Direct Threat and Business Necessity: Understanding and Untangling Two ADA Defenses

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I. INTRODUCTION

Many scholars and practitioners are familiar with the basic anti-discrimination formula set out in The Americans with Disabilities Act (ADA).[1] Paraphrasing three different portions of the statute, the ADA's discrimination ban can be stated as follows:

> No employer shall discriminate against a qualified individual with a disability because of the disability of such individual who, with or without reasonable accommodation, can perform the essential functions of the employment position, unless the accommodation would impose an undue hardship on the operation of the business of that employer.[2]

The ADA, however, also contains two other defenses that receive less attention: the direct threat and business necessity defenses.

These latter two defenses have some shared attributes as they both provide a possible basis for an employer to minimize some of the safety and health risks associated with employing individuals with disabilities. Indeed, some courts tend to apply these defenses as if they were almost interchangeable in nature.[3] But, while the direct threat and business necessity concepts have overlapping application in some contexts,[4] they are two distinct defenses. The direct threat defense entails an individualized assessment of health and safety risks.[5] The business necessity defense, on the other hand, implicates broader considerations of workplace productivity.[6]

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1. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2009).

2. *See* 42 U.S.C. §§ 12112(a), 12111(8), 12112(b)(5)(A); Stephen F. Befort, *Let's Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the "Regarded as" Prong of the Statutory Definition of Disability*, 2010 UTAH L. REV. 993, 995–96 (2010).

3. *See, e.g.*, Kroll v. White Lake Ambulance Auth., 763 F.3d 619 (6th Cir. 2014); Bender v. Norfolk S. Corp., 31 F. Supp. 3d 659 (M.D. Pa. 2014).

4. *See infra* notes 24–55 and accompanying text.

5. *See infra* notes 30, 59 and accompanying text.

6. *See infra* notes 78–93 and accompanying text.

This article provides a comprehensive roadmap of these two defenses. Part II discusses the contours and applications of the direct threat defense. Part III does the same for the business necessity defense, focusing on the three contexts in which the business necessity defense may be asserted and the criteria relevant to determining whether an employer's action is job-related and consistent with business necessity. Part IV then examines three particularly contentious issues on which the courts are currently divided: the burden of proof allocation for establishing the existence of a direct threat, medical inquiries related to sick leave usage, and the use of qualification standards that tend to screen out individuals with a history of drug or alcohol addiction. These three issues are interrelated in terms of calling into question the relative weight that should be given to stereotypical assumptions about the disabled as opposed to objectively based risks of actual harm. This article takes the position that reliance on objective assessments is preferable to reliance on speculative assumptions.

II. THE DIRECT THREAT DEFENSE

This Part introduces and examines the direct threat defense in four sections. The first section traces the origin of the direct threat defense in the Supreme Court's jurisprudence. The second section lays out the statutory and regulatory guidance concerning this defense. The third section discusses the significant judicial interpretation and application of the defense. The final section examines two contexts in which the usual requirement of determining the existence of a direct threat through an individualized assessment is not required.

A. Origins

The direct threat defense originated in a 1978 amendment[7] to Section 504 of the Rehabilitation Act of 1973, a precursor of the ADA applicable to federal agencies and federally-funded programs.[8] The amendment codified the direct threat concept but only with respect to individuals who posed a safety risk due to the use of alcohol or drugs.[9] Courts in the early 1980s then began to extend the concern-for-safety defense to impairments that did not involve substance abuse.[10]

7. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602 §122(a)(6)(c), 92 Stat. 284–85.

8. 29 U.S.C. § 794.

9. *See* Ann Hubbard, *Understanding and Implementing the ADA's Direct Threat Defense*, 95 NW. U. L. REV. 1279, 1298–99 (2001).

10. *See, e.g.*, Strathie v. Dep't of Transp., 716 F.2d 227, 232–34 (3rd Cir. 1983); Doe v. N.Y.U., 666 F.2d 761, 775 (2d Cir. 1981).

The Supreme Court crafted the modern contours of the direct threat defense in *School Board of Nassau County v. Arline*.[11] In that case, a teacher was fired from her job because she was infected with tuberculosis, a contagious disease, and posed a potential health risk to her students.[12] The teacher, Ms. Arline, brought an action alleging that her dismissal was a violation of the Rehabilitation Act.[13] The employer initially argued that the teacher should not be covered under the Rehabilitation Act because the employer's adverse action was based on the teacher's contagiousness rather than her disease.[14] The Court rejected that logic, stating "[t]he fact that *some* persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act *all* persons with actual or perceived contagious diseases."[15] The Court found that such a blanket exclusion "would be inconsistent with the basic purpose of § 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others."[16] The Court, accordingly, found that an individual with tuberculosis, or another contagious disease, is a handicapped individual covered by the Rehabilitation Act.[17]

The Court then considered whether the employee was "otherwise qualified" for the position despite her handicap[18] and reinforced the importance of conducting an individualized inquiry to achieve the "goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks."[19] The Court used the following factors recommended by the American Medical Association to determine whether or not someone with a contagious disease is otherwise qualified:

> (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious); (c) the severity of the harm (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.[20]

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11. 480 U.S. 273 (1987).
12. *Id.* at 273.
13. *Id.*
14. *Id.* at 291–92.
15. *Id.* at 284–85 (emphasis in original).
16. *Id.* at 284. The Court found that "[t]he Act [is] carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgements." *Id.* at 285.
17. *Id.* at 285.
18. *Id.* at 287.
19. *Id.*
20. *Id.* at 288.

The Court remanded the case to decide—based upon these factors—whether or not Arline would be considered an otherwise qualified employee.[21] Subsequently, the district court ruled that Arline was not actively contagious and was "otherwise qualified," and ordered her reinstatement or for the school to provide front pay for lost wages until her retirement.[22]

Importantly, the Supreme Court in *Arline* acknowledged that employers do have a legitimate interest in not extending jobs to or retaining disabled individuals who may pose a danger to others. [23] The Court stated in a footnote that:

> A person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk. The Act would not require a school board to place a teacher with active, contagious tuberculosis in a classroom with elementary schoolchildren.[24]

B. ADA Statute and Regulatory Guidance

The Supreme Court decided *Arline* in 1987, laying out the groundwork for the direct threat defense factors as well as requiring an individualized inquiry approach that relies upon objective medical knowledge. The ADA was enacted in 1990 with the express inclusion of direct threat defense language.[25] The ADA defines "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[26] The ADA also provides in its "defenses" section, § 12113, that:

> (b) Qualification standards
> The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.[27]

The Equal Employment Opportunity Commission (EEOC), the agency charged with the enforcement of Title I of the ADA, has further provided a regulatory gloss through its regulations, interpretive guidance, and enforcement guidance. In its notice-and-comment regulations, the EEOC adopted and restated the four-factor test enunciated in *Arline*:

> Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by

21. *Id.*
22. *See* School Bd. of Nassau Cty. v. Arline, 692 F. Supp. 1286, 1292 (M.D. Fla. 1988).
23. *Arline*, 480 U.S. at 287.
24. *Id.* at 287 n.16.
25. 42 U.S.C. § 12111.
26. § 12111(3).
27. § 12113(b).

> reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:
>
> (1) The duration of the risk;
> (2) The nature and severity of the potential harm;
> (3) The likelihood that the potential harm will occur; and
> (4) The imminence of the potential harm.[28]

The EEOC further elucidated in its Interpretive Guidance that an employer may deny an employment opportunity to an individual with a disability only if that employee poses a "significant risk, *i.e.*, high probability, of substantial harm; a speculative or remote risk is insufficient."[29] Finally, the EEOC has also issued an Enforcement Guidance on Disability-Related Inquiries and Medical Examinations in which the agency takes the position that:

> The determination that an employee poses a direct threat must be based on an individualized assessment of the employee's present ability to safely perform the essential functions of the job. The assessment must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or best objective evidence. To meet this burden, an employer may want to have the employee examined by a health care professional of its choice who has expertise in the employee's specific condition and can provide medical information that allows the employer to determine the effects of the condition on the employee's ability to perform his/her job. Any medical examination, however, must to limited to determining whether the employee can perform his/her job without posing a direct threat, with or without reasonable accommodation. An employer also must pay all costs associated with the employee's visit(s) to its health care professional.[30]

C. Case Law

The Supreme Court first provided guidance for determining the existence of a direct threat under the ADA in its 1998 *Bragdon v. Abbott* decision.[31] In that decision, a majority of the Court held that "[t]he existence, or nonexistence, of a significant [health or safety] risk must be

28. 29 C.F.R. § 1630.2(r).

29. 29 C.F.R. pt. 1630, App. § 1630.2(r).

30. EEOC, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act, at *9 (July 27, 2000), https://www.eeoc.gov/policy/docs/guidance-inquiries.html.

31. 524 U.S. 624 (1998).

determined from the standpoint of the person who refuses the treatment or accommodation, and the risk assessment must be based on medical or other objective evidence."[32] In making this determination, the Court explained, the views of public health authorities should receive special weight and authority.[33]

As to the merits, while the *Bragdon* Court remanded the case to the court of appeals for further analysis, the majority opinion suggested that a patient with the human immunodeficiency virus (HIV) likely will not be found to pose a direct threat to a treating dentist given the lack of evidence showing a likelihood of transmission.[34] On the other hand, a subsequent decision of the Fifth Circuit found that an HIV-infected dental hygienist posed a direct threat of HIV transmission to his patients.[35] This provider-patient distinction likely reflects differences in education and training. Health care professionals are more likely to be knowledgeable about safety precautions that can guard against the potential for transmission than are members of the general public. In addition, an infected patient only poses a risk to their immediate health care provider while an infected provider may pose a risk to a much larger patient population.

In a second ADA direct threat decision, *Chevron v. Echazabal*,[36] the Supreme Court in 2002 endorsed the EEOC's regulation that broadened the definition of "direct threat" to include employees who pose a significant risk of substantial harm to the health or safety of themselves as well as to the health and safety of others.[37] Echazabal was an independent contractor working at a Chevron refinery who applied for a permanent employee role with the company.[38] The employer agreed to hire him as long as he could pass the company's physical exam.[39] The exam, however, showed that Echazabal had a liver abnormality and damage from hepatitis C, which doctors said would be aggravated by continued exposure to toxins at the refinery.[40] The company withdrew its offer after reviewing Echazabal's medical exam and did not keep him on as an independent contractor.[41] Echazabal filed suit against the company, claiming they violated the ADA.[42] The employer defended its position by claiming that hiring a

32. *Id.* at 649.
33. *Id.* at 650.
34. *Id.* at 653–55.
35. Waddell v. Valley Forge Dental Assocs., Inc., 276 F.3d 1275, 1284 (11th Cir. 2001).
36. Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002).
37. 29 C.F.R. § 1630.2(r).
38. *Echazabal*, 536 U.S. at 76.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*

worker with this type of disability would be a "direct threat" to the applicant's own health.[43]

Echazabal argued that the express language of the ADA's direct threat defense only protected employers against liability if the employee would potentially pose a "harm-to-others."[44] The Court found, however, that Congress gave broad discretion and deference to the agency to set the limits of what a permissible qualification requirement could be.[45] The Court concluded that the EEOC was "acting within the reasonable zone when it saw a difference between rejecting workplace paternalism and ignoring specific and documented risks to the employee himself, even if the employee would take his chances for the sake of getting a job."[46] The Court also noted that an employer could potentially be liable under the Occupational Safety and Health Act for allowing an individual to work in an environment when the employer knows the risk that a specific individual faces.[47]

The Tenth Circuit Court of Appeals has ruled that the direct threat defense may also be asserted when an employee's disabled family member poses a threat of harm. In *Den Hartog v. Wasatch Academy*, a teacher worked and lived on a private boarding school campus with his family.[48] The teacher's son repeatedly threatened the safety of others on campus and, despite attempts at accommodating the teacher's family, the employer eventually terminated the teacher.[49] The teacher then brought a claim against the employer alleging a violation of the ADA's "associational" provision.[50]

The employer alleged that both the teacher and his son were direct threats under the Act.[51] The employer "alleged that [the son] was a 'direct threat' in the literal sense, while [the father/employee] was a direct threat 'insofar as he was unwilling to cooperate in keeping his son . . . off

43. *Id.*

44. *Id.* at 80–82.

45. *Id.* at 73–74.

46. *Id.* at 86. Several commentators have criticized the Court's reasoning, arguing that it is paternalistic for an employer to decide whether or not an employee might be endangering himself by taking on a certain job, and that such a decision should be left up to the employee. *See, e.g.*, Adam B. Kaplan, *Father Doesn't Always Know Best: Rejecting Paternalistic Expansion of the "Direct Threat" Defense to Claims Under the Americans with Disabilities Act*, 106 DICKINSON L. REV. 389, 390 (2001); Craig Robert Senn, *Fixing Inconsistent Paternalism Under Federal Employment Discrimination Law*, 58 UCLA L. REV. 947, 950 (2011).

47. *Echazabal*, 536 U.S. at 84–85.

48. 129 F.3d 1076, 1078 (10th Cir. 1997).

49. *Id.* at 1077.

50. *Id.* at 1080. Title I of the ADA states that prohibited discrimination encompasses "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." 42 U.S.C. § 12112(b)(4).

51. *Den Hartog*, 129 F.3d at 1089.

campus.'"[52] The teacher argued that "the 'direct threat' defense is only applicable to employees who constitute a direct threat and it does not, as a matter of law, apply to associates or relatives of an employee who may constitute a direct threat."[53] The court of appeals disagreed, finding that since the direct threat provisions of the ADA expressly apply to threats posed by both disabled employees and disabled customers, it would be odd if this language would not also extend to direct threats "posed by mentally disabled *associates or relatives* of non-disabled employees."[54] The court held, accordingly, that an employer could escape liability when a disabled associate of a non-disabled employee posed a direct threat of harm.[55]

Federal courts have underscored several other important attributes of direct threat jurisprudence. First, court decisions stress that a de minimis[56] or slightly increased[57] risk to health or safety is insufficient to establish the direct threat defense. Instead, the evidence must establish "a high probability of substantial harm."[58] Second, the direct threat defense cannot be made when an employer fails to conduct an individualized assessment of whether an applicant's disability posed a significant harm to health or safety.[59] Similarly, there is no direct threat defense where a threat of harm can be eliminated or reduced by a reasonable accommodation.[60] Finally, an employer is likely able to establish the direct threat defense in circumstances where an employee has actually engaged in violence or other harmful behavior coupled with reasonable indicia of likely repetition.[61]

D. Exceptions to the Individualized Assessment Requirement

As noted above, direct threat analysis generally requires a fact-intensive, individualized analysis based on reasonable medical knowledge instead of stereotypical assumptions made about the potential threats that an individual's disability may pose.[62] Nonetheless, there are two narrow exceptions to the individualized assessment requirement.

The first exception implicates the existence of an applicable government safety standard. There is no need for an individualized assessment "[w]hen an individual cannot satisfy objective physical or

52. *Id.*
53. *Id.*
54. *Id.* at 1090 (emphasis in original).
55. *Id.* at 1092–93.
56. *See, e.g.*, Osborne v. Baxter Healthcare Corp., 798 F.3d 1260, 1278 (10th Cir. 2016).
57. *See, e.g.*, EEOC v. Hibbing Taconite Co., 720 F. Supp. 2d 1073, 1082 (D. Minn. 2010).
58. *Id.*
59. *See, e.g.*, Littlefield v. Nevada, 195 F. Supp. 3d 1147, 1157–58 (D. Nev. 2016).
60. *See, e.g.*, EEOC v. Wal-Mart Stores, 477 F.3d 561, 572 (8th Cir. 2007).
61. *See, e.g.*, Jarvis v. Potter, 500 F.3d 1113, 1124–25 (10th Cir. 2007); EEOC v. Amego, Inc., 110 F.3d 135, 145–46 (1st Cir. 1997); Adams v. Alderson, 723 F. Supp. 1531, 1531–32 (D.D.C. 1989).
62. *See supra* notes 30, 59 and accompanying text.

mental qualification standards that government regulators have prescribed for the position."[63] In such cases, "the employer is . . . required . . . not to hire that individual for the job."[64]

The Supreme Court's decision in *Albertson's, Inc. v. Kirkingburg* illustrates this exception.[65] Albertson's, a trucking company, terminated Kirkingburg from his position as a commercial truck driver because he could not satisfy basic Department of Transportation (DOT) vision standards.[66] Following his termination, Kirkingburg obtained a waiver of the DOT requirement, but Albertson's nonetheless declined to rehire him.[67] The Supreme Court ruled that Kirkingburg's inability to meet the DOT standard justified termination even without an individualized assessment of his driving capabilities.[68] The court stated that "[i]t is crucial to [Albertson's] position that Albertson's here was not insisting upon a job qualification merely of its own devising," but that it was instead complying with a "binding" regulation.[69] The Court also held that Kirkingburg's subsequently obtained waiver from the standard did not alter this result because the waiver program was an experimental data collection mechanism rather than a substantive modification of the DOT visual acuity standard.[70]

The principles endorsed in *Albertson's*, however, do not automatically shield an employer that decides to extend government safety standards beyond what is covered by the applicable regulation. In that situation, an employer must show either that the safety standard is warranted by individualized circumstances[71] or that the adoption of such a standard is job-related and consistent with business necessity.[72]

In addition to the government safety standard exception, the ADA also permits employers to exclude individuals without an individualized analysis who have a disability that would inherently preclude successful job performance.[73] A Senate committee report commenting on the proposed ADA stated that "this legislation prohibits the use of a blanket rule excluding people with certain disabilities except in the very limited situation where in all cases [the] physical condition by its very nature would

63. Hubbard, *supra* note 9, at 1311.

64. *Id.*

65. 527 U.S. 555 (1999).

66. *Id.* at 560.

67. *Id.*

68. *Id.* at 569–70.

69. *Id.* at 570.

70. *Id.* at 571–77.

71. *See* Hubbard, *supra* note 9, at 1313.

72. *See* Bates v. United Parcel Service, 511 F.3d 974, 995 (9th Cir. 2007). The *Bates* decision is discussed *infra* in Part III.

73. *See* Hubbard, *supra* note 9, at 1313–14.

prevent the person with a disability from performing the essential functions of the job, even with reasonable accommodations."[74] One commentator has suggested that examples of permissible blanket exclusions might include "a lifeguard who is blind and therefore cannot see swimmers in distress or a front line firefighter who cannot walk and therefore cannot rescue people from burning buildings."[75] This exception, however, is very narrow and will not justify an automatic disqualification simply because a correlation may exist between a type of impairment and diminished job performance.[76] Just as with Title VII's bona fide occupational qualification exception, an individualized assessment of capabilities will be required unless all members of the class are inherently incapable of successful job performance.[77]

III. THE BUSINESS NECESSITY DEFENSE

A. Three Contexts: ADA Statute and Regulatory Guidance

The ADA authorizes employers to assert a business necessity defense in three different contexts: in applying qualification standards, in withdrawing conditional offers of employment, and in making medical inquiries or undertaking medical examinations for current employees. The first section of this Part examines the statutory and regulatory guidance relevant to each of these three contexts. The second section discusses the leading case law relative to each of these contexts. The final section analyzes whether a unitary business necessity standard should apply across all contexts.

1. Qualification Standards

The "defenses" section of the ADA further provides: "[i]t may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and that such performance cannot be accomplished by reasonable accommodation . . . ."[78]

74. S. COMM. ON LