
doing so, it ignores a large body of empirical research establishing that prediction
of violence, even by skilled clinicians in highly controlled in-patient settings, is
dubious at best.8 In the hands of employers, the “tools” for predicting violence by
individuals operating within a wide array of uncontrolled situational contexts have
even less prognostic validity or reliability.

Given the crude methods available for purported prediction of violence, it is
unsurprising that individuals with psychiatric disabilities face intensified scrutiny
and efforts based on diagnostic categories. Claims that individuals with psychiatric
disabilities harbor the potential for violence tap into a deep reservoir of trans-
historical fear and stigma-induced stereotyping that enactment of the ADA did little
to drain.9 That individuals with psychiatric disabilities find themselves at the center
of the political/judicial debate over the ADA owes as much to this historical legacy

3. See infra notes 32-33, 35.
4. See infra Part III.
5. See infra Part III.A.-B.
6. See infra notes 75-76 and accompanying text.
7. See infra notes 35, 37-38 and accompanying text.
8. See infra Part III.C.
9. See generally DEVIANCENAND MEDICALIZATION: FROM BADNESS TO SICKNESS 38-72 (Peter Conrad & Joseph
as it does to the discursive influence of the new workplace violence prevention industry. One can observe these old fears and stereotypes, and the junk science they animate, operating in a variety of legal contexts, including trends toward permitting the introduction of propensity evidence in sexual assault cases, the enactment of notification schemes such as “Megan’s Law,” and capital sentencing standards that permit introduction of expert testimony predicting future dangerousness.

The heightened fear of employee violence that permeates the new workplace violence account and is aggressively marketed to employers, freights interactions between employers and employees. For example, in 1998 a postal worker was fired merely for telling co-workers about his nightmares that involved a shooting at work—a shooting in which he, himself, was a victim.10 This same fear of lurking violence has prompted companies to hire consultants as surrogates to notify employees of termination.11 In this social climate, cases alleging mistreatment, discrimination and outright exclusion based on fear of violence are beginning to find their way into the courts. On the whole, ADA claims arising out of these situations have received a chilly reception. Predictably, courts have proved hospitable to employers, mirroring conventional biases against individuals with psychiatric disabilities, and reflecting the new workplace violence account.

Part One of this article examines the cultural emergence of the archetype of the disgruntled postal worker. Part Two then discusses its appropriation by the new workplace violence prevention industry. Part Three presents an account of the reality of workplace violence. Part Four comments on the contribution of both to the backlash against the ADA. In sum, this paper argues that the claim that potentially dangerous workers can be identified and excluded from the workplace is a sham. The “tools” employed by the new workplace violence industry operate not to identify and exclude potentially dangerous individuals, but rather to identify and exclude individuals with psychiatric disabilities.

II.
THE SOCIAL CONSTRUCTION OF WORKPLACE VIOLENCE

Workplace violence, now frequently identified as “epidemic,” received scant attention until 1987.12 Indeed, the phrase “violence in the workplace” did not appear in major media outlets until 1986.13 In the past, occupational health and

10. See generally Georgia Pabst, Man Fired over Dreams Presaging Shooting, Postal Service says his Dreams. Gestures Threatened Others, MILWAUKEE J. SENT., Dec. 15, 1998, at A1. Ironically, the dreams turned out to be correct; another worker did in fact attack that office.
safety professionals focused on detecting and correcting unsafe conditions. The Occupational Health and Safety Act of 1970 was largely enacted in response to increasing injury rates in manufacturing industries in the 1960s. Thus, regulations promulgated under the Act address myriad environmental dangers, from unsafe equipment to exposure limits for toxic substances, but omit mention of workplace violence as a locus of workplace safety concern. Similarly, the National Institute for Occupational Safety and Health ("NIOSH") did not begin to address assault related injuries in the workplace until the late 1980s. These regulatory priorities accurately reflected the dominant contribution of environmental factors to deaths, injury and disease on the job, from asbestos-induced deaths from mesothelioma to repetitive injuries caused by poor ergonomic design. Unsafe conditions resulted in 2,516 deaths and roughly 3 million injuries in 1997. That workplace violence was not on OSHA's or NIOSH's radar screen is therefore understandable.

In the late 1980s and early 1990s, however, a series of sensational murders at U.S. Postal Service branches seized the national headlines. In August 1986, a part-time postal worker, Patrick Sherrill, killed 14 co-workers at a post office in Edmond, Oklahoma. In the words of one workplace violence consultant: "This watershed event fixed a seemingly unalterable course toward increased violence in the working environment." Interestingly, however, media coverage of the post office killings initially focused on harsh conditions and abusive management in the agency itself. But after another sensational incident at a post office in Royal Oak, Michigan in 1991, and a separate set of incidents occurring on the same day in 1993, the "disgruntled" or "deranged" worker became the focus of media accounts. At Congressional hearings following these events, the Postal Service promised to...
begin screening applicants in order to prevent violence.\textsuperscript{22}

Following these incidents, the “dangerous co-worker” emerged as a progressively distinct and increasingly recognizable category in the taxonomy of social violence. Rather than drawing attention to the dehumanizing conditions and speed-ups that already exacted a huge toll from postal employees, injuring vast numbers of them, the post office killings fueled a growing focus on worker-on-worker violence. This in turn led to an implicit construction of the individual worker, rather than the conditions in which work was conducted, as the primary locus of occupational risk.

In the late 1980s and early 1990s government agencies such as NIOSH, as well as individual epidemiologists at a variety of universities and research institutes, began directing resources and attention to the study of workplace violence.\textsuperscript{23} During the early 1990s, Congressional hearings were held on the post office incidents.\textsuperscript{24}

At the same time, the popular media began assimilating the post office incidents into movies, sitcoms, and other narratives. Newspapers and television portrayals featured employees with grudges who suddenly erupted in murderous rages.\textsuperscript{25} A recent episode of \textit{King of the Hill}, for example, depicts a fired drug addict returning to his former job.\textsuperscript{26} Someone rushes into the office and announces “Leon’s in the parking lot . . . and he looks disgruntled.” Expecting a volley of bullets, everyone cowers under their desks or behind other pieces of office furniture. Notably, instead of a gun, Leon returns with a social worker and the show proceeds to focus on the demands for accommodation the social worker makes. The episode is but one example of the sheer evocative power of the postal worker incidents which generated the term “going postal.”\textsuperscript{27}

\textbf{22.} \textit{See Postal Operations and Services Violence in the United States Postal Service, 1993: Before the Joint Hearing of the U.S. House of Representatives Subcomm. on Census, Statistics and Postal Personnel and the Subcomm. on Postal Operations and Services, Comm. on Postal Operations and Civil Service, (1993) (statement of Marvin Runyon, Chief Executive Officer and Postmaster General of the United States). In fact, the homicide rate for postal workers from 1980 to 1989 was lower than the national average. \textit{See NIOSH, U.S. Dep’t of Health & Human Serv’s Current Intelligence Bulletin, Violence in the Workplace (1996) (visited Feb. 29, 2000) <http://www.cdc.gov/niosh/violintr.html> [hereinafter, NIOSH, Violence in the Workplace]. The comparatively low homicide rate for Postal Service employees is even more noteworthy given that the agency employs roughly 840,000 people nationwide. \textit{See George Watson, Signs Were There Despite Indications of Medical Illness, Suspect in Shootings Received No Help, HARTFORD COURANT, Sept. 19, 1998, at A1. It is even more remarkable in light of the fact that many of Postal Service positions involve risk factors for attacks from non-employees, such as robberies. \textit{See discussion infra Part II. A.}}

\textbf{23.} \textit{See Kraus & McArthur, supra note 12, at 202.}

\textbf{24.} \textit{See Joint Hearings, supra note 23 (statement of Marvin Runyon); Bill McAllister, Runyon Vows Efforts to Curb Violence at Post Offices, WASH. POST, Aug. 6, 1993, at A19.}

\textbf{25.} \textit{See generally Lopez, supra note 2, at M4 (“Workplace violence has become such a powerful concern in recent years that a phrase, now almost a cliché, has been added to the office lexicon: ‘going postal’.“); De Tran, Slayings Latest In Workplace Assaults Violence, L.A. TIMES, July 9, 1993, at A26 (“More people in general in the country are using the workplace as a site to vent out their rage,” said Michael Mantell, a San Diego specialist in police psychology.”); Chan, supra note 11, at E1 (“a series of bone chilling headlines: ‘Terror at 1 Market Plaza . . . ’ ‘Insurance Agent shoots 5 . . . ’ ‘Postal Worker kills 14 . . . ’.”).}

\textbf{26.} \textit{King of the Hill: Junkie Business (FOX television broadcast, Apr. 26, 1998).}

\textbf{27.} The term first appears in newspapers in 1993. \textit{See Vick, supra note 2. But the term has gained wide usage}
After the major motion picture *Clueless* popularized the phrase “going postal,” it gained increasing currency in newspapers across the country. The video game “Postal” further extends its cultural influence. Through repetition, sensational reports of isolated incidents, and incorporation into a wide variety of entertainment media, the image of the violent co-worker, poised to explode into a homicidal rage, came to function as a *leitmotif* in discussions of violence at the workplace.

Who “goes postal?” Media accounts of workplace violence construct varying profiles of the employee with a strong predisposition toward violence. This individual “overreacts” to perceived injustice; he has few friends or apparent interests and seems “strange”; he is a loner with poor social skills, some form of mental illness, and a fascination with weapons. Through this stereotype, specific demographic and personality traits and more broadly, certain psychiatric conditions, are tightly linked to violence.

### III. THE EMERGENCE OF THE WORKPLACE VIOLENCE PREVENTION INDUSTRY

The stereotyped image of the disgruntled, potentially violent worker has not remained confined to media depictions. A simple internet search turns up myriad web sites sponsored by lawyers, consultants, and other professional service providers specializing in the supposed prevention of workplace violence. Large...
defense-side labor and employment law firms conduct trainings on workplace violence and advertise their availability for consultation on prevention strategies, appropriating popular accounts in their literature, with seminar titles such as "Slackers, Hackers and Pistol Packers." Practice guides and continuing legal education materials introduce attorneys to the "growing problem" of workplace violence, and advise on strategies for navigating among ostensibly conflicting obligations, such as protecting employees from violence by co-workers versus compliance with the ADA. A newly constituted army of workplace violence "experts" market specialized tools for identifying dangerous workers. Lending support to the clamor are organizations ranging from NIOSH to state and local law enforcement agencies. Through their publications, these organizations lend an aura of governmental validation to the claim that worker-on-worker violence

31. Landels Ripley and Diamond, Slackers Hackers and Pistol Packers: How to Avoid Hiring the Wrong Person, Working Breakfast Series (Sept. 18, 1998); see also Law Offices of Rebecca A. Speer, What Employers Need to Know About Workplace Violence (visited Feb. 20, 2000), available at <http://www.workplacelaw.com> (providing information to "encourage employers to learn about workplace violence and the positive strategies they can adopt to meet critical legal obligations and business objectives related to the problem.").


34. See NIOSH, Violence in the Workplace, supra note 22, at 5; see also OSHA, U.S. Department of Labor, Workplace Violence Awareness and Prevention: Facts and Information (visited Jan 19, 1999), available at <http://www.osha-slc.gov/workplace_violence/workplaceViolence.Patl.html>. Importantly, NIOSH carefully distinguishes co-worker violence from the "epidemic" of general assaults and homicide. "Unfortunately, sensational acts of co-worker violence (which form only a small part of the problem) are often emphasized by the media to the exclusion of the almost daily killings of taxicab drivers, convenience store clerks and other retail workers, security guards, and police officers. These deaths often go virtually unnoticed, yet their numbers are staggering . . . ." Id. at <http://www.edc.gov/niOSH/violintr.html>.

PSYCHIATRIC DISABILITIES

represents a problem of epidemic proportions.

Many of these professional services recommend the use of particular checklists of behavioral indicators of future employee violence. For example, one recent review listed the following indicators of violence potential: (i) erratic behavior; (ii) behaving as if upset or under stress; (iii) making threats or engaging in threatening behaviors; (iv) bringing a dangerous instrumentality to the work premises; or (v) an off-duty commission of a violent act. Suggested tools for identifying dangerousness, a state assumed to be hypostatic and context-independent, include such traditional tools as clinical assessments and psychological profiling tests, but also less familiar methods, including handwriting analysis. With the advent of less costly DNA testing, the ability to perform testing on biological specimens such as hair and saliva, and the proliferation of behavioral genetic research linking genetic loci to impulsive and aggressive behavior, the arsenal of tools hawked to employers for imagined uses is likely to expand.

The literature, advertising, and services provided by the new workplace violence prevention industry reveal several distinct themes. First, much of the literature disseminated by the new workplace violence prevention industry begins by framing the problem as an epidemic. As one workplace violence consulting firm recently claimed, “[v]iolence in the workplace has become the occupational health and safety issue of the 1990s. As a problem, it only will worsen as sweeping social and economic changes take the nation into the next century.” A recent survey by a security company concluded that “executives are realizing it’s the employees themselves who increasingly are the threat.”

Second, in these accounts, workplace violence is depicted as an employee “going postal.” For example, one website asserts that “[a] disgruntled employee may return to his or her former place of employment after being terminated and commit murder.” Such marketing materials transform accounts of random violence by disgruntled workers into apparently commonplace occurrences for which every employer should prepare. For example, another website focusing on workplace violence notes that after the Oklahoma post office incident, “[s]uddenly workplace violence became a problem that could occur anywhere and anytime.”

36. Janet E. Goldberg, Employees with Mental and Emotional Problems, 24 STETSON L. REV. 201, 234 n.231 (1994); Baron, supra note 21, at 338-341.
38. See Brunner et al., Abnormal Behavior Associated with a Point Mutation in the Structural Gene for Monoamine Oxidase A, SCIENCE 578, 578-80 (Oct. 22, 1993).
40. Vrana, supra note 29 (referring to survey by Pinkerton).
41. See generally id.
The commodity value of disseminated fear is obvious. Reshaping perceptions of extraordinary events by representing them as commonplace increases the perceived need for professional services, if only to address liability concerns.44

Third, the literature relies on a particular constitutive construction of the potentially violent employee. Such employees are generally male, white, over 35 years old, and have psychiatric and/or substance abuse problems, poor social skills, and a fascination with weapons.45 Another account presents a similar profile of the dangerous employee:

A middle-aged man who is a chronic complainer, distrustful and rigid, is the typical disgruntled employee, studies have shown. Other signs of danger are: constantly blames problems on others; carrying a concealed weapon or flashing a weapon to test other employees’ reactions; paranoid behavior; seems desperate due to recent family, financial or other personal problems; interest in semiautomatic or automatic weapons; moral righteousness and the belief that the company is not following its rules and procedures.46

Often, the profiling is more reductionist, directly inviting surveillance of individuals with psychiatric conditions.47 The informal checklists of violence indicators offered by workplace violence “experts” often degenerate into a focus on behaviors assumed to indicate underlying mental health problems. For example, one organization posted the following description on a web site: “[t]he physiological causes of workplace violence are also the result of employees who have experienced emotional, physical, or sexual abuse from childhood. Employees may bring their ‘baggage’ into the workplace. The manager or supervisor assumes the parental role and the co-workers may resemble siblings.”48

Fourth, violence prevention entrepreneurs offer classifications and heuristic strategies for screening out the potentially violent employee. These range from the unsophisticated and intuitive, such as anecdotal stories told by retired police officers from which lists of informal indicators are extracted,49 to the ostensibly


45. See, e.g., Robinson, supra note 30, at <http://www.smartbiz.com/sbs/columns/robin1.htm>; Illinois State Police, supra note 35, at <http://www.state.il.us/ISP/viewkpklc/vwppl.htm> (listing psychosis, depression, and personality disorders, including personality traits, as indicators of violence potential). The Illinois State Police exempts “hunters or gun hobbyists” from characteristics of “interest or obsession with weapons.” Id. at <http://www.state.il.us/ISP/viewkpklc/vwppl.htm>.

46. Vrana, supra note 29.

47. See generally Sentry Insurance, Workplace Violence (visited January 1, 1999) <http://www.sentry.com/workviol.htm> (“psychological disorders”); Illinois State Police, Violence in the Workplace: Abnormal Behavior (last modified Aug. 25, 1997) <wwww.state.il.us/ISP/viewkplc/vwppl.htm> (suggesting looking for emotional difficulties as indicator of abnormal behavior, and listing mental illness as a cause for abnormal behavior). See, e.g., Sample, supra note 44, at <http://www.sampleassociates.com/newsletters/mar97.html> (listing “5ignificant changes in behavior (mood swings, outbursts, insubordination, paranoia))’; Baron, supra note 21, at 339-340 (listing “[s]evere personality disorders” and “psychotic and/or paranoid behavior” as indicators); Goldberg, supra note 37, at 234 n.231.


49. See Chan, supra note 11, at El.
sophisticated, such as clinical assessments by psychologists or psychological personality tests.\textsuperscript{50}

In summary, following a small number of incidents in the late 1980s and early 1990s, sensational news stories and the subsequent assimilation of the stories into a wide range of media narratives generated a particular account of workplace violence. The vividness of the post office incidents and their commercial fictionalization have led people to perceive that worker-on-worker violence poses a high level of occupational risk. The fear accompanying this heightened perception of risk has in turn been exploited by an industry whose advertisements and advice to employers not only capitalized upon but accentuated and further disseminated the new workplace violence account. The account drew and continues to draw attention away from other more significant sources of occupational mortality and morbidity while generating a perceived need for the specialized services of the new workplace violence entrepreneurs. As Part IV discusses, this account also plays a role in the weakening and de-legitimizing of the Americans with Disabilities Act.

IV.
THE REALITY OF WORKPLACE VIOLENCE

Characterizations of workplace violence by the new workplace violence entrepreneurs frequently begin with statistical references reflecting the scope or scale of the workplace violence problem. For example, these descriptions may begin by noting that homicide has become the second leading cause of workplace death for men, and the leading cause of workplace death for women.\textsuperscript{51} Other accounts may refer to the costs associated with workplace violence.\textsuperscript{52} These statistics are often accompanied by images or apocryphal accounts of a current or former worker "going postal."\textsuperscript{53} The juxtaposition of the statistics with particular images or stories thus creates an impression in the mind of the reader that the statistics cited refer specifically to worker-on-worker violence. This, however, is not the case.

\textsuperscript{50} See generally Workplace Violence Research Institute, supra note 30 (offering "Symptom Recognition Workshop" as an element of workplace violence prevention program); Hilson Research, Inc., 1999 Catalog 4 (1999).

\textsuperscript{51} See, e.g., Maiuro, supra note 29, at A37 ("[M]urder has become the No. 1 cause of death for women on the job. For men, who traditionally suffer much mightier rates of death due to accidental injuries associated with physical labor, it is now ranked third, after machine-related deaths and driving accidents."); see also Robinson, supra note 30, at <http://www.smartbiz.com/sbs/columns/robin1.htm>.

\textsuperscript{52} Workplace violence marketing materials frequently cite total costs to the national economy in the billions of dollars per year. See, e.g., Guardsmark advertisement, N.Y. TIMES, available at <http://www.guardsmark.com>; Peerless Video, Call to Action: Managing Violence in the Workplace <http://www.peerless-video.com/call.htm>; Crisis Solutions, supra note 31 at <http://www.crisissolutions.com>. Such exaggerated claims rarely cite any support, but in all likelihood come from definitions of workplace violence broad enough to cover personal and property theft. See infra Part III.A.

\textsuperscript{53} See supra notes 1-2 and accompanying text.
A. The Reality of Workplace Homicide

The category of “homicide” reflected in the statistics cited by the new workplace violence entrepreneurs includes not only deaths caused by co-workers, but also deaths caused by customers, intruders, and other outsiders. It includes, for example, deaths of convenience store clerks and taxicab drivers in connection with armed robberies.

Despite the breadth of this category, the actual number of homicides at the workplace is small, particularly given the significant and increasing amount of time that employees spend at work. 1996 statistics reveal that nationally there are slightly more than 20,000 homicides per year. 54 In 1997, the most recent year for which detailed statistics are available, workplace homicides accounted for only 856 homicides, or roughly 4.25% of the total. 55

More importantly, however, workplace homicide accounts for only 14% of all deaths related to employment. 56 The leading cause of work related mortality, accounting for 42% of the total, is vehicular accidents—not surprising when one considers that traffic accidents accounted for roughly 44,000 deaths in 1996. 57 Deaths during crimes perpetrated by non-employees accounted for the overwhelming majority of those roughly 856 work-related homicides. 58 The most recent figures indicate that fully 85% of workplace homicides occur in connection with robberies or other crimes perpetrated by outsiders. 59 Only 7% of all workplace homicides are perpetrated by current or former employees. 60 Accordingly, in 1997, only 56 of the 856 work-related homicides, or even more starkly contextualized, only 56 of the approximately 20,000 nationwide homicides, were perpetrated by employees or former employees at work. 61

Thus, these statistics reveal that workplace homicide is an uncommon occurrence. Homicides by employees or former employees are vastly less common still. Customer and stranger violence presents a far greater homicide risk than does


55. See BUREAU OF LABOR STATISTICS, supra note 19, at <http://www.bls.gov/special.requests/ocwco/oshwc/cfoi/cfnr0004.txt>. This figure is down from the average of 1,032 from 1992-96.

56. See id. at Table 1.


58. See BUREAU OF LABOR STATISTICS, supra note 19, at <http://www.bls.gov/special.requests/ocwco/oshwc/cfoi/cfnr0004.txt>. BLS statistics count death at the hands of a co-worker or former co-worker separately from death by robbery or other crimes even if the incidents overlap. Telephone Interview with Guy Toscano, BLS Census of Fatal Occupational Injuries (January 1999).

59. See BUREAU OF LABOR STATISTICS, supra note 19, at <http://www.bls.gov/special.requests/ocwco/oshwc/cfoi/cfnr0004.txt>. This figure is up from 1995 when crimes perpetrated by outsiders accounted for seventy-five percent of workplace homicides. See Guy Toscano, Workplace Violence: An Analysis of Bureau of Labor Statistics Data, 11 OCCUPATIONAL MEDICINE: STATE OF THE ART REVIEWS 227 (April-June 1996). NIOSH also estimated that 73-82% of workplace homicides are due to robbery and crimes by outsiders. NIOSH, supra note 34.

60. See BUREAU OF LABOR STATISTICS, supra note 19, at <http://www.bls.gov/special.requests/ocwco/oshwc/cfoi/cfnr0004.txt>.

61. See id.
violence by employees or former employees. Moreover, these risks are
concentrated in certain industries, with retail, service, transportation, and public
utilities industries accounting for over 75% of workplace homicides in 1997.62
Measures directed at protecting employees against crime by customers, intruders
and other strangers would have the greatest likelihood of reducing the toll from
work-related homicide. In fact, Southland Corporation (the operator of 7-Eleven
Stores) and Roy Rogers restaurants, both establishments at high risk for crime
victimization, have experienced great success in reducing workplace homicide by
focusing prevention efforts on robbery.63 In spite of this evidence, the new
workplace violence account locates the source of homicide risk in workers
themselves, not in customers or strangers.

B. The Reality of Assault in the Workplace

One can observe in the new workplace violence account a similar
misconstruction of the sources of risk of assault.64 The Bureau of Labor Statistics
logged 18,538 non-fatal workplace assaults in 1997.65 This should first be
compared to the 1.91 million aggravated assaults and 1.24 million simple assaults
with an injury reported by the Bureau of Justice Statistics for 1997.66 Moreover, the
number of assaults specifically attributable to current and former employees is even
smaller, accounting for only 7% of employment-related assaults.67 Visitors and
intruders, such as robbers, inflicted 33% of these assaults, and health care patients
were responsible for another 45%.68 As one might expect, service sector

62. See NIOSH, Violence in the Workplace, supra note 22. Workplace homicides by industry and sex are
distributed as follows: for male workers, 36.1% occur in retail trade, 16% in the service industry, 10.5% are in public
administration, and 10.6% in transportation/public utilities. The percentage of homicides for women in the same sectors
are 45.5%, 22.2%, 2.9% and 3.8%. Id.
REVIEWS 349 (April-June 1996).
64. See Braverman & Braverman, supra note 39 (after recognizing that worker on worker violence is only a
fraction of the problem, the article transitions to a discussion of the dangerous co-worker, citing the NW Insurance
Survey); Vrana, supra note 29 (“Although deaths are relatively rare, reports of anger and hostility in the workplace are
on the rise.”).
65. See BUREAU OF LABOR STATISTICS, NATIONAL CENSUS OF NON-FATAL OCCUPATIONAL INJURIES. As with
workplace homicides, this figure is down from 21,255 in 1993. See Toscano, supra note 59, at 233. NIOSH similarly
Bureau of Labor Statistics (“BLS”) non-fatall assault figures cannot be directly compared to workplace homicide rates
in the Census of Fatal Occupational Injuries since non-fatall assaults exclude self-employed and government workers
and the figures are compiled from entirely distinct sources. BLS compiles nonfatal assault figures from reports
required under OSHA, and therefore the statistics include only assaults resulting in days away from work. By omitting
minor, non-injury causing incidents, the data may not be an accurate representation of all assaults. They do, however,
provide data on the injury-causing assaults that motivate the new workplace violence account. Toscano, supra note 59.
Id. This figure includes any type of verbal assault as well as the type of injury-producing attack that the workplace
violence model posits.
68. See BUREAU OF LABOR STATISTICS, supra note 20, at <http://www.bls.gov/news.release/osh.nws.htm>; see
employees, such as those working as nurses' aides and security guards, were the victims of 52% of assaults. Managerial and professional employees chiefly in professions such as nursing and social work were victims of 21% of the assaults.

Most current accounts of workplace violence fail to address these facts. They attempt instead to bolster their claims by relying on the Bureau of Justice Statistics Criminal Victimization Survey that reported approximately 1.5 million workplace assaults per year. The high estimate of total assaults that this survey obtained is explained by the inclusion of simple assault not resulting in any injury and from the inclusion of many forms of sexual harassment. While high rates of low-level aggression and sexual harassment have undeniable importance, and reveal much about the daily lives of employees and the appropriate targets of prevention strategies, they plainly constitute different phenomena than that represented in the new workplace violence account.

As might be expected, none of the studies of violence that measure deaths or injuries included violence inflicted by employers, violence that might be properly classifiable as homicide or assault. The recent immolation of four employees at Tosco's Avon, California refinery, which appears to have resulted from high-level managers' refusal to permit workers to shut down an unsafe operation involving volatile chemicals, is one example of uncounted corporate homicide. Also omitted in these estimates of "assault" are injuries caused by managers who force employees to work with dangerous equipment or machinery.

In summary, these depictions reveal that the new workplace violence account is premised on the claim that workplace violence, specifically worker-on-worker violence, is "epidemic" in the United States. The claim is bolstered by statistics reflecting apparently high levels of such violence and promotional literature generally associating these statistics with apocryphal accounts of worker-on-worker violence. This presentation obscures the fact that worker-on-worker violence represents but a minute portion of total workplace mortality or morbidity risk, and
draws attention away from more substantial sources of risk, such as traditionally defined unsafe working conditions. Indeed, even the Government reports that the workplace violence industry cites to support its claims, are careful to specify that the problem of workplace violence derives overwhelmingly from companies failing to protect workers from outsider crime. A recent NIOSH report observed, "[u]nfortunately, sensational acts of co-worker violence (which form only a small part of the problem) are often emphasized by the media to the exclusion of the almost daily killings of taxicab drivers, convenience store clerks and other retail workers, security guards, and police officers. These deaths often go virtually unnoticed, yet their numbers are staggering . . . ."

Nevertheless, in typical fashion the new workplace violence entrepreneurs frequently claim that, through the use of their psychological profiling and related products, they can help employers identify and exclude those employees or applicants who pose a heightened risk of future violence.76 For example, one top personality testing service proclaims: "Inappropriate aggressive behavior and employee violence have become major concerns for employers throughout the United States. The IS2™ is used to aid in the identification of individuals who may tend to disregard rules and/or societal norms."77 Another employment consultant offers to "identify early warning signs and potentially dangerous personalities" and to "[a]ssess violent employees or managers."78 Still another offers the services of its "Hostile Employee Suppression Unit."79 These services confidently present profiles of violent employees such as the following:

Individuals who commit violence tend to fit a pattern . . . Often, they are loners and the main focus of their life is their job. Perpetrators may exhibit a fascination with weapons and the occurrence of violence in other workplaces. Other warning signs may include: previous threats or violent behavior; verbal abuse, intimidation of co-workers and harassing phone calls; holding grudges, inability to handle criticism, and wishing harm upon others; romantic obsession with a co-worker or manager; marital problems, psychological disorders, alcohol or drug abuse.80

While some profiles of the dangerous employee include behavioral factors such as past violence and threats, they are fundamentally based on the assumption that people with mental disturbance are potentially violent. Thus, almost all of the

75. NIOSH, supra note 35 at <http://www.cdc.gov/niosh/violintr.html>
77. Hilson Research, Inc., 1999 CATALOG 4 (1999). The catalog also assures employers that the Inwald Survey 2 ("IS2™") "is in compliance with the Americans with Disabilities Act (ADA) and the Civil Rights Act (CRA). It can be administered prior to a conditional job offer." Id. Only in the IS2™ Sample Report, does the company clarify the limitations of the test. "This report is intended to be used as an aid in assessing an individual's suitability for employment. It is not intended as a substitute for a pre-employment interview; as a final evaluative report regarding a candidate's ultimate job suitability, or as a sole source for denying employment to an applicant." Hilson Research, Inc., IS2™ Sample Report, (Nov. 11, 1994).
78. Safe@Work, supra note 33, at <http://www.careerlab.com/safework.htm>.
profiles include the general category of "psychological disorders" as a major indicator of violence potential and often simply focus on traits and behaviors assumed to be associated with mental disturbance, such as "paranoid style of thinking."\textsuperscript{41}

C. Lack of Data That Can Predict Workplace Violence

In spite of the many claims made by workplace violence entrepreneurs, research has identified few verifiable correlates of future violence. Those that have been identified—primarily history of violence, substance abuse, and demographic factors—are largely exogenous;\textsuperscript{82} that is, they lie primarily outside the individual. Even this limited body of actuarial correlates of violence bears little relation to the kinds of behavioral or diagnostic markers of the supposedly violent "personality types" generally included in the instruments advertised by the new workplace violence entrepreneurs. In particular, available research presents no valid basis for concluding that an individual who "act[s] strangely" or who has diagnosed psychiatric conditions poses any greater risk of future violence than others in the general population.\textsuperscript{83}

Research has failed to establish that psychiatric disorder \textit{per se} is a dominating risk factor for future violence.\textsuperscript{84} The existing limited research on this issue indicates that only serious psychiatric disorder is linked to violence and then, only in combination with substance abuse.\textsuperscript{85} Only certain psychiatric conditions, such as schizophrenia, major depression, and bi-polar disorder—in combination

\begin{footnotesize}
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  \item[81.] See Sample, \textit{supra} note 45, at <http://www.sampleassociates.com/newsletters/mar97.html> (pointing to "significant changes in behavior (mood swings, outbursts, insubordination, paranoia)" as indicators of potential violence); Crisis Solutions, \textit{supra} note 31, at <http://www.crisissolutions.com> ("Whether violence results during the commission of a crime, is caused by a disgruntled or deranged present or former employee ... ."); Sentry Insurance, \textit{supra} note 47, at <http://www.sentry.com/workviol.htm> ("warning signs may include . . . marital problems, psychological disorders, alcohol or drug abuse.").
  
  \item[82.] See John Monahan, \textit{Dangerous and Violent Behavior}, 1 \textit{OCCUPATIONAL MEDICINE: STATE OF THE ART REVIEWS} 559, 566 (Oct.-Dec. 1986). Monahan notes that mental disorder does \textit{not} in the aggregate correlate with violent behavior. Rather the correlates of crime among the mentally disordered appear identical to those among any other group. They include (1) age, (2) gender, (3) race, (4) social class, and (5) prior criminality. Similarly, the correlates of mental disorder among criminal offenders mirror those in other populations: they tend to be (1) age, (2) social class, and (3) previous disorder.
  
  \item[83.] The relevance of such indicators to the individual in question is precisely the issue under the ADA. See infra, Part IV, discussing direct threat standard under the ADA articulated in \textit{School Board of Nassau v. Arline}, 480 U.S. 273 (1987).
  
  \item[84.] See John Monahan, \textit{The Scientific Status of Research on Clinical and Actuarial Predictions of Violence}, in \textit{SOCIAL AND BEHAVIORAL SCIENCES} (1998). In the past few years, a few studies have indicated that there may indeed be some connection between mental disturbance and violence potential. \textit{Id.} Monahan points out, however, that "demonstrating the existence of a statistically significant relationship between mental disorder and violence is one thing, demonstrating the legal and policy significance of the magnitude of that relationship is another." \textit{Id.}
  
  \item[85.] See Jeffrey W. Swanson, et al., \textit{Mental Disorder, Substance Abuse, and Community Violence: An Epidemiological Approach}, \textit{VIOLENCE AND MENTAL DISORDER} 109-10 (John Monahan & Henry J. Steadman eds., 1994). ("Since violence itself was a statistically rare event, the \textit{absolute risk} of violence in the presence of mental illness remained low—about 7% in the course of a year—even while the \textit{relative risk} was about three times as high as in the nondisordered population. On the other hand, having a substance abuse diagnosis was associated with a much higher risk of violence in both absolute and relative terms."). \textit{Id.} at 112.
\end{itemize}
\end{footnotesize}
with the additional factor of substance abuse—appear associated with a heightened risk of violence.\textsuperscript{86} It must be emphasized that even in this narrow class of diagnostic categories linked to small increases in violence risk, the increased risk is confined to individuals whose psychiatric conditions lie at the far end of the severity spectrum.\textsuperscript{87} Individuals with mild or moderate symptomology do not differ significantly from the normal population in their rate of violence.\textsuperscript{88} Thus, only when particular psychiatric disorders of particularly high severity are combined with substance abuse does psychiatric disorder correlate significantly with violent behavior. Such individuals are exceedingly unlikely to have gained employment or even to live in unsupervised settings.

One of the preeminent researchers on the prediction of violence recently summarized the state of this evidence as follows:

By all indications, the great majority of people who are currently disordered . . . are not violent. None of the data give any support to the sensationalized caricature of the mentally disordered served up by the media, the shunning of former patients by employers and neighbors in the community, or 'lock 'em all up' laws proposed by politicians pandering to public fears. The policy implications of mental disorder as a risk factor for violent behavior can be understood only in relative terms. Compared to the magnitude of risk associated with the combination of male gender, young age, and lower socioeconomic status, for example, the risk of violence presented by mental disorder is modest. Compared to the magnitude of risk associated with alcoholism and other drug abuse, the risk associated with 'major' mental disorders such as schizophrenia and affective disorder is modest indeed. Clearly, mental health status makes at best a trivial contribution to the overall level of violence in society.\textsuperscript{89}

Moreover, if even moderate levels of psychiatric disorder are not associated with an increased likelihood of future violence, behavioral traits can be expected to have even less predictive acuity. Nonetheless, undesirable behavioral traits prompt most referrals of workers to industrial psychologists for fitness-for-duty evaluations.\textsuperscript{90} Assessment of behavioral traits is also recommended by many of the new workplace violence entrepreneurs as a screening device.\textsuperscript{91} Neither specific behavioral traits, nor histories of psychiatric diagnosis or treatment have heuristic

\textsuperscript{86} See Monahan, supra note 85. But as the authors of this preliminary study note, the association of these symptoms with violence, "both in an absolute sense and compared with other known causes and correlates of violence . . . is also modest. . . . Finally, our results and their theoretical underpinnings challenge the unfortunate stereotyping of mental patients. Most mental patients do not experience the specific psychotic symptoms we identified as risks for violent behavior."); see also Bruce G. Link & Ann Stueve, Psychotic Symptoms and the Violent/Illegal Behavior of Mental Patients Compared to Community Controls, VIOLENCE AND MENTAL DISORDER 156 (John Monahan & Henry J. Steadman eds., 1994).

\textsuperscript{87} See Link and Stueve, supra note 87, at 149-50.

\textsuperscript{88} Id. at 150.

\textsuperscript{89} Monahan, supra note 85.


value in predicting future violence in a workplace environment.

The connection between psychiatric disability and the propensity for violence remains poorly understood and so lacking in clinical utility that studies of clinical predictions have demonstrated these indicators to be accurate less than half the time. These dismal figures have not improved in the past thirty years. In fact, the inaccuracy of clinical predictions of dangerousness received widespread attention in Barefoot v. Estelle, a 1983 United States Supreme Court case challenging the admissibility of predictions of dangerousness in capital sentencing in Texas. In its amicus curiae brief for Barefoot, the American Psychiatric Association contended that “two out of three predictions of long-term future violence made by psychiatrists are wrong,” and that “a layman with access to relevant statistics can do at least as well and possibly better” than psychiatrists in making such predictions.

A highly influential 1988 article in the journal Science presented an equally troubling picture of clinical predictions of violence. The study revealed that predictions of this sort were riddled with error. The errors derived from serious disagreement among clinicians regarding the assessment of subjects’ current status, “overpathologization,” and the subsequent failure of clinicians to achieve superior results to either laypersons or actuarial methods.

Furthermore, a 1994 study of forensic violence prediction by Robert Menzies and his colleagues demonstrated similar results. Despite the use of an “intensified and diversified assembly of prediction indices and outcome measures over an extended 6-year time frame,” Menzies determined that the accuracy of predictions concerning 162 persons remanded for forensic evaluations was “decidedly unimpressive.” In a typical finding, laypersons using a psychometric instrument outperformed chief psychiatrists in predicting future violence. Expanding on findings from a prior study, Menzies concluded that the overwhelming body of empirical evidence remains highly equivocal as to the ability to distinguish between individuals who are potentially violent and those who are not. Stated Menzies, “[Using] the best methods that we could muster . . . we were in general not able appreciably to elevate the accuracy of forensic forecasts” over those achieved in an earlier study published in 1985. Pessimistic about the possibility of gains in

92. See Monahan, supra note 85.
93. Id.
97. Id.
99. Id. at 18.
100. Id. at 19.
101. Id. at 25.
102. Id. (referring to Robert J. Menzies et al., The Dimensions of Dangerousness: Evaluating the Accuracy of Psychometric Predictions of Violence Among Forensic Patients, 9 LAW AND HUMAN BEHAVIOR 49 (1985)).
accuracy, Menzies and his colleagues struck a decidedly mordant tone in concluding that abandonment of the dangerousness construct is unlikely. In so doing, they cited recent trends toward the construct's rehabilitation, "second generation work aimed at the scientification of dangerousness" and the construct's "continuing discursive power."

These critiques encourage the conclusion that even the use of referral to a clinical psychologist for a fitness-for-duty exam is unlikely to provide information that would identify potentially violent employees with any reliable degree of accuracy, except, perhaps, in instances of severe disability unlikely to be present in the employment context. Rather, they suggest that prediction of violence is tenuous at best, even in highly controlled contexts, with institutionalized subjects diagnosed with one or more of a narrow set of severe psychiatric disorders. The claim that an individual worker's propensity for future violence can be predicted in the employment environment, using any tools, let alone the crude "tools" offered by the new workplace violence entrepreneurs, is both spurious and dangerous.

V. THE JUDICIAL RESPONSE

As we have seen, conspicuously missing from the new workplace violence account is any meaningful empirical support for its central assumptions: that workplace violence is "epidemic," that violence-prone workers are legion, and that future dangerousness can be predicted in the employment setting. The pseudo-science, reliance on stereotypes, and "intuitive epidemiology" underlying the account encourage fear-driven responses. Employers persuaded by the account can be expected to embrace and deploy screening, surveillance and preemptive exclusion, sweeping up individuals with psychiatric disabilities and even those whose behavior invites suspicion of psychiatric disability.

The legislative history and statutory purposes of the ADA stand in express conflict with the approach encouraged by this popular account. Mythology and stereotyping, such as the belief that psychiatric disability is associated with a propensity for dangerousness, were explicitly denounced in the congressional debate preceding the passage of the Act, and have been repudiated in the EEOC's interpretive guidance to its implementing regulations. In contrast to the employer

103. Id. at 25-26.

104. The House Judiciary Report, for instance reads:

"For example, an employer may not assume that a person with a mental disability, or a person who has been treated for a mental disability, poses a direct threat to others. This would be an assumption based on fear and stereotype. The purpose of creating the 'direct threat' standard is to eliminate exclusions which are not based on objective evidence about the individual involved. Thus, in the case of a person with mental illness there must be objective evidence from the person's behavior that the person has a recent history of committing overt acts or making threats which caused harm or which directly threatened harm."


105. See, 29 C.F.R. app. § 1630(2)(r). The EEOC's Interpretive Guidance to the ADA states that "Such consideration [of direct threat] must rely on objective, factual evidence—not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes—about the nature or effect of a particular disability, or of disability generally."
response encouraged by the popular account, the ADA calls for rational, scientific decision-making in the assessment of risk. It requires that an employer seeking to exclude an employee because of safety concerns demonstrate that the individual poses a direct threat to the health or safety of other individuals in the workplace. In the same respect, the EEOC has adopted the position taken by the U.S. Supreme Court in the 1987 Rehabilitation Act case, School Board of Nassau County v. Arline. According to the EEOC, in determining whether an individual constitutes a direct threat, an employer must make a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence. Specific factors that must be addressed include: (i) the duration of the risk, (ii) the likelihood that the potential harm will occur, (iii) the nature and severity of the potential harm, and (iv) the imminence of the potential harm.

The confrontation between the popular account and the rational scientific model upon which the ADA and its regulations are predicated can readily be discerned in judicial decisions interpreting the direct threat defense, as well as in cases that wrestle with issues raised by employees perceived as threatening. When a popular account is at odds in crucial respects with a prescribed judicial duty, it can be expected that judicial responses will be modulated by the popular account, particularly where, as in this area, the popular account has a strong valence and taps into a wellspring of fears.

In reconciling such dissonance in the context of psychiatric disabilities, courts have sought to recast or reinterpret case narratives in order to accommodate the pragmatic and normative concerns embedded in the new workplace violence account. They have also restructured the legal inquiry in ways that more readily accommodate and conform to the new social construction of workplace violence. In the process of performing these rearrangements, the scientific approach to risk advanced by the ADA has frequently been subordinated to a less rigorous approach characterized by overgeneralization, stereotyping, and other forms of heuristic thinking.

Perhaps the best example of these two judicial devices—recasting the case narrative and manipulating the required legal analysis, is Cody v. Cigna Healthcare. In Cody, a nurse with depression and anxiety complained to a high-level manager that her symptoms were being exacerbated by her assignment to work in parts of the City of St. Louis that she viewed as dangerous. Her direct supervisor and co-workers did not respond well to news of her disability and complaints. A cup, labeled with the phrase “alms for the sick” appeared on Cody’s desk, and she was warned that if she complained to a higher level supervisor, she would suffer negative consequences.

108. 29 C.F.R. § 1630.2(r); see also Bragdon v. Abbott, 118 S.Ct. 2196, 2210 (1998).
109. 29 C.F.R. § 1630.2(r).
110. 139 F.3d 595 (8th Cir. 1998).
111. Id. at 597.
Cody became upset in response to the cup incident, and at her supervisor’s suggestion, left work for the day. After she left, a co-worker informed the manager to whom Cody had complained that Cody had been “behaving strangely” and had spoken about carrying a gun. The co-worker expressed fear that Cody might be violent. The next morning, other co-workers told the manager that Cody had been observed “sprinkling salt in front of her cubicle to keep away evil spirits,” staring into space for lengthy periods, and “drawing pictures of sperm.” Her co-workers also reported that Cody had talked about a gun.\textsuperscript{112}

When Cody arrived for a scheduled meeting with the manager, he claimed to have seen “a noticeable bulge in her purse.”\textsuperscript{113} A local security specialist was summoned, and Cody’s purse was searched. No weapon was found. Nevertheless, the manager ordered her to see a psychologist. When Cody left the meeting to go home, she was unable to open either the exit door or the parking lot gate because, while the meeting was in progress, her security card had been deactivated. On instructions from the manager, the parking lot attendant confiscated the card. Subsequently, the manager denied Cody’s request for a transfer, causing her to decline return to her job. She then brought claims under the Americans with Disabilities Act and the Missouri Human Rights Act for workplace harassment and constructive discharge based on mental disability.\textsuperscript{114}

In its analysis, the Eighth Circuit began by examining whether Cody was a “qualified individual with a disability” entitled to protection under the Act.\textsuperscript{115} In order to establish that she met this threshold, Cody had to demonstrate that she had a substantially limiting impairment or was regarded by her employer as having one.\textsuperscript{116} The court concluded that Cody failed to meet either of these definitions. It found Cigna’s offer of paid medical leave and its imposition of the requirement that she see a psychologist, not to indicate that it believed her to be substantially impaired.\textsuperscript{117} The court interpreted security measures to which she was subjected on the day of the meeting as not indicating such belief either. Rather, according to the court, these actions provided evidence only that Cigna regarded Cody as a threat, not as disabled. “Employers,” the Eighth Circuit opined, “need to be able to use reasonable means to ascertain the cause of troubling behavior without exposing themselves to ADA claims under Sections 12112(a) and 12102(2)(C).”\textsuperscript{118}

The Cody court’s presentation of the facts obscures a remarkable subtext: an individual with serious psychiatric disabilities aggravated by her job assignment and demonized by her co-workers after she requested an accommodation. Her co-workers seem to have banded together in an effort to oust her by tormenting her and by portraying her to her supervisor as lethal. Rather than a deliberate

\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Id. at 598.
\textsuperscript{116} Id. at 598-99.
\textsuperscript{117} Id. at 599.
\textsuperscript{118} Id.
distortion, this may have been an accurate expression of their assumptions about her. Interestingly, however, it was the co-workers, not Cody, who committed aggressive, menacing acts directed at others. In the judicial domain, the story that emerges about an employer’s need to address legitimate workplace safety concerns created by a psychiatrically disabled employee buries this account of virulent stereotyping and group harassment.

Under the ADA, in order to justify the security measures taken to exclude Cody from the workplace, her employer should have been required to present scientific and/or objective evidence that she posed a “significant risk of substantial harm to the health or safety of . . . others that cannot be eliminated or reduced by reasonable accommodation.” 119 The EEOC has argued, and many courts have agreed, that employers bear the burden of proving the existence of a direct threat, or any other affirmative defenses to liability. 120 In contrast, the Eighth Circuit reconfigured the legal terrain to Cody’s detriment. The court relocated the nature of the potential threat emanating from Cody from the issue of direct threat to the question of statutory coverage. Since Cody could not make the initial showing that she was disabled or regarded as disabled—rather than regarded as a threat—she was simply excluded from protection under the Act. 121 In this way, not only was the burden of proof shifted to Cody, but more importantly, the standard for examining the employer’s response was substantially relaxed and adjusted so as to accommodate the perception of threat portrayed in the popular account.

That the legal topography has become more difficult for ADA plaintiffs in circumstances similar to Cody’s is highlighted by juxtaposing Cody with Lussier v. Runyon. 122 In Lussier, an earlier Rehabilitation Act case, the plaintiff was a postal worker who suffered from Post-Traumatic Stress Disorder. He was targeted by his supervisors as a violence risk in the wake of the 1991 Royal Oak and Ridgewood post office violence incidents. 123 As the court noted, “[o]n November 15, 1991, the Postmaster General responded to the Royal Oak tragedy by issuing a news release announcing that Postal Service personnel files would be reviewed to uncover Postal Service workers with dangerous propensities.” 124 The supervisor placed a copy of this news release in Lussier’s file. Later Lussier was terminated for complaints

119. 29 C.F.R. § 1630.2(r).
120. The EEOC made this argument, with which the court disagreed, in EEOC v. Amego, Inc., 110 F.3d 135, 137 (1st Cir. 1997). See also Nunes v. Wal-Mart, 164 F.3d 1243, 1247 (9th Cir. 1999) (finding that defendant bears the burden of proving that plaintiff was a direct threat because it is an affirmative defense); Rizzo v. Children’s World Learning Centers, 84 F.3d 758, 764 (5th Cir. 1996) (stating that “as with all affirmative defenses the employer bears the burden of proving that the employee was a direct threat.”).
121. The court never reached the issue of whether Cody had experienced disability-based harassment. However, it should be noted that courts have been disinclined to find co-worker and supervisor harassment sufficiently severe or pervasive to be actionable. For example, in McClain v. Southwest Steel Co., Inc., 940 F. Supp. 295, 300-302 (N.D. Okla. 1996), the plaintiff’s co-workers called him “crazy” and a “lunatic,” queried him about Prozac and hospitalization, and asked him “what the f***’s wrong with you,” without violating the plaintiff’s rights under the ADA.
122. Lussier v. Runyon, 3 A.D. Cases 223 (D. Me. 1994).
123. Id. at 225-26.
124. Id. at 226.
about his temper and inability to get along with subordinates, as well as for concealing information about arrests on his application. Sifting through the evidence presented in support of Lussier’s termination, the court rejected as pretextual the postal service’s reasons for termination, concluding that his termination was based on unfounded fears “that Lussier could be violent . . . based on [the supervisor’s] understanding of Lussier’s medical and military background.”

Another common strategy for reconfiguring the legal landscape has appeared in recent ADA cases. When employees’ actual or perceived psychiatric disabilities cause conflict with co-workers or supervisors, this conduct may be characterized as violating company rules or judicial expectations of appropriate workplace behavior. In these circumstances an employer need not prove that the employee’s behavior constitutes a direct threat, since misconduct may be deemed inconsistent with the ADA’s requirement that an individual with a disability demonstrate that “with or without reasonable accommodation” she or he “can perform the essential functions of the job.” Compliance with all rules and behavioral expectations is regularly seen as an essential function of any job. While previously, some courts had found that if conduct were causally related to a disability—so that the disability manifested itself in the conduct—such conduct would not render the employee unqualified, currently only the Second Circuit maintains this position. This represents a significant narrowing of the protections accorded employees with psychiatric disabilities under the ADA.

A consensus has emerged that misconduct, however intertwined with disability, can be punished. Courts have not yet confronted claims by individuals with disabilities such as Tourette’s Syndrome, in which many symptoms might constitute misconduct, if conduct and disability are seen as separable. However, a student’s challenge to his exclusion from mainstream education under the Individuals with Disabilities in Education Act prompted just such a result. In Clyde K. v. Puyallup School District, No. 3, the Ninth Circuit treated a Tourettic student’s sexually explicit exclamations as the equivalent of sexual harassment for which he could be excluded. This case illustrates that in cases where disability and conduct are connected but conceptually distinguishable, courts have little difficulty

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125. Id. at 226-28.
126. Id. at 231.
127. 42 U.S.C. § 12111(8).
130. See Nielsen v. Moroni Feed Co., 162 F.3d 604, 608, n.8 (10th Cir. 1998).
131. 35 F.3d 1396 (9th Cir. 1994).
upholding punishment of conduct.\textsuperscript{132}

Although the EEOC regulations and interpretive guidelines defining essential job functions call for an individualized assessment of whether particular functions are essential requirements of a specific job,\textsuperscript{133} the ability to get along with co-workers or comply with supervisors, and other such behavioral standards, are assumed to be unvarying and universal. In this vein, an additional consensus has emerged in opposition to earlier case law. In \textit{Nisperos v. Buck},\textsuperscript{134} a 1989 case, the court found that remaining drug-free was not an essential function of the job of an Immigration and Naturalization Service attorney, despite the agency’s jurisdiction over drug smuggling. Such a result would be highly unlikely in the current judicial climate, where termination for trivial transgressions, including those resulting from serious provocation, is upheld.\textsuperscript{135}

Under the ADA, a court considering whether a particular employee presents a direct threat or is able to perform the essential functions of a job must consider whether reasonable accommodation would reduce the threat or enable the employee to successfully perform the job. However, accommodations likely to enable individuals with psychiatric disabilities to meet these requirements are routinely deemed \textit{per se} unreasonable by reviewing courts.\textsuperscript{136} Courts frequently find modifications in the environment, including work at home, transfer away from stressful co-workers or an abusive supervisor, or modification of conduct standards, to be unreasonable as a matter of law.

For example, in \textit{Gaul v. Lucent Technologies Inc.},\textsuperscript{137} significant conflict with a co-worker caused an employee with depression and anxiety disorders to express concern that he would “pop”—i.e., suffer another nervous breakdown. He sought transfer away from the “prolonged and inordinate” stress that had precipitated his crisis. By framing the request as one for a low-stress environment that would require continuous monitoring, the court had no difficulty finding his request unduly burdensome.\textsuperscript{138} It framed such a request as an unwarranted intrusion into personnel matters. In couching modification of environmental stressors as beyond reach, the court further narrowed the ADA’s protection of individuals with psychiatric disabilities.

Just as there is dissonance between the ADA and the Rehabilitation Act in the

\textsuperscript{132} See also Palmer v. Circuit Court of Cook Cty., 117 F.3d 351 (7th Cir. 1997), cert. denied, 1998 U.S. LEXIS 761 (1998).
\textsuperscript{133} See 29 C.F.R. § 1630.2(n); 29 C.F.R. pt 1630, app § 1630.2(n).
\textsuperscript{134} 720 F. Supp. 1424, 1428-1429 (N.D. Cal. 1989).
\textsuperscript{135} For example, in a recent case, \textit{Keil v. Select Artificials}, 1999 U.S. App. LEXIS 3411 (8th Cir. 1999), a deaf employee had been repeatedly denied any permanent accommodation, such as an interpreter or TDD, isolating him in his workplace. After the owner purchased a new car, and she again denied him a TDD, he upbraided her for selfishness in front of several co-workers, and slammed a desk drawer. The court upheld termination based on these seemingly excusable infractions.
\textsuperscript{136} But see Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281, 1285 (7th Cir. 1996) (holding that reasonable accommodation of individual with serious psychiatric disabilities was required).
\textsuperscript{137} 134 F.3d 576, 578 (3rd Cir. 1998).
\textsuperscript{138} Id. at 581.
case law interpreting "direct threat" and "qualifications," crucial differences emerge between cases regarding the accommodation of psychiatric disabilities under the ADA and analogous cases under the Rehabilitation Act. In 1991 the court in *Kent v. Derwinski* did not hesitate to order a supervisor to employ "soft approach" discipline methods in correcting the deficiencies of a developmentally disabled laundry worker. Now, with few exceptions, courts increasingly deny the very accommodations that would enable employees with psychiatric disabilities to succeed.

In summary, while earlier cases decided under the Rehabilitation Act characteristically applied a rigorous analysis to employer decisions to exclude workers based on fears of future dangerousness, more recent decisions display far more deference to employers' judgment, even when patently based on stereotyping and other forms of heuristic thinking. This deferential approach is reconciled with the analytical strictures of disability discrimination laws in two ways. First, courts adjudicating ADA cases are increasingly removing the analysis of potential dangerousness from the "direct threat" defense. The direct threat analysis requires an exacting analysis, objective and individualized medical and risk-related evidence. By relocating analysis to other more flexible parts of the statute, courts are more easily influenced by fears, stereotypes, and "intuitive epidemiology" that characterize the new workplace violence account.

Second, courts are increasingly analyzing reasonable accommodation issues in mental disability cases not within the framework of the undue hardship defense, but rather under the threshold question of statutory coverage. By holding certain types of accommodations to be *per se* unreasonable, a plaintiff's claims can be rejected at the outset, on the grounds that she or he is unable to perform the essential functions of the job, with or without reasonable accommodation. In this respect, courts are founding critical legal analysis not on those portions of the statute that impose high burdens on employers and limit opportunities for heuristic analysis, but rather on sections that permit more ready influence by the myths, fears, and stereotypes perpetuated by the new workplace violence account.

Additionally, as seen in *Cody v. Cigna Healthcare*, where the specter of workplace violence is raised, courts tend to structure a case's factual narrative in a manner that reflects the popular account of workplace violence. Once the events giving rise to the case are recast in this manner, the employer's decision to exclude the plaintiff appears reasonable, prudent, and non-discriminatory. In short, judges, along with employers, appear to have been captured by the popular account of workplace violence. A substantial set of recent mental disability cases reveal that the result of this trend is a weakening and a rhetorical de-legitimation of the mental

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140. See *Wood v. County of Alameda*, 1995 U.S. Dist. LEXIS 17513 (N.D. Cal. 1995) (ordering transfer away from a stress-inducing co-worker); *see also* *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281 (7th Cir. 1996) (requiring employer to account for employee's mental disability in interactive accommodation process).

141. See supra notes 112-122 and accompanying text.
VI.
CONCLUSION

People, including judges, can be expected to respond to the hazards they perceive. Laws that appear to constrain or prohibit prudent responses to perceived risk will naturally generate resistance, resentment, or even ridicule. Unfortunately, the ability to accurately perceive the existence or seriousness of a risk is constrained by a variety of subconscious factors. Indeed, the severity of a risk is often estimated based on the ease with which one can bring to mind situations in which that risk materialized. The more vividly and frequently a particular disaster scenario is portrayed, the more serious the risk it represents is perceived to be. In similar fashion, the more closely a class of aversive events conforms to popular conceptions about the way things are, the more likely their occurrence will seem and the more serious any risks associated with their occurrence will appear.

The ADA was enacted, in large measure, to prevent subjective and irrational perceptions of risk from limiting the opportunities of people with disabilities from participating fully in all aspects of society. Unfortunately, to the extent that cultural forces reinforce exaggerated perceptions of risk, people will perceive laws like the ADA, which require a more scientific and less heuristic approach to risk, as ill-conceived obstacles to prudent risk reduction efforts.

The new workplace violence account, conceived and perpetuated largely for commercial gain, is providing just this type of reinforcement. The account posits that worker-on-worker violence is a serious problem and suggests that potentially violent workers can be identified and removed from the workplace before disaster descends. Furthermore, it portrays the ADA as an unfortunate obstacle around which a prudent employer must navigate to protect employees.

This representation influences judicial construction of the ADA. One can reasonably expect that if a law is viewed as an impediment to prudent action, it will be interpreted as narrowly as possible. Further, this perception and this narrowing interpretation may not remain confined to workplace violence cases. Instead, precedents originating in these cases have the potential to affect the disposition of other cases as well. In this way, the discursive power of the new workplace violence account extends far beyond the fear of workplace violence and psychiatric disabilities. It ultimately operates to weaken and, we suggest, rhetorically to delegitimize, the Act as a whole.

142. This tendency is referred to as the “availability heuristic.” See Amos Tversky & Daniel Kahneman, Availability: A Heuristic for Judging Frequency and Probability, 5 COGNITIVE PSYCHOLOGY 207 (1973).

143. This phenomenon is known as the “representativeness heuristic.” See Daniel Kahneman & Amos Tversky, Subjective Probability: A Judgment of Representativeness, 3 COGNITIVE PSYCHOLOGY 430 (1972).