NOTE

“Upside Down and Backwards”: The ADA’s Direct Threat Defense and the Meaning of a Qualified Individual After *Echazabal v. Chevron*

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I. INTRODUCTION

Consider Mario Echazabal. He has a life-threatening liver disease and seeks a job working in Chevron's oil refinery where he will be exposed to chemicals that will aggravate his condition. Chevron denies Echazabal the position on the ground that he is not qualified for the position and that the work environment poses a direct threat to his health. Echazabal sues for employment discrimination under the Americans with Disabilities Act (ADA). His case raises three questions under the Act: (1) is an individual qualified for a position that threatens his life?; (2) does the “direct threat” defense available to employers under the ADA include threats to oneself?; and (3) does requiring an employer knowingly to place an individual in harms way impose an undue hardship on that employer? In Echazabal v. Chevron U.S.A., the Ninth Circuit, considering these questions together for the first time, read the ADA to prohibit an employer from denying employment to an individual with a disability even if the work environment poses a “direct threat” to the health or safety of that individual.

The result in Echazabal is problematic for several reasons. First, by requiring employers to place employees in life-threatening situations, the decision creates unavoidable conflicts with labor laws that must now be resolved by expensive and unpredictable litigation. Such a route is unnecessary given that the ADA not only considered but expressly recognized the legitimate employer concerns and requirements of other laws pertaining to health and safety concerns in the workplace. Second, the decision directly contradicts long-standing federal and state statutes mandating that employers maintain safe work environments. The holding’s most obvious conflict, however, is with the safety regulations set forth in the Occupational Safety and Health Act (OSHA), which require employers to maintain a workplace “free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”

Echazabal effectively repeals these safety regulations with respect to

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disabled individuals who will knowingly be harmed by the work environment. Consequently, Echazabal renders less protection to workers known to be in danger than to those who are not. As Judge Stephen Trott urged in dissent, this result is "upside down and backwards." Workers who need protection from workplace hazards can now sue if they are not placed in harm's way and inevitably sue once they are harmed.

Fortunately, the ADA's current statutory scheme does not require this illogical result. This Note argues that the majority's emphasis on the direct threat provision is misplaced and overly narrow. Part I reviews the ADA's prima facie case and direct threat defense, including the current circuit split over the proper scope of the defense. Part II discusses the Ninth Circuit's decision in Echazabal v. Chevron. Part III of this Note explores the problematic implications of Echazabal and argues that contrary to the assertions of the majority, an employee who will be physically harmed by the everyday work environment cannot perform the "essential functions" of the position as that term is defined by the ADA and construed under relevant case law. As a consequence, an employee who will be physically harmed by the otherwise safe job setting is not "otherwise qualified" for the position irrespective of whether the individual is a threat to other employees. Although this interpretation does not conclusively resolve the troublesome question of whether the direct threat defense applies to threats to oneself, it is the logical approach, more often than not yielding the correct result given the ADA's statutory scheme and underlying purpose.

II.
THE ADA'S PRIMA FACIE CASE AND DIRECT THREAT DEFENSE

The ADA is codified under three main titles. Title I—the focus of this Note—prohibits discrimination in employment. Title II prohibits discrimination in state and local government programs, and Title III prohibits discrimination by private entities in providing public accommodations. In addition to the guidance provided by the statute itself, the ADA is also supported by a number of interpretive provisions promulgated pursuant to legislative grant by administrative agencies. The ADA delegates regulatory and enforcement authority over Title I to the Equal Employment Opportunity Commission (EEOC). Pursuant to that

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4. Echazabal, 226 F.3d at 1074.
5. 42 U.S.C. §§ 12111-17 (1994). Title I of the ADA applies to all employers with 15 or more employees, other than the federal government and private membership clubs. Id. § 12115. In addition to employers, Title I also applies to employment agencies, labor organizations, and labor-management committees. Id. § 12111(2).
6. Id. §§ 12131-50.
7. Id. §§ 12181-89.
8. Id. § 12116 ("Not later than one year after [the date of enactment of this act], the Commission
legislative grant, the EEOC has promulgated formal regulations defining such terms as “direct threat” and “qualified individual.” These interpretations—such as illustrated by Echazabal—are hotly contested and have given rise to a substantial amount of controversy and commentary, most notably on the EEOC’s expansive interpretation of the direct threat defense. In addition to these regulations, the EEOC has also published a technical assistance manual “to help employers...and persons with disabilities learn about their obligations and rights under the employment provisions of the Americans with Disabilities Act.” As with the regulations, the technical assistance manual is routinely cited by courts for instructive guidance on the intended meaning of the ADA.

In interpreting the ADA, courts look for guidance in case law interpreting the Rehabilitation Act of 1973. The 1973 Act, the progenitor of the ADA, was the first comprehensive federal law involving the rights of people with disabilities. In Echazabal, for example, the court noted that in drafting the ADA’s direct threat provision, Congress intended to codify the Supreme Court’s interpretation of a similar provision in the Rehabilitation Act. In School Board of Nassau County v. Arline, the Supreme Court held that a schoolteacher diagnosed with tuberculosis could not be automatically excluded from protection under the Rehabilitation Act without an objective and individual inquiry based on prevailing medical knowledge. The holding in Arline does not refer to threats to the individual himself, a fact relied on by the majority in Echazabal for the conclusion that Congress did
not intend the direct threat provision to include threats to oneself.\textsuperscript{16} However, because the schoolteacher's condition was not agitated or threatened by her continuing to teach at the school, the fact pattern did not properly present the issue addressed in \textit{Echazabal}, where the plaintiff's condition would worsen with exposure to chemicals present in the everyday work environment.

\section*{A. The ADA's Prima Facie Case}

The ADA prohibits covered employers from discriminating against qualified individuals based upon known physical or mental impairments. The statute provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual."\textsuperscript{17} In order to establish a prima facie case of discrimination under the ADA, the plaintiff must prove by a preponderance of the evidence: (1) that he has a disability within the meaning of the ADA; (2) that he is able to perform the essential functions of the position with or without reasonable accommodation (i.e., that he is "qualified"); and (3) that the employer discharged him in whole or in part because of the qualifying disability.\textsuperscript{18} The prima facie case establishes that, "if an individual with a disability can perform the essential functions of the position, yet has suffered adverse employment action because of that disability, the employer may have engaged in the type of discrimination the ADA is designed to prevent."\textsuperscript{19} In \textit{Doe v. Region 13 Mental Health-Mental Retardation Commission},\textsuperscript{20} the court aptly described such a scheme as creating a "catch-22" situation for the plaintiff. The ADA's prima facie case requires the plaintiff to prove simultaneously that she is "disabled," but not so "disabled" as to be unqualified to perform the job.\textsuperscript{21}

The ADA's definition of a covered "disability" is nearly identical to the three-prong definition of a "handicapped individual" under the Rehabilitation Act.\textsuperscript{22} Under the ADA, an individual is considered to have a

\begin{thebibliography}{9}
\item \textsuperscript{16} \textit{Echazabal}, 226 F.3d at 1067.
\item \textsuperscript{17} 42 U.S.C. § 12112(a) (1994).
\item \textsuperscript{18} See Moriskey v. Broward County, 80 F.3d 445, 447 (11th Cir. 1996); Katz v. City Metal Co., 87 F.3d 26, 30 (1st Cir. 1996).
\item \textsuperscript{19} See EEOC v. Amego, 110 F.3d 135, 142 (1997).
\item \textsuperscript{20} 704 F.2d 1402 (5th Cir. 1983).
\item \textsuperscript{21} \textit{id.} at 1408 n.6 ("The 'Catch-22' implicit in virtually all section 504 actions is particularly evident in this case... Ms. Doe was required to prove her handicap for jurisdictional purposes, but simultaneously required to prove that she was not so handicapped as to be unqualified to perform her job.").
\item \textsuperscript{22} An individual with a disability under the Rehabilitation Act is defined as any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. 29 U.S.C. § 706(8)(B).
\end{thebibliography}
disability if that individual has a "physical or mental impairment that substantially limits one or more of the major life activities of such individual." Alternatively, an individual is disabled if the individual has a "record" of physical or mental impairment or is "regarded as" having such an impairment. Therefore, the Act protects two types of plaintiffs: (1) those individuals who are actually disabled and (2) those who are treated as if they are disabled. The expanded definition of disability reflects the fact "that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." In Echazabal, the court did not discuss whether or not Echazabal's liver disease satisfied the definition of actual or perceived disability under the ADA.

Degree or fact of disability notwithstanding, the ADA only extends protection to individuals demonstrating that they are "otherwise qualified" for employment in the contested capacity. This phrase is the source of an enormous amount of litigation because it stands as the test for protection under the Act. Pursuant to legislative grant, the EEOC regulations have defined an "otherwise qualified" individual as one who "satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position." In deciding whether an individual is qualified under the ADA, the courts have consistently followed the EEOC's two-step inquiry, asking: (1) whether the individual meets the necessary prerequisites for the position; and (2) whether the individual can perform the essential job

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23. 42 U.S.C. § 12101(3)(2); see Roth v. Lutheran Gen. Hosp., 57 F.3d 1446 (7th Cir. 1995) (finding condition of strabismus not substantially limiting to physician). EEOC regulations define "physical or mental impairment" to include virtually any physiological or psychological disorder. 29 C.F.R. § 1630.2(b). Under EEOC regulations, an individual is "substantially limited" if the individual is unable to perform a major light activity that the average person in the general population can perform. 29 C.F.R. § 1630.2(j)(1). As with the Rehabilitation Act, the ADA defines "major life activities" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, reading, learning, and working." 29 C.F.R. § 1630.2(i).

24. Id. A "record of impairment" means that the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. 29 C.F.R. § 1630.2(k). An individual is regarded as "having an impairment" when the individual is treated as being substantially impaired in a major life activity even though the impairment does not limit the individual as such. 29 C.F.R. § 1630.2(i); see Katz v. City Metal Co., 87 F.3d 26 (1st Cir. 1996) (holding that employer who had a heart attack was disabled because his employer regarded him as disabled). See generally LAURA F. ROTHSTEIN, DISABILITIES AND THE LAW § 4.08 (2d ed. 1997).


27. 29 C.F.R. § 1630.2(m).
functions, with or without reasonable accommodation.28

The first step in the qualification process requires the court to
determine whether the plaintiff satisfies the work-related prerequisites for
the position.29 In determining whether the first prong has been satisfied a
court may consider the plaintiff’s education, work experience, training,
Skills relevant to the position, and other factors such as plaintiff’s good
judgment and ability to work with other people.30 Given the wide variety of
relevant factors, courts often begin with the plaintiff’s related job history
and performance in related positions, and find that the prerequisite
requirements are satisfied if the employee has a satisfactory record of past
performance.31 Although prerequisites may include company policy, the
policy may not be arbitrarily applied to an individual deemed to have a
disability.32 For example, as a work-related prerequisite a construction
company may require five years of prior welding experience if it is the
company’s policy that all starting welders must have that level of
experience.33 The issue of employee security clearances as prerequisite
requirement is consistently litigated.34 Courts have held that where the
position sought by the plaintiff requires an employee to obtain security
clearance, the failure of the disabled individual to obtain or maintain
adequate clearance deprives that individual of the necessary prerequisites
for the job, and as a consequence he or she is not a qualified individual
under the ADA.35 Related holdings instruct that if an employee has been

28. See, e.g., Taylor v. Phoenixville Sch. Dist., 174 F.3d 142 (3rd Cir. 1999); Foreman v. Babcock
& Wilcox Co., 117 F.3d 800 (5th Cir. 1997) (the plaintiff bears the burden of establishing
“qualification”); Ross v. Ind. State Teacher’s Ass’n. Ins. Trust, 159 F.3d 1001, 1013 (7th Cir. 1998).
29. See, e.g., Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 563 (7th Cir. 1996) (stating
that the court first considers whether “the individual satisfies the prerequisites for the position, such as
possessing the appropriate educational background, employment experience, skills, licenses, etc.”)
(quoting 29 C.F.R. § 1630.2(m)); Basith v. Cook County, 241 F.3d 919 (7th Cir. 2001).
30. See 29 C.F.R. § 1630.2(m); see also Burns v. Coca-Cola Enters., Inc., 222 F.3d 247, 256 (6th
Cir. 2000); Bay v. Cassens Transp. Co., 212 F.3d 969, 974 (7th Cir. 2000); Reed v. Heil Co., 206 F.3d
1055, 1062 (11th Cir. 2000) (“[D]oes the individual have sufficient experience and skills, an adequate
educational background, or the appropriate licenses for the job[?]”).
hotel worker satisfied prerequisites because he received positive evaluations and because he had no
record of disciplinary actions prior to his termination).
32. See, e.g., Dalton v. Subaru-Isuzu Auto., Inc., 141 F.3d 667, 678 (7th Cir.1998) (“Nothing in
the ADA requires an employer to abandon its legitimate, nondiscriminatory company policies defining
job qualifications, prerequisites, and entitlements to intra-company transfers.”); Aka v. Wash. Hosp.
Ctr., 156 F.3d 1284, 1305 (D.C. Cir. 1998) (en banc) (“An employer is not required to reassign a
disabled employee in circumstances when such a transfer would violate a legitimate, nondiscriminatory
policy of the employer.”) (internal quotations omitted).
33. Id.
nuclear plant operator not qualified where he fails to maintain security clearance as required by federal
removed from work by her physician due to illness or disability, the
employer may insist, as a prerequisite to the employee's return to the job,
that she provide a medical release specifically authorizing her to resume
work. For example, in Koshinski v. Decatur Foundry, discussed in detail
infra, an employee who requested medical leave to visit a hand specialist
was required to obtain clearance through the company's physician before
returning to work. This is worth emphasizing because it demonstrates
judicial deference to corporate judgment with regard to qualification, and it
connotes sympathy to companies who could face lawsuits by such
individuals if allowed to work or return thereto without medical clearance.

The second prong of the qualification test requires courts to determine
whether a plaintiff meeting a position's prerequisites for the job is
nevertheless unqualified because of her inability to perform the "essential
functions" of the position. The EEOC defines essential functions as
"fundamental job duties, not including marginal functions of the position." The
job functions may be essential because there are a limited number of
employees among whom the function can be distributed, or because the job
is a highly specialized one and the individual was hired specifically because
of her ability to perform its particularly unique function. Evidence of
whether a function is essential may include the employer's judgment,
written job descriptions prepared in advance, the amount of time required
for performing a function, the consequences of not requiring the incumbent
to perform that function, collective bargaining agreement terms, work
experience of a past incumbent in the same position, or the current work
experience of the incumbent in similar jobs. In Echazabal, the defendant,
Chevron, had indicated that the proper applicant would need to pass a
physical exam, but the court rejected this job qualification as an attempt
to make an otherwise nonessential element essential.

B. The ADA's Direct Threat Defense

If an individual has satisfied the three prima facie elements—disability,
qualification, and adverse employment decision—the employer has

employee who has not been released by her doctor to return to work is not qualified to perform the
essential functions of job).
37. 177 F.3d 599 (7th Cir. 1999).
38. See 29 C.F.R. § 1630.2(m); see also Burns v. Coca-Cola Enters., Inc., 222 F.3d 247, 256 (6th
Cir. 2000); Bay v. Cassens Transp. Co., 212 F.3d 969, 974 (7th Cir. 2000); Reed v. Heil Co., 206 F.3d
1055, 1062 (11th Cir. 2000).
39. 29 C.F.R. § 1630.2(n).
40. Id. § 1630.2(n)(2).
41. Id. § 1630.2(n)(3).
42. Echazabal, 226 F.3d at 1076.
available two principal defenses under the ADA. First, an employer may legally exclude an otherwise qualified individual if that individual poses a direct threat or significant risk of substantial harm to health or safety that cannot be reduced or eliminated by reasonable accommodation. In the ADA's definitional section, the term "direct threat" is defined as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." In determining whether an individual constitutes a direct threat, the factors to be considered include the duration of the risk, the nature and severity of the potential harm, and the likelihood that the harm will in fact occur. The plain language of the statute requires only that threats to "others" be considered. However, in drafting regulations to guide the implementation of Title I, the EEOC (not without controversy) diverged from the plain language of the statute and defined direct threat as 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."

III.

ECHAZABAL V. CHEVRON

Mario Echazabal began working at Chevron's oil refinery in Southern California in 1972. Employed by various maintenance contractors, he worked primarily as a "plant helper" in the refinery's coker unit, which extracts usable petroleum from the crude oil that remains after other refining processes. In 1992, Echazabal applied for and was provisionally offered a position in the coker unit working directly with Chevron, but a pre-employment physical examination revealed that Echazabal suffered from asymptomatic Hepatitis C - a chronic, uncorrectable, and life-threatening viral liver disease. The disease was discovered by Dr. Philip Bailey, a toxicology expert at the University of Texas and resident physician at Chevron's medical clinic, who concluded that Echazabal's liver was "grossly abnormal" and that he should not be exposed to liver-toxic chemicals. Based on Dr. Bailey's finding, Chevron rescinded the job offer on the ground that the position, as advertised by Chevron, required the safe handling of various liver toxic substances such as "hydrocarbon

44. 42 U.S.C. § 12113(b); see Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 569 (1999).
45. Id. § 12111(3).
46. 29 C.F.R. § 1630.2(r).
47. Id. § 1630.2(r).
48. Echazabal, 226 F.3d at 1071.
49. Id. at 1070.
50. Id. at 1073 (Trott, J., dissenting).
liquids and vapors, acid, caustic, refinery wastewater and sludge, petroleum solvents, oils, greases, and chlorine bleach.\textsuperscript{51} Despite the threat to his liver, Echazabal continued in his immediate employment at the refinery with Irwin Industries (Irwin), a maintenance contractor, and Chevron made no effort to remove him from his contract assignment.\textsuperscript{52}

Three years later, while still at the refinery with Irwin, Echazabal again applied to Chevron for the same position and again was provisionally granted the position contingent upon his passing the requisite physical examination.\textsuperscript{53} This time Echazabal was examined by Dr. Kenneth McGill, who succeeded Dr. Bailey and who was also familiar with the conditions and demands present in the refinery's coker unit.\textsuperscript{54} Like Dr. Bailey, Dr. McGill conducted extensive medical tests and concluded that the chemicals and solvents to which Echazabal would be exposed at the refinery would further damage his liver and seriously endanger his life.\textsuperscript{55} This finding was supported by collaborations with Chevron's Medical Director and Echabazal's personal physician, both of whom agreed that Echazabal should not be exposed to hepatotoxic hydrocarbons.\textsuperscript{56} Not a single doctor disagreed with this conclusion, and Echazabal offered no evidence to the contrary.\textsuperscript{57} On the basis of the medical evidence, Chevron once again withdrew its contingent job offer on the ground that Echazabal could not pass the requisite physical examination.\textsuperscript{58} This time, however, Chevron asked that Echazabal be removed from his immediate position with Irwin unless he could be placed in a “position that eliminate[d] his exposure to solvents/chemicals.”\textsuperscript{59} As a result, Echazabal was no longer permitted to work at the Chevron refinery.

\textsuperscript{51} Id.
\textsuperscript{52} Id. at 1065.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id. Irwin's own medical specialist also examined Echazabal and independently concluded that his condition would be worsened by exposure to the refinery's chemicals, “causing probable death.” Id. at 1073 (Trott, J., dissenting).
\textsuperscript{57} Id. at 1075. There is a discrepancy in the decision regarding the opinion of Echazabal's treating physicians. The majority opinion states that “throughout his treatment, Echazabal told each physician who treated him about the type of work that he did [and] none of these physicians advised Echazabal that he should stop working at the refinery because of his medical condition.” Id. at 1065. Conversely, the dissent states that “[n]ot a single doctor disagreed with [the] conclusion [that Echazabal could not work at the refinery without endangering his life].” Id. at 1073. The dissenting opinion most likely reconciles the discrepancy by effectively nullifying the evidence cited by the majority. In his dissent, Judge Trott notes that Echazabal's "facially competing [medical] evidence" surfaced after the decision had been made and therefore was immaterial to the bona fides of the decision itself. Id. (citing Cook v. U.S. Dept of Labor, 688 F.2d 669 (9th Cir. 1982) (holding that medical evidence presented after decision is made is immaterial in the context regarding the bona fides of the decision on appeal)).
\textsuperscript{58} Id. at 1065.
\textsuperscript{59} Id.
After losing his position at the refinery, Echazabal filed a complaint with the EEOC and subsequently filed a complaint in state court alleging that, among other things, both Chevron and Irwin had discriminated against him on the basis of a disability in violation of the Americans with Disabilities Act.\(^6\) Chevron removed the action to federal court, which granted Chevron’s motion for summary judgment on all claims.\(^6\) Echazabal subsequently appealed. On appeal, the court initially held unanimously that the district court had erred in concluding that the “direct threat” defense includes threats to oneself. Subsequently, the court granted Chevron’s motion for rehearing and amended its decision to include a dissent by Judge Trott.\(^6\)

\(\text{A. The Majority Opinion}\)

The majority opinion contains two arguments both justified, at their core, by one principle. Writing for the majority, Judge Reinhardt first argued that the Equal Employment Opportunity Commission’s expansive interpretation of the direct threat provision need not be followed because the plain language of the statute controls, and it does not expressly include threats to oneself.\(^6\) The court supported this contention with passages found in the ADA’s legislative history.\(^6\) The court’s second argument centered on whether Echazabal satisfied the ADA’s prima facie case as a “qualified individual with a disability.”\(^6\) The court rejected Chevron’s argument that the written job description defines the qualified applicant, and instead held that Echazabal was an “otherwise qualified” individual because he could perform the “essential functions” of the job, which did not include the safe handling of the liver toxic chemicals but rather only those

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\(^6\) Id.

\(^6\) In addition to the action brought under the ADA, Echazabal brought actions under the Rehabilitation Act and California’s Fair Employment and Housing Act, as well as a claim that Chevron intentionally interfered with Echazabal’s employment contract with his contract employer. Id. at 1065 n.1.

\(^6\) Such a motion is rarely granted. In fact, the Ninth Circuit is less likely to rehear by a three-judge panel than by the full court. In 1992, for example, 610 petitions for rehearing were filed and only sixteen—or 2.5%—were granted. In that same year, the court entertained 1052 suggestions for rehearing en banc and 41—or 3.9%—were granted. See Federal Appellate Practice – 9th Circuit, § 8.22 n.66 (1994) (citing data provided by Ninth Circuit Clerk Cathy A. Catterton); see also HERBERT MONTE LEVY, HOW TO HANDLE AN APPEAL 243 (3d ed. 1990) (noting that less than one percent of all petitions for rehearing are granted and that the chance of successfully rehearing the court’s original position is even smaller); EEOC v. Gen. Tel. Co., 885 F.2d 575, 577 (9th Cir. 1989) (withdrawing its opinion upon reconsideration, quoting Justice Rutledge as stating, “[w]isdom too often never comes, and so one ought not to reject it merely because it comes late”).

\(^6\) 226 F.3d at 1066.

\(^6\) Id. at 1067.

\(^6\) Id. at 1070 (citing 42 U.S.C. § 12112(a)).
The court justified its conclusion by invoking the ADA’s principle against paternalism, and noting that the ADA’s emphasis on employee autonomy was a recurrent theme in related employment discrimination legislation. The court approaches this analysis backwards. Rather than beginning with the question of qualification, the court began with the question of whether the direct threat defense applies and concluded with the question of whether plaintiffs like Echazabal satisfy the prima facie case. Such an approach presented the case as if the central question was the scope of the direct threat defense, when in fact the provision was merely one of the issues presented.

In denying Chevron the use of the direct threat defense, Judge Reinhardt relied foremost on the plain language of the statute. He emphasized the express language of the defense, which provides that an employer may impose as a qualification of employment “the requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.” Because the statutory language includes as a defense only threats to other individuals, the court reasoned that Chevron could not deny Echazabal employment on the ground that he was a threat only to himself.

The court supported its strict interpretation of the direct threat provision with three arguments based on the legislative history of the ADA. First, according to the court, the use of the term “direct threat” throughout the ADA’s legislative history without “reference to threats to the disabled person himself,” indicates an intent to exclude threats to oneself. The court found only one relevant discussion in the legislative history, which it interpreted as contrary to the plain reading of the statute. Despite the probable relevance of the passage the court dismissed it on the theory that it did not take place in the context of discussing the direct threat defense. Second, the court observed that the congressional reports indicate that the direct threat provision was intended to codify the Supreme Court’s definition of “direct threat” articulated in School Board of Nassau County v. Echazabal.
Arline" to mean "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." Finally, the court pointed to comments made by Senator Ted Kennedy, a co-sponsor of the Act, during the congressional hearing process. According to Senator Kennedy, "[u]nder the ADA, employers may not deny a person employment opportunity based on paternalistic concerns regarding the person's health."

Once again relying on the plain language of the direct threat provision, Judge Reinhardt rejected the notion that the EEOC's contrary interpretation of the ADA's direct threat provision should govern. Although the EEOC regulations define "direct threat" to include threats to oneself, the court nonetheless stated that "the direct threat defense plainly expresses Congress's intent to include... only threats to other individuals in the workplace." In so holding, the court declined to consider the level of deference to be accorded to the regulations under the Supreme Court's decision in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. Judge Reinhardt also rejected the argument that the court's plain reading of the direct threat provision would expose employers to unavoidable tort liability, relying on his reading of the Supreme Court's suggestion in International Union, U.A.W. v. Johnson Controls, that state tort law is preempted by federal antidiscrimination law when the former interferes with the later. With a conclusory flourish, the court stated that, in any event, "the extra cost of employing disabled individuals does not in itself provide an affirmative defense to the discriminatory refusal to hire

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74. *Echazabal*, 226 F.3d at 1067 (citing *Arline*).
75. Id. at 1103.
76. Id. at 1069.
77. Id. at 1015.
78. Id. In *Chevron*, the Court held that two questions are presented when a court reviews the construction of a statute promulgated by an administrative agency. The first question is whether Congress has specifically addressed the issue. "If the intent of Congress is clear, that is the end of the [court's inquiry]; for both the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A.*, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). If the court finds that Congress has not directly spoken to the issue, the next question is whether the interpretation promulgated by the agency is based on a reasonable construction of the statute. If the agency's interpretation "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, [the court] should not disturbed it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id.* at 845; see *Wong*, *supra* note 10, at 1147. In *Echazabal*, the majority did not reach the second question because it found the statute unambiguous with regard to the question whether the "direct defense" applies to threats to oneself. *Echazabal*, 226 F.3d at 1069. In dissent, Judge Trott argued otherwise, saying that *Chevron* stands for the general proposition that the court should accord agency interpretations substantial deference. *Id.* at 1074.
80. *Echazabal*, 226 F.3d at 1070.
those individuals.”

The court next addressed the issue of whether the plaintiff is a “qualified individual with a disability” within the contemplation of the ADA. Most courts evaluate this issue at the outset of any action because the question of whether a plaintiff is qualified for a particular position usually precedes the application of any affirmative defenses. The court’s contrary approach effectively reduced the issue of qualification to one of a second defense. Under this unorthodox approach the court held that Echazabal was an otherwise qualified individual because he could perform the essential functions of an employee in such a position. The court defined “essential functions” as those “job functions . . . that constitute a part of the performance of the job.” The court then described the position for which Echazabal applied as consisting of “various actions that helped keep the coker unit running.” In the court’s opinion, the fact that Chevron had included as part of the job description a requirement that the employee pass a physical examination did not change the essential functions of the job. “Chevron does nothing more than add a prohibited condition to [the] actual job functions when it asserts that the job functions at the coker unit consists of performing the actions that help keep the unit running without posing a risk to oneself.” The court reasoned that to ignore the “limits of the actual functions of the job” would permit Chevron to add any additional functions “it chooses to impose,” thus rendering the term essential functions “meaningless.” As a consequence of rejecting Chevron’s express requirement that the employee be able to withstand certain chemicals, the court effectively ignored the ADA’s express instruction that “consideration shall be given to the employer’s judgment as to what functions of the job are essential, and . . . this description shall be considered evidence of the essential functions of the job.”

81. Id.
82. Id. at 1070.
83. See, e.g., Koshinski v. Decatur Foundry, Inc., 177 F.3d 599, 604 (7th Cir. 1999) (“The direct threat issue arises . . . only after an ADA plaintiff has made out a prima facie case.”); EEOC v. Amego, Inc., 110 F.3d 135, 142-44 (1st Cir. 1997). In some cases the court begins (and sometimes ends) by analyzing the preliminary question of whether the plaintiff is protected by the ADA as an “individual with a disability.” See, e.g., Deppe v. United Airlines, 217 F.3d 1262 (9th Cir. 2000). Under the ADA, an individual is considered to have a disability if he or she has a “physical or mental impairment that substantially limits one or more . . . major life activities, [has] a record of such impairment; or [is] regarded as having such impairment.” 42 USC § 12101(3)(2). In Echazabal, neither the majority nor dissent contested the issue that Echazabal was a disabled individual within the meaning of the ADA.
84. Echazabal, 226 F.3d at 1071.
85. Id.
86. Id. at 1071.
87. Id. at 1071-72.
88. Id. at 1070 (citing 42 U.S.C. § 12111(8)).
B. Judge Trott’s Belated Dissent

Five months after the panel issued a unanimous decision, the court granted Chevron’s motion for rehearing. At that time, Judge Trott issued a strongly-worded dissent. Creating a two-one split, he articulated three primary reasons for his change of position. First, he argued that Echazabal was not “otherwise qualified” for the position. He stated: “I do not understand how we can claim [Echazabal] can perform the essential functions of the position he seeks when, precisely because of his disability, those functions may kill him.” Trott next argued that the direct threat provision includes threats to oneself. He relied on the EEOC’s interpretation of the provision and noted that its implementation manuals reinforced that interpretation. Those materials, he reasoned, should be afforded deference under the so-called Chevron doctrine, which holds that the court should defer to agency regulations where a statute is silent or ambiguous with respect to the issue in question. Third, he contended that it “would be an undue hardship to require an employer to place an employee in a life-threatening situation.” His argument drew upon the ADA’s undue hardship defense, which provides a defense to employers who are able to demonstrate that an accommodation constitutes an undue burden. Judge Trott agreed with Chevron that the majority’s holding would lead to illogical results, noting: “[A] steelworker who develops vertigo can keep his job constructing high rise buildings; a power saw operator with narcolepsy or epilepsy must be allowed to operate his saw; and a person allergic to bees is entitled to be hired as a beekeeper.” He then voiced skepticism that Congress intended such “absurd” results when it enacted the ADA. Emphasizing his dislike with the outcome, Trott labeled the majority’s decision “fortunate” because it created a circuit conflict that will “compel the Supreme Court – or Congress – to resolve the dispute – unless we do so

89. Id. at 1073.
90. Id.
91. Id.
92. Id.
93. Id.
94. Id. at 1074.
95. Id. The ADA defines “discrimination” to include an employer’s “not making a reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual . . . , unless . . . [the employer] can demonstrate that the accommodation would impose an undue hardship on the . . . [employer’s] business.” 42 U.S.C. § 12112(b)(5)(A). The term “undue hardship” is defined to mean “an action requiring significant difficulty or expense.” 42 U.S.C. 12111(10)(A). Although courts usually apply the undue hardship defense to economic hardships, the court in Vande Zande v. State of Wisconsin, Department of Administration held that the financial condition of the employer is only one consideration. In addition to economic feasibility, the employee must show that the accommodation is efficacious and of proportional value. 44 F.3d 538, 541 (7th Cir. 1985); see infra III.D.1.
96. Echazabal, 226 F.3d at 1074.
97. Id.
ourselves by way of *en banc* review."

C. The Circuit Conflict

In holding that *Echazabal* was "qualified" for the refinery job within the meaning of the ADA because he posed no "direct threat" to other people, the *Echazabal* court created or contributed to at least two conflicts with other courts of appeals.

First, the court’s holding that the "direct threat" defense does not apply to an individual who poses a direct threat to himself is in direct conflict with decisions by the Eleventh and Fifth Circuits, both of which recognize a "direct threat" defense to ADA liability where an employee’s "assigned tasks present grave risks to [the] employee" as a result of a medical condition. In *Moses v. American Nonwovens*, an employee with epilepsy was fired because there was a significant risk that he would have seizures on the job if he continued working. The employee’s duties included sitting on a platform above fast-moving press rollers, where she was exposed to machinery that reached temperatures of 350 degrees Fahrenheit. As in *Echazabal*, the danger was unavoidable given the nature of the position and general work environment. In granting summary judgment, the court held that "an employer may fire a disabled employee if the disability renders the employee a direct threat to his own health or safety." *Moses* thus held that an employee who poses a direct threat to herself is not protected by the ADA.

Similarly, in *Borgialli v. Thunder Basin Coal Co.*, the Fifth Circuit considered the firing of an employee with physical and psychiatric disorders "who worked with explosives and who harbored a grudge against his supervisor, threatened suicide and perhaps injury to others." The court affirmed summary judgment in favor of the employee because "[u]nder the ADA it is a defense to a charge of discrimination if an employee poses a direct threat to the health or safety of himself or others," and because the examining physicians had reasonably concluded that the employee presented "a direct safety threat to himself and to the other workers."  

Second, the majority’s holding that Echazabal was "qualified" for the position, despite the agreement among his doctors that the everyday

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98. *Id.; see supra* note 1.
100. 97 F.3d 446 (1996).
101. *Id.* at 447.
102. 235 F.3d 1284 (10th Cir. 2000).
103. *Id.* at 1294 (citing *Moses*).
104. *Id.* at 1288, 1290, 1292.
chemicals present at the refinery would harm or kill him, is squarely at odds with the Seventh Circuit's decision in *Koshinski v. Decatur Foundry, Inc.* In that case, Koshinski was fired after his employer's doctors concluded that he should not be exposed to the vibrations involved in his job because it would "exacerbate" his degenerative osteoarthritis. Rejecting "Koshinski's self-destructive wish to return to this particular job," the court held that Koshinski was not "qualified to do the job" because he could not "perform the essential functions" of the position. By analyzing the case in terms of whether Koshinski was qualified given the safety risks, the Seventh Circuit refutes and openly questions the Ninth Circuit's proclamation that satisfying the demands of the "direct threat" defense is the "exclusive" way in which employers may take account of safety concerns.

The First Circuit also has adopted an approach based on "qualification" rather than "direct threat." In *EEOC v. Amego, Inc.*, the First Circuit considered a claim by a depressed and bulimic therapist who was dismissed because she had attempted suicide twice with medications that she had obtained from her work at a mental rehabilitation hospital. In applying the approach in *Koshinski*, the court rejected her claim, holding that the ability to handle, administer, and document medication was an essential function of the position. The court noted that, although the conduct in question clearly threatened the employer's clients, the employee's use of prescription medications obtained from work ultimately threatened the employee herself, and warranted the employer's preventive action. As the employer had argued, "it was the manner of the suicide attempts—use of medications, including prescription medications—that motivated [the] decision [to let the plaintiff go]."

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105. 177 F.3d 599 (7th Cir. 1999).
106. *Id.* at 601.
107. *Id.* at 603.
108. *Echazabal*, 226 F.3d at 1070.
110. *Id.* at 142.
111. *Id.* at 144.
112. *Id.* at 143.
113. *Id.* at 148; see also *EEOC v. Exxon Corp.*, 263 F.3d 871, 873 (5th Cir. 2000) (stating that "safety requirements are not exclusively cabined into the direct threat test"). Similarly, in *Daugherty v. City of El Paso*, the Fifth Circuit held that insulin-dependent diabetics are not "qualified" individuals for the position of bus drivers. 56 F.3d 135, 143 (5th Cir. 1997). The court relied on a Department of Transportation regulation, prohibiting insulin-dependent diabetics from being drivers, and noted that it protected the safety of the driver as well as other drivers and pedestrians. *Id.* at 144.
IV. ANALYSIS

A. Overview

The Ninth Circuit's decision in Echazabal directly contradicts longstanding federal and state statutes mandating that employers maintain a safe work environment; exposes employers to unavoidable, protracted, and unpredictable litigation; and imposes an undue moral burden on employers to place employees in life-threatening situations. The majority reaches its unfortunate holding by making two missteps. First, by overemphasizing the plain language of the direct threat provision, the majority suppresses the initial inquiry as to whether the employee is a qualified individual who meets the prerequisites of the position and can perform the essential functions of the position. Sidestepping the elements necessary to establish the prima facie case, the court jumped straight to the direct threat provision, which is not a part of the prima facie case but rather an affirmative defense. If the proper analysis had been followed, the essential functions inquiry would have revealed that Echazabal, although disabled within the meaning of the ADA, is not an otherwise qualified individual because an essential function of any position necessarily includes the ability to safely perform that position. Alternatively, Echazabal is not qualified because he failed to meet the job-related prerequisites. This characterization is supported both by the legislative history of the ADA and by the recent court decision in Koshinski v. Decatur Foundry, Inc.114

Second, even if the court had correctly addressed the essential functions inquiry, in approaching the direct threat provision, the court still misinterpreted the fact pattern as requiring consideration of whether the direct threat provision applies to threats to one's self. While working in the oil refinery, Echazabal did not pose a direct threat to others or himself. Rather, the work environment posed an indirect threat to Echazabal, whose liver disease would be worsened by indirect contact with the liver-damaging chemicals. The court addresses the intellectually challenging problem of interpreting the direct threat defense, but it did not have the authority to do so, as Congress clearly intended for plaintiffs like Echazabal to be treated in the "otherwise qualified" context. This description finds substantial support in cases defining workplace hazards, cases discussing employee safety clearances, and the legislative history of the ADA.

Before discussing these contentions, a review of the problematic implications of Echazabal illustrates the illogic of the opinion and the importance of interpreting the ADA's statutory scheme to not require an

114. 177 F.3d 599 (7th Cir. 1999).
employer knowingly to place an individual in a life-threatening situation.

B. The Problematic Implications of Echazabal

1. Compromising Workplace Safety

The decision in Echazabal is in direct conflict with numerous federal and state statutes mandating that employers maintain a safe work environment. The most obvious conflict is with the workplace safety standards codified in the Occupational Safety and Health Act of 1970 (OSHA). OSHA states its purpose and policy as "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." At the outset, it is important to note that the majority in Echazabal relies on a similar clause in the ADA, which provides that one of the Act's purposes is to prevent paternalistic behavior. OSHA's purpose to protect workers moves in precisely the opposite direction. The point is not that the statutes inherently conflict, but that the majority's reliance on a narrow passage in the ADA is unwarranted given the abstract, all-encompassing nature of such purpose provisions.

Under OSHA's "general duty" provision, an employer is required to maintain a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." A violation of the "general duty" provision has two basic elements: (1) the existence of a hazard likely to cause death or serious physical harm, and (2) the employer's awareness of the hazard. If, as in Echazabal, it were the case that an employer knowingly places an employee with a terminal illness in contact with chemicals that will further aggravate his condition, the
second element of the offense would clearly be satisfied, as the employer would be well aware of the danger of serious physical harm. Thus, whether an employer is liable under the general duty clause in the Echazabal context depends on whether the employer’s actions constitute a “hazard,” as that term is defined in the relevant case law.

The case law does not definitively answer the question whether exclusionary policies based on medical screening violate OSHA. In Oil, Chemical and Atomic Workers International Union v. American Cyanamid Co., Cyanamid had adopted a policy of requiring all women between the ages of sixteen and fifty to provide proof that they had been surgically sterilized before working in the lead pigments department. Cyanamid justified the policy on the possibility of birth defects in the unborn children of women exposed to the lead. The employer was cited under the “general duty” provision, but the Occupational Safety and Health Review Commission vacated the citation. In affirming the Commission’s decision, the D.C. Circuit held that the term “hazard” means “processes and materials which cause injury or disease by operating directly upon employees as they engage in work-related activities.” Defined as such, the “hazard” term arguably includes the potential and indirect consequences of chemical exposure so long as the harm arises from work related activities. Although Cyanamid ultimately leaves open the question whether employers would violate OSHA by placing employees like Echazabal in danger, the decision is nevertheless relevant to the issue whether Echazabal faced a direct threat in the oil refinery or whether, as in Cyanamid, the threat was an indirect threat of chemical exposure. By definition, of course, an indirect threat does not implicate the direct threat provision; the notion of an individual being a “direct threat” to himself involves an element of “self-punishment,” which is not present in the workplace safety context.

In addition to federal regulations mandating workplace safety, state statutes also require employers to furnish a safe and healthy work environment. Similar to OSHA, California Labor Code sections 6400 through 6404 establish a public policy of promoting safety in the workplace. These sections provide that “[e]very employer shall furnish employment and a place of employment which are safe and healthful for the

121. 741 F.2d 444 (D.C. Cir. 1984).
122. Id. at 446.
123. Id.
124. Id. at 447.
125. Cyanamid, 741 F.2d at 449. Applying this test, the court found that Cyanamid had not violated OSHA because the sterilization requirement did not affect employees while they were at work.
126. See, e.g., Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1089 (10th Cir. 1997) (finding that the “gravamen of the defendants’ argument” was that the disabled individual was an “indirect threat,” rather than a “direct threat”).
employees therein;”¹²⁷ that “[e]very employer shall do every other thing reasonably necessary to protect the life, safety, and health of employees;”¹²⁸ and that “[n]o employer shall require, or permit any employee to go or be in any employment or place of employment which is not safe and healthful.”¹²⁹ These provisions taken together, express an explicit public policy of requiring employers to take reasonable steps to provide a safe and healthy workplace for all employees.¹³⁰ Legal precedent has recognized and reaffirmed this policy. In City of Palo Alto v. Service Employees International Union,¹³¹ the court considered a city employer’s challenge to an arbitration decision requiring the reinstatement of an employee who had verbally threatened other city employees. The city argued that it “would not fulfill its obligation to provide a safe workplace if it speculated about whether [the employee] really meant to carry out his threat.”¹³² While affirming the reinstatement on other grounds, the court agreed with the City that Labor Code section 6400 et seq. “clearly make it an employer’s legal responsibility to provide a safe place of employment for their employees.”¹³³

Violation of workplace safety standards allow for the imposition of criminal as well as civil sanctions.¹³⁴ OSHA, for example, provides for criminal sanctions in at least two situations. First, OSHA contemplates criminal sanctions when an employer’s willful violation of a standard, order, or regulation causes the death of an employee.¹³⁵ Second, an employer may be held criminally liable if he makes a false representation regarding OSHA compliance.

Whether or not an employer such as Chevron in Echazabal would

¹²⁸. Id. § 6401.
¹²⁹. Id. § 6402; see also Hentzel v. Singer Co., 138 Cal. App. 3d 290 (1982) (finding section indicates the statutory objective of creating a “safe and healthy working environment for all employees”). Labor Code sections 6403 and 6404 also relate to employee safety. Labor Code section 6403 states: “No employer shall fail or neglect to do any of the following: [§] (a) To provide and use safety devices and safeguards reasonably adequate to render the employment and place of employment safe. [§] (b) To adopt and use methods and processes reasonably adequate to render the employment and place of employment safe. [§] (c) To do every other thing reasonably necessary to protect the life, safety, and health of employees.” Labor Code 6404 provides: “No employer shall occupy or maintain any place of employment that is not safe and healthful.” See also City of Palo Alto v. Serv. Employees Int’l Union, 77 Cal. App. 4th 327, 335-36 (1999).
¹³². Id. at 334.
¹³³. Id.
¹³⁵. Id. at § 666(e).
actually be sanctioned under a legislative standard is not clear. Based on the plain language of sanction provisions, an employer who knowingly harms an employee is at a minimum subject to civil sanctions and vulnerable to criminal sanctions as well. For our purposes, however, it is sufficient to note that Echazabal places the ADA in direct conflict with the very purpose of an equally groundbreaking, and arguably as important, federal statute. Imposed or not, the availability of criminal sanctions illustrate the public policy in favor of workplace safety. Presumably, the Echazabal majority was well aware that its decision would compromise workplace safety. However, the court places the ADA’s principal against paternalism over OSHA’s prohibition against workplace hazards.

The majority’s reliance on the supremacy of the ADA over OSHA is mistaken for two reasons. First, Echazabal, as discussed infra, is not a qualified individual subject to the ADA’s protection against paternalism. The primary question before the court was not whether Echazabal posed a direct threat to himself, but whether he could perform the essential functions of the job, an inquiry which does not raise clear issues of paternalistic behavior. By emphasizing the direct threat issue, the majority creates a “false conflict” between paternalism and self-determination and then proceeds to analyze that “conflict” as if it were properly presented. It was not. The majority’s extensive discussion “on the principle [against paternalism] that underlie[s] the ADA in particular and federal employment discrimination law in general” was purely imported by the court and is inapplicable in the Echazabal context where the disabled individual is unable to satisfy the prima facie elements of the case.136

A second problem with the majority’s assertion of the supremacy of the ADA over OSHA is that, even if the artificial conflict were substantiated in fact, neither the legislative history addressing workplace safety nor the relevant case law indicates that the public policy of workplace safety is ordinarily inferior to the ADA’s preference to avoid paternalistic policies. On the contrary, the public policy rationale for prioritizing strong workplace health and safety laws is “well-defined and dominant.”137 Such a preference is readily inferred from OSHA’s “general duty” provision, but legal precedent has described the public policy concerning workplace safety as well-identified. In G.B. Goldman Paper Co. v. United Paperworkers International, the court addressed the question of whether a public policy in favor of workplace safety existed.138 The court concluded that “the matter of workplace safety has dominantly manifested itself on federal and local agendas, [which] indicates that safety

136. 226 F.3d at 1068.
138. Id.
in the work environment has become a well-defined and dominant public policy." In *E.I. Dupont de Nemours & Co. v. Grasselli Employees Ass’n*, the Seventh Circuit, after deciding that workplace safety was a valid public policy, affirmed an arbitrator’s determination that a discharged employee was unlikely to engage in improper conduct in the future and concluded that his reinstatement did not violate such public policy. As with the ambiguous nature of statutory “purpose provisions,” it is important here to note that the majority’s implicit presumption that the policy against paternalism is dominant over the policy in favor of workplace safety has no foundation in statute or case law. Though elementary, the court nevertheless fails to acknowledge conflicting principles found in other federal legislation. Indeed, the ADA itself rests upon a number of different and often conflicting principles. In *Taylor v. Pathmark Stores, Inc.*, for example, the court recognized that “the ADA has as a major purpose the protection of individuals who are subject to stereotypes about their abilities.” Paternalism, then, is but one form of discrimination Congress intended to protect against, but even this principle is stretched thin by the court in *Echazabal*, which justifies its perplexing outcome entirely by reference to the abstract principle of paternalism.

2. Imposing Unavoidable Litigation

Although stating that the issue was not properly presented, the majority in *Echazabal* nonetheless rejected the argument that its decision would unduly expose employers to substantial tort liability. In making the argument, the court noted that the Supreme Court has “strongly suggested” that federal antidiscrimination law would preempt conflicting state tort law. In *International Union, U.A.W. v. Johnson Controls*, the Court considered the constitutionality of an employment policy that denied to presumably fertile women certain jobs involving exposure to lead. The employer argued that the policy was based on the need to protect developing fetuses from exposure to lead poisoning. In holding that the

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139. *Id.* at 618; see also United States Postal Serv. v. Nat’l Ass’n of Letter Carriers, 839 F.2d 146 (3d Cir. 1988) (holding that reinstating an employee who had fired gun shots at his Postmaster’s empty parked car would not violate the public policy of workplace safety because he did not manifest any violent tendencies at the time of his reinstatement); Culbertson Enters., Inc. v. Argonaut Ins. Co., No. 94-6746, 1995 WL 395927, *4 (E.D. Pa. June 29, 1995) (acknowledging the “public policy goal of maintaining a safe workplace”).

140. 790 F.2d 611 (7th Cir. 1986).

141. 177 F.3d 180,193 (3d Cir. 1999) (emphasis added).

142. 226 F.3d at 1070.

143. *Id.* at 1070.


145. *Id.* at 191.
employer's discriminatory conduct violated Title VII of the Civil Rights Act, the Court stated that “we have not hesitated to abrogate state law when satisfied that its enforcement would stand as an obstacle to the accomplishment of the full purposes and objectives of Congress.”\(^{146}\)

In dissent, Judge Trott aptly labeled the preemption argument a “thin reed at best.”\(^{147}\) As demonstrated by the passage itself, Johnson Controls does not stand for the proposition that the ADA preempts state tort actions. Assume, for instance, that an individual with a disability is injured while working for an employer who was required by the ADA to place that employee in danger. As a result, the employee brings a state tort action. The Echazabal court contended that this action would be preempted by the ADA. However, the action is not preempted for the simple reason that Congress did not intend the ADA to displace any of the rights or remedies provided by other federal laws or other state or local laws, including state common law actions, that provide greater or equal protection to individuals with disabilities. The ADA contains a “savings clause,” which states that “nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State . . . that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter.”\(^{148}\) Therefore, if a state tort claim affords greater or equal protection, it is not preempted by the ADA. The holding in Johnson Controls supports rather than contradicts this conclusion. In Johnson Controls, the Court held that only in the absence of an expressed congressional intent will the Court imply the preemptive effect of a federal regulation, but the implication is unnecessary with the ADA since Congress has clearly expressed its intent.\(^{149}\)

Other cases have expressed a concern for placing employers between the proverbial rock and a hard place. For example, in Chandler v. City of Dallas,\(^ {150}\) Dallas adopted a driver-safety program based on regulations\(^ {151}\) promulgated by the Federal Highway Administration (FHA) concerning the safe operation of motor vehicles. The regulations included a requirement that city employees who drive on public roads have no medical history or diagnosis of diabetes and have visual acuity at prescribed standards.\(^ {152}\) In reversing a district court judgment in favor of the plaintiffs, the Fifth Circuit stated that the plaintiffs could not prove that they were “qualified” given the city’s reliance on the FHA’s regulations in developing its driver-safety

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\(^{146}\) Id. at 209-10 (1991) (internal quotation marks omitted).

\(^{147}\) 226 F.3d at 1075.

\(^{148}\) 42 U.S.C. § 12201; 29 C.F.R. § 1630.1(b).

\(^{149}\) 499 U.S. at 209-10.

\(^{150}\) 2 F.3d 1385 (1993).

\(^{151}\) 49 C.F.R. § 391.41.

\(^{152}\) Chandler, 2 F.3d at 1388-89.
program. The *Chandler* court held that “as a matter of law, a driver with insulin-dependent diabetes or with vision that is impaired to the extent discussed in [the FHA regulations] presents a genuine substantial risk that he could injure himself or others.” The court then echoed the sentiment expressed by the Fifth Circuit in *Collier v. City of Dallas*: “Woe unto the employer who puts such an employee behind the wheel of the vehicle owned by the employer which was involved in a particular accident.”

*Chandler* is instructive for two reasons. First, it illustrates the judiciary’s concern with placing employers in a helpless situation in which they must choose between placing employees in life-threatening positions and protracted litigation. In *Echazabal*, the majority dismissed this concern because “the extra cost of employing disabled individuals does not in itself provide an affirmative defense to discriminatory refusal to hire those individuals.” The statement, though technically true, is misleading. While the ADA’s undue hardship defense requires that an employer make reasonable accommodations for individuals with disabilities, an accommodation is reasonable only if its costs are not clearly disproportionate to the benefits it will provide. In the case of an employee who will be seriously harmed by the everyday work environment, the costs of a personal injury lawsuit are potentially exorbitant and the “benefit” of the accommodation proportionately miniscule. A second lesson of *Chandler* is the deference courts should provide federal safety legislation. In *Chandler*, the court upheld the disqualification of the plaintiffs because the federal law had mandated set safety standards which the employer was then obligated to follow. OSHA regulations mandating workplace safety operate similarly. By prescribing rigid safety standards, OSHA necessarily excludes certain employees from certain employment. As recognized in *Chandler*, such regulation should be respected if reasonable. *Echazabal* thus fails to acknowledge *Chandler*’s two basic principles.

Even if the ADA does in fact require an employer to hire an employee who will be harmed by the work environment, it still would only be “likely” that state tort law would be preempted. Given that four of the five circuits that have considered the question have concluded that the direct threat

153. *Id.* at 1398.
154. *Id.* at 1395.
156. *Chandler*, 2 F.3d at 1395 (quoting *Collier*).
157. 226 F.3d at 1070.
159. See infra III.D.1.
defense does not apply to threats to oneself or that the safety risks render an individual like Echazabal unqualified under the ADA,\textsuperscript{161} the Ninth Circuit's interpretation seems an abrogation more than an affirmation. The inefficient result is also not required by the ADA. As was stated above, the ADA's undue hardship defense requires that an employer make reasonable accommodations for individuals with disabilities, but such accommodation is reasonable "only if its costs are not clearly disproportionate to the benefits it will provide."\textsuperscript{162} In the case of employees like Echazabal, the costs of a personal injury lawsuit would be potentially exorbitant while the "benefit" of the accommodation would effectively harm—perhaps kill—the alleged "beneficiary."

C. Echazabal and the ADA's Qualified Individual

The first step in any ADA case is determining whether the plaintiff is an otherwise qualified individual covered by the ADA.\textsuperscript{163} Although the court in Echazabal eventually reached the issue of qualification, it did so only after mischaracterizing the case as one centering on whether the direct threat defense is available to employers who deny employment to individuals whose condition will be aggravated by the otherwise safe workspace. Once it reached qualification, moreover, the court expounded its own novel theory on the meaning of the performance of the "essential functions" of the position, thereby ignoring the clear intention of Congress that an employee is not qualified if he cannot perform the job without harming himself. In order to establish a prima facie case of discrimination under the ADA, the plaintiff must prove that he has a disability within the meaning of the ADA, that he is qualified for the position with or without reasonable accommodation, and that the employer discharged him because of his disability.\textsuperscript{164} Determining whether an individual is "otherwise qualified" for a position is a two-step process.\textsuperscript{165} First, the court must determine whether the individual meets the necessary prerequisites for the position, such as possessing the appropriate educational background and employment experiences. If an individual satisfies the prerequisites, the next question is whether the individual can perform the essential job

\textsuperscript{161} See supra I.C.
\textsuperscript{162} Id.
\textsuperscript{163} See supra I.A.
\textsuperscript{164} See Borgialli v. Thunder Basin Coal Co., 235 F.3d 1284, 1290 (10th Cir. 2000).
\textsuperscript{165} See, e.g., Chandler v. City of Dallas, 2 F.3d 1385, 1393-94 (5th Cir.1993) (holding that a court considers whether plaintiff can "perform the essential functions of the job, i.e., functions that bear more than a marginal relationship to the job at issue," and, if not, whether "any reasonable accommodation by the employer would enable [her] to perform those functions"); see also Fields v. St. Bernard Parish Sch. Bd., No. 99-3396, 2000 WL 1560012 (E.D. La. 2000).
functions with or without reasonable accommodation.\textsuperscript{166} The second step has two parts: (1) identifying the functions of the job that are essential to its performance, and (2) determining if the person can perform these functions with or without reasonable accommodation.\textsuperscript{167}

In \textit{Echazabal}, the majority ignored the ADA's established framework and developed case law in discussing qualification.\textsuperscript{168} The court stated simply that "[j]ob functions are those acts or actions that constitute a part of the performance of the job," and that "performing the work at the coker unit without posing a threat to one's own health or safety is [not] an 'essential function' of the coker unit job."\textsuperscript{169} The court fails to cite a single source of support for its characterization of "essential functions" as excluding any requirement of safety to oneself. According to the court, the "essential function" of the coker unit, and consequently of the employees hired to run it, is to keep the unit running.\textsuperscript{170} But what about the qualification that the employees be able to do so in compliance with federal legislation mandating workplace safety? Or the qualification that an employee must be able to tolerate a minimum level of chemicals? The ADA's legislative history and relevant caselaw, as discussed immediately below, demonstrate that health and safety cannot be deemed non-essential without undermining the effectiveness of both ADA and OSHA legislation.

1. Legislative History

The majority's characterization of an "essential function" contradicts the ADA's legislative history, which clearly indicates Congress's understanding that a necessary element of any essential function is that the employee be able to perform the function without harming herself. The report of the House Committee on Education and Labor provides that a job applicant undergoing a pre-employment medical examination may be rejected consistent with the ADA, "if the examining physician [finds] that there [is] a high probability of substantial harm if the candidate performs the particular functions of the job in question . . . ."\textsuperscript{171} The passage is

\begin{itemize}
\item \textsuperscript{166} See, e.g., Chandler v. City of Dallas, 2 F.3d 1385, 1393-94.
\item \textsuperscript{167} See Tyndall v. Nat'l Educ. Ctr. Inc. of Ca., 31 F.3d 209, 213 (4th Cir.1994) (citing Chandler) (holding that plaintiff bears the burden of proving (1) that she could perform the essential functions of her job, and (2) if not, that she could perform those functions with a reasonable accommodation by her employer); see also Foremanye v. Bd. of Cnty. Coll. Trustees for Baltimore County, 956 F. Supp. 574, 578 (D. Md. 1996).
\item \textsuperscript{168} Compare Koshinski, where the Seventh Circuit did not address whether the plaintiff had a "direct threat" defense because "[t]he ‘direct threat’ issue arises only after an ADA plaintiff has made out a prima facie case." Koshinski v. Decatur Foundry, Inc., 177 F.3d 599, 603 (7th Cir. 1999).
\item \textsuperscript{169} \textit{Echazabal}, 226 F.3d at 1070-71.
\item \textsuperscript{170} \textit{Id.} at 1070.
\end{itemize}
important for two reasons. First, the passage not only contemplates but requires paternalistic action in favor of workplace safety. By contemplating paternalistic behavior where the applicant is unable to safely perform a particular task, the passage contradicts the implicit assertion in Echazabal that anti-paternalism is an inviolable principle of the ADA. The principle against paternalism has exceptions, one of which is the disqualification of plaintiffs who seek the ADA’s protection only to use that protection to harm themselves. The exception is logical. Without it, “a steelworker who develops vertigo can keep his job constructing high-rise buildings” or “a power saw operator with narcolepsy or epilepsy must be allowed to operate his saw.” Further, after being harmed by the everyday materials lawfully used in the workplace, the employee may then bring a tort action against the employer because the ADA, according to the Echazabal court, requires that the employer knowingly endanger those of its workers who prove a direct threat to themselves.

Second, the passage indicates the intent of Congress that an essential function of any job include the ability of the applicant to perform the necessary duties without substantial threat of harm to himself or others. If an employee or prospective employee has a disability that directly affects his ability safely to perform the job, the employer may deny the individual the position, not because he poses a direct threat to himself, but because he is not qualified for the position. In this regard, the passage contradicts the assertion in Echazabal that an essential function of the coker unit position did not include the ability safely to tolerate the handling of liver toxic substances. The majority believes that an individual with a disability is qualified if he can perform the everyday duties of the position irrespective of his own safety. The interpretation is absurd. Suppose, for example, that instead of a slowly debilitating disease Echazabal’s condition would result in death twenty-four hours after contact with the chemicals present in the coker unit. Fully aware of the danger, the employer has required all employees to pass a pre-employment physical. Echazabal fails the physical. According to the court, he is protected by the ADA—even though he fails the physical and even though he will die as a result—because on his first and last day of work he can perform the everyday duties of the position. The contention, among other problems, effectively nullifies the employer’s laudable attempt to create a safe work environment; exposes the employer to unavoidable and protracted litigation; imposes an undue burden on the employer and other employees in the workplace; and contradicts the very purpose of decades’ worth of federal legislation protecting workers from

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172. Echazabal, 226 F.3d at 1068-69.
173. Id. at 1074.
174. Id. at 1070-71.
175. Id.
harm.

2. Case Law on Qualification

In addition to the legislative history defining the phrase “essential function,” the majority’s characterization of an “essential function” is also contradicted by regulations and case law. Of particular relevance and similarity is the Seventh Circuit’s decision in Koshinski. Koshinski had a job with Decatur Foundry that required the operation of various hand tools, such as a pneumatic hammer and pressurized water hose, as well as heavy lifting, hammering, painting, and shoveling. After experiencing pain in his wrist, Koshinski notified his supervisor and visited a hand specialist, who diagnosed Koshinski with nonoccupational degenerative osteoarthritis. He recommended to Koshinski that if he insisted on returning to work that he should avoid repetitive tasks and exposure to vibration. Subsequent visits to additional hand specialists, as well as the foundry’s own personal physician, confirmed the diagnosis made by the original physician. After one such visit, it was found that Koshinski’s strength was rapidly decreasing, and one specialist expressed dismay with his continued employment at the foundry: “At this point, I have nothing further to offer him. He needs to change his occupation.” On the basis of these reports, the foundry eventually let Koshinski go, saying that the foundry did not have other employment within the reasonable limits set by the physicians. Koshinski acknowledged the hand-intensive nature of his work but nevertheless brought suit under the ADA on the theory that he could perform the position despite the continued agitation of his condition.

The Seventh Circuit affirmed the district court’s holding that, despite his desire to continue working, Koshinski could not perform the essential functions of the job and therefore was not a “qualified individual with a disability.” The court emphasized the unanimous agreement among Koshinski’s physicians that he stay away from high force and high frequency repetitive tasks. The fact that Koshinski wanted to return to

176. 177 F.3d 599 (7th Cir. 1999).
177. Id. at 600.
178. Id.
179. Id.
180. Id. at 601.
181. Id.
182. Id.
183. Id.
184. Id.
185. Id. at 602.
work despite the threat of increased harm was immaterial: "Koshinski may have shown that he wanted to return to work despite the pain and harm, but that is not the test. He had to show that he was qualified to do the job."\textsuperscript{186} The court then expressly dismissed as premature Koshinski’s attempt to invoke the reasoning advanced by the majority in \textit{Echazabal}, namely, that it is of no consequence under the ADA whether or not a person may cause a direct threat to himself.\textsuperscript{187} The court refused to entertain the contention because the “direct threat issue arises ... only after an ADA plaintiff has made out a prima facie case, as an employer’s defense to the challenged adverse employment decision.”\textsuperscript{188} Since Koshinski could not show that he was entitled to protection under the ADA, the court did not reach the question of whether the employer had a valid defense for refusing to reinstate the plaintiff.

Cases similar to \textit{Echazabal} and \textit{Koshinski} are not uncommon.\textsuperscript{189} A number of decisions involve plaintiffs who are a threat to others as well as themselves.\textsuperscript{190} More common are “pure” direct threat cases in which employers prove that the plaintiff poses or would pose a direct threat to other employees, customers, or the general public.\textsuperscript{191} These cases clearly raise the proper application of the defense, and in this respect are relatively straightforward. But the application of the defense is not so clear in cases like \textit{Echazabal} and \textit{Koshinski}, where the plaintiff poses no real “threat” to anyone, including themselves, but instead the otherwise safe work environment threatens the disabled individual. In the latter case, the use of the term “threat” is subtly, yet importantly different. In the ordinary case, the plaintiff is alleged to do the threatening, whether it be directly by force or indirectly, as with infectious diseases. In the \textit{Echazabal} and \textit{Koshinski} context, however, it is not the individual but the workplace that is doing the threatening. It is in this second, more questionable manner that Chevron raised the direct threat defense against \textit{Echazabal}.

The questionable application of the direct threat doctrine provided an easy target for the majority, which then proceeded to ignore the stronger contention that such an individual is not in fact qualified for the position. Although not mentioned in \textit{Echazabal}, the approach in \textit{Koshinski} presents a serious challenge to the majority that it failed to meet either expressly or

\textsuperscript{186} \textit{Id.} at 603.

\textsuperscript{187} \textit{Id.}

\textsuperscript{188} \textit{Id.} (citing 42 U.S.C. 12113(b)).

\textsuperscript{189} See EEOC v. Amego, Inc., 110 F.3d 135 (1st Cir. 1997); EEOC v. Exxon, 203 F.3d 871 (5th Cir. 2000).

\textsuperscript{190} See, \textit{e.g.}, Moses v. Am. Nonwovens, Inc., 97 F.3d 446, 447 (11th Cir. 1996) (finding that employee with epilepsy not qualified under ADA where he posed risk to himself and others).

\textsuperscript{191} See, \textit{e.g.}, Robertson v. Neuromedical Ctr., 161 F.3d 292 (5th Cir. 1998) (holding that neurologist with ADD, which affected his memory, posed direct threat to his patients).
implicitly. The decisions are factually analogous in that both cases concern an employee who can perform the everyday functions of the position but is prohibited from doing so because medical advice concludes that the work environment will seriously aggravate the individual’s disability. Perhaps what makes such cases rare, is that both plaintiffs also desired the positions despite the risk of personal pain and harm. *Koshinski* applies an accepted doctrinal approach and responds by holding simply that such an individual is not qualified under the ADA because he cannot safely perform the essential functions of the position. *Echazabal*, on the other hand, inverts the analysis by narrowly interpreting the direct threat provision as not applying to threats to an employee’s own safety, and then dismissing the well-settled qualification analysis by fashioning its own novel definition of the essential functions of a position.

ADA cases concerning security and medical release requirements provide a further example of the proper treatment of plaintiffs like *Echazabal*. In *McCoy v. Pennsylvania Power and Light Co.*, the court considered the allegations of a former nuclear plant operator for a power and light company who alleged that his rights under the ADA were violated when his security clearance was revoked due to alcoholism. In finding that the operator was not “otherwise qualified” for the position after losing his security clearance, the court emphasized that the employer was obligated by Nuclear Regulatory Commission regulations to assure that its employees were trustworthy and reliable and did not cause a threat to public health and safety. Federal regulations made security clearance an essential component, or qualification, of the plaintiff’s position, and since revocation of the plaintiff’s security clearance was a direct result of his disability, the plaintiff could not be considered a qualified individual within the meaning of ADA.

In *McCoy*, the court relied on another security clearance case, *McDaniel v. AlliedSignal, Inc.*, in which the defendant operated a plant that produced non-nuclear components for nuclear weapons. The employer in *McDaniel* was required by the U.S. Department of Energy (DOE) to employ only persons who had obtained and maintained security clearances from the DOE, and to notify the DOE if an employee’s mental state might significantly affect his judgment. After an electrician employed by *AlliedSignal* had been hospitalized for depression for a third time, the defendant notified the DOE. Thereafter, the DOE revoked his security

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193. *Id.* at 443-44.
194. *Id.* at 443.
196. *Id.* at 1483.
197. *Id.* at 1486.
clearance, and the plaintiff was terminated.\textsuperscript{198} The court held that the plaintiff was not a qualified individual with a disability protected under the ADA.\textsuperscript{199} The court reasoned that maintaining security clearance was an essential qualification, or prerequisite, of the plaintiff's position, as evidenced by EEOC regulations as well as the defendant's employee handbook specifying the security requirement.\textsuperscript{200}

Although neither McCoy nor McDaniel is controlling authority, both decisions illustrate that essential function and prerequisite qualifications can include secondary medical requirements that implicate federal statutes. Both cases present an employee who, like Echazabal, could perform a position's everyday requirements, but nevertheless lacked qualification because he could not perform the position without both violating federal legislation and risking expensive litigation. Further, as with Echazabal, the plaintiffs in both cases had been disqualified from their jobs by pre-existing employer regulations, of which they had adequate notice. Security clearance in the McCoy and McDaniel contexts is thus similar to a medical clearance in Echazabal. In both, the employer imposes a requirement in part because it is mandated by federal law, in part out of fear of tort liability, and in part to avoid the moral burden of retaining an employee who may or will be harmed by the work environment.

The approach taken by the courts in McCoy and McDaniel is closely related but crucially different from that taken in Koshinski. Unlike Koshinski, where the court found the plaintiff unqualified on the ground that he could not perform the essential functions of the job,\textsuperscript{201} McCoy and McDaniel held that with respect to loss of security clearance the plaintiff was unqualified because he could not maintain the prerequisites of the position. To place the cases in terms of the EEOC's two-part analysis for determining qualification, the security clearance cases fall under the initial inquiry of whether the plaintiff satisfies the prerequisites for the position, while Koshinski falls under the second inquiry of whether the plaintiff can perform the essential functions of the job. In Echazabal the court curtly addressed the Koshinski situation, and held, incorrectly, that plaintiffs like Echazabal can perform the essential functions of the position. The merits of that holding notwithstanding, the court failed to address the equally important question of why Echazabal was qualified if he had not passed the prerequisite physical exam. As illustrated by the security clearance cases, this question is an independent inquiry, and turning on whether the employer's criteria is arbitrarily applied to individuals with disabilities.\textsuperscript{202}

\textsuperscript{198} Id.
\textsuperscript{199} Id. at 1491.
\textsuperscript{200} Id. at 1488; see supra III.C.2.
\textsuperscript{201} 177 F.3d at 603.
\textsuperscript{202} See supra.
A prerequisite that all employees pass a routine physical exam prior to beginning work is hardly arbitrary or unreasonable or even uncommon. Therefore, even if the majority is correct that safety and health is not an essential element of any essential function, the court fails to address the separate question of whether an employer must hire an individual who does not satisfy the prerequisites of the position.

The majority in Echazabal ignored the McCoy/McDaniel and Koshinski approaches because they were too “paternalistic.” In response, Judge Trott aptly observed that “‘paternalism’ here is just an abstract out-of-place label of no analytical help,” and that “[w]hether paternalism or maternalism, the concept is pernicious when it is allowed to dislodge long-standing laws mandating workplace safety.” The majority responded that the courts had interpreted federal employment discrimination statutes to prohibit paternalistic employment policies. For example, in Dothard v. Rawlinson, the Supreme Court stated that “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.” This statement simply does not address the situation at issue. In the case of Echazabal, the employer’s decision to deny him the position was based at least in part on the employer’s federal obligations to maintain a safe work environment. That is to say, whereas the court framed Chevron’s argument as one based on the danger of the job, Chevron in fact argued that Echazabal was not qualified for the position as defined by federal and state legislation mandating workplace safety.

D. The Undue Hardship and Direct Threat Defenses in Echazabal

1. Undue Hardship

A reasonable application of the “undue hardship” defense includes the situation in which an employer is required to hire an employee who the employer knows has a substantial likelihood of being severely harmed by the work environment, and thereafter is sued for not providing a safe work environment. The primary reason is not, as suggested by the court in

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204. 226 F.3d at 1074.
205. Id.
207. The undue hardship defense requires employers to accommodate disabled individuals, even when those determinations impose additional cost, unless the employer can demonstrate that the
Echazabal, simply “the extra cost of employing” plaintiffs like Echazabal. Rather, the primary reason in that the cost is disproportionate to any perceived “benefit” to employees who will only be harmed or killed by the workplace. In Vande Zande v. State of Wisconsin Department of Administration, the Seventh Circuit held that proportionality is an essential element of the undue burden analysis. The court explained that the financial condition of an employer is only one consideration in determining whether an otherwise reasonable accommodation would impose undue hardship. In addition to the financial cost of the accommodation, the cost of the benefit cannot be “disproportionate to the benefit.” More importantly: “Even if an employer is so large . . . that it may not be able to plead ‘undue hardship,’ it would not be required to expend enormous sums in order to bring about a trivial improvement in the life of a disabled employee.”

In weighing the benefits and costs in cases where the plaintiff will be harmed or killed by the everyday work environment, it is difficult to avoid the conclusion that even a minimal cost constitutes an undue burden when balanced against the “benefit” of physical harm. In Echazabal, the majority did not discuss in any detail the availability of the undue hardship defense, but as Judge Trott stated in dissent, “it would be an undue hardship to require an employer to place an employee in a life-threatening situation.” This statement provides an additional consideration raised when an individual seeks to use the ADA as a sword in order to obtain a position that will inevitably harm that individual. That is, cases like Echazabal (and Koshinski) highlight the fact that moral weight is an important consideration in the undue hardship analysis when an employer is required to place an employee in a life-threatening situation, thereby imposing on the employer and its employees both an economic and moral burden.

As a consequence of its unfounded fixation with banishing the abstract concept of employer paternalism, the majority missed the complexity of the undue hardship analysis. Its unwillingness to grapple with the realities faced by employers is mistaken; most rational people would concede that even if Chevron’s actions in denying Echazabal employment could be characterized as paternalistic, such paternalism should not be prohibited at

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208. Echazabal, 226 F.3d at 1070.
209. 44 F.3d 538 (7th Cir. 1995).
210. Id. at 542 (“It is understood that in deciding what care is reasonable the court considers the cost of increased care.”).
211. Id. at 542.
212. Id. at 542-43.
213. Echazabal, 226 F.3d at 1074.
the expense of health and safety or the ability of employers to avoid consciously subjecting individuals to harm.

2. Direct Threat

Ever since the EEOC expanded the direct threat provision to include threats to oneself there has been considerable controversy as to whether doing so reflected the intent of Congress.\textsuperscript{214} The legislative history on the matter is largely inconclusive and provides support for either interpretation. On the one hand, it may be argued, as in the majority opinion in \textit{Echazabal}, that if Congress intended to include as a defense threats to oneself it would not have limited the statute to direct threats "to others."\textsuperscript{215} The provision in this respect is indeed unambiguous. By its own words, the defense plainly does not require that the employee pose a direct threat to the health or safety of the individual, or even to health or safety generally, but expressly requires a threat to other individuals.\textsuperscript{216} This interpretation also finds limited support in the legislative history, which, as emphasized in \textit{Echazabal}, contains only a few references to threats to the individual himself.\textsuperscript{217} However, although Congress usually used the "to others" language, nowhere did it emphasize the importance of the words to exclude individuals who posed a direct threat to the disabled person himself. In this regard, there is no evidence to prohibit the pragmatic and sensible interpretation of the legislation to include "oneself."

On the other hand, it may be argued, as did the dissent in \textit{Echazabal}, that even if the plain language is unambiguous, Congress clearly did not intend the ADA to require employers to place employees in life-threatening situations or otherwise face liability.\textsuperscript{218} For two reasons, this is the preferable interpretation of Congress's intent. First, interpreting the direct threat provision as including direct threats to the health or safety of the individual himself would avoid unpredictable litigation and conflicts with federal statutes mandating workplace safety. This argument finds limited support in the legislative history of the provision. The EEOC justified its expansive interpretation of the "direct threat" defense by reference to two cases interpreting a similar provision in the Rehabilitation Act. In both cases, the court applied the direct threat defense to threats to oneself.\textsuperscript{219}

\textsuperscript{214} For an excellent discussion of this controversy, see Wong, \textit{supra} note 10, at 1143.
\textsuperscript{215} 226 F.3d at 1069.
\textsuperscript{216} See 42 U.S.C. § 12113(b).
\textsuperscript{217} 226 F.3d at 1067.
\textsuperscript{218} Id.
\textsuperscript{219} See Mantolete v. Bolger, 767 F.2d 1416, 1422-24 (9th Cir. 1985) (concluding that a disabled individual is not a qualified handicapped person if her employment would pose "a reasonable probability of substantial harm" to her).
Second, it does not necessarily follow that if Congress did not intend the direct threat defense to include threats to oneself, an employer violates the ADA by denying employment to such individual. Rather, an equally likely explanation is that Congress did not intend such individuals to be “otherwise qualified” as that term is defined both in the ADA and its case law.\textsuperscript{220} This Note advocates the approach of defining “otherwise qualified” as excluding rather than including plaintiffs like Echazabal. In addition to the arguments set forth above, the legislative history of the ADA also supports the common sense notion that an applicant who will be harmed by the work environment is not qualified for the position irrespective of whether or not the applicant poses a direct threat to himself. The legislative history of the ADA allows employers to require medical examinations after a conditional offer has been made, so long as they are given to all entering employees in a particular category and the results of such examinations are not used to discriminate against an individual with the disability unless such results make the individual not qualified for the job.\textsuperscript{221} The report of the House Committee on Education and Labor contains a passage specifically applicable to plaintiffs like Echazabal:

A candidate, undergoing a post-offer, pre-employment medical examination may not be excluded, for example, solely on the basis of an abnormality on an x-ray. However, if the examining physician found that there was a high probability of substantial harm if the candidate performed the particular functions of the job in question, the employer could reject the candidate . . . .\textsuperscript{222}

The \textit{Echazabal} majority buried this passage in its discussion on the direct threat defense, dismissing it as immaterial to the question of whether the defense applied to threats to oneself.\textsuperscript{223} If the court had not analyzed the case backwards, addressing Chevron’s affirmative defenses first, it would have more squarely faced the legislative history indicating Congress’s clear intent to permit the use of medical examinations that disqualify individuals who may be harmed by the everyday work environment. The intent of Congress in this respect is unambiguous. Under the ADA, medical screening is permitted in order to protect employers from being required to hire an individual with a disability who is not qualified for the position because she cannot perform the essential functions of the job.\textsuperscript{224}

\textsuperscript{220} See supra III.C.1.


\textsuperscript{222} \textit{Id.} (emphasis added).

\textsuperscript{223} 226 F.3d at 1067 n.6.

\textsuperscript{224} As the legislative history indicates, discussed supra III.C.1., an employer may reject such a candidate even though he poses no direct threat to other employees and even though doing so may result in paternalistic behavior. The report of the House Committee on Education and Labor states that “[a] physical or mental criterion can be used to disqualify a person with a disability only if it has a direct impact on the ability of the person to do their actual job duties without imminent, substantial threat of
One commentator has suggested that *Echazabal* "reached the right result using the wrong reasoning."\(^{225}\) Professor Mark Rothstein emphasizes the court's observation that "[t]here is no evidence that the health of [Echazabal's] liver ever affected his ability to do the job," and argues that even if Chevron "could assert the direct threat defense, it could not prove it."\(^{226}\) The contention is based on the requirement that the direct threat defense only applies when the risk is immediate and severe:

The legislative history of the ADA and the EEOC interpretation make it clear that a 'direct threat' is difficult to prove. Patronizing assumptions, generalized fears, and speculative or remote risks are insufficient. The cases upholding a direct threat have involved... positions that placed the individual workers in danger.\(^{227}\)

Based on this observation, Professor Rothstein describes the direct threat defense as a "narrower and more demanding subset of the broader defense that the individual lacked the necessary qualifications for the position."\(^{228}\) Given the limited nature of the direct threat defense, he concludes that plaintiffs like Echazabal do not pose a direct threat within the contemplation of the ADA because their condition does not immediately affect their ability safely to perform the essential functions of the position.\(^{229}\)

The argument is correct to the extent that it logically describes the limited role of the direct threat defense and persuasively illustrates the inapplicability of the defense in *Echazabal*. Echazabal's life-threatening condition did not pose an immediate or severe threat and therefore was not at issue in the case. But the analysis is incorrect in concluding that *Echazabal* reached the correct result. Professor Rothstein misses both the complexity and rarity of the issue presented in *Echazabal* by failing to distinguish between two types of plaintiffs. One is the plaintiff like Echazabal who does not pose an immediate threat but who desires a position in a place where the everyday work environment will significantly aggravate his life-threatening condition. The other is the plaintiff who does not pose an immediate threat but who seeks employment in an otherwise safe work environment.\(^{230}\) While the ADA clearly protects the later type of...
employee, it just as clearly should not protect the former.

V.
CONCLUSION

In its analysis of *Echazabal v. Chevron*, the court fashions an intellectually challenging and novel question that it should not have reached. The issue of whether the direct threat defense applies to threats to oneself is not properly presented by plaintiffs like Echazabal, who will be harmed by the otherwise safe work environment. This type of plaintiff should have been distinguished from the one who suffers from an illness that will worsen irrespective of the work environment. Echazabal is not a "direct threat" within the meaning of the ADA. But contrary to the assertions of the majority, such an individual also is not a qualified individual protected by the ADA, for two alternative reasons: (1) the legislative history and *Koshinski v. Decatur Foundry* illustrate that an element of any essential job function is the requirement that the individual be able to perform the position without harming himself; (2) *McCoy* and *McDaniel* reveal that the imposition of a pre-employment physical exam is an accepted and reasonable prerequisite for the job. Under either theory, the result is that an employer need not hire an individual with a disability that will be worsened by the workplace, not because the individual is a direct threat to himself, but because the individual cannot satisfy the prima facie elements of the ADA case. This interpretation is based on the fundamental application of ADA doctrine, and finds substantial support in the ADA history and case law. More importantly, an examination of the problematic implications caused by *Echazabal* reveals the inherent errors in an approach focusing on "direct threat" rather than "qualification." The decision creates conflict with longstanding federal and state safety legislation, imposes a moral burden on employers, and exposes employers to unavoidable and unpredictable litigation.

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banc) (holding that a bus driver with a hearing impairment did not pose an immediate threat).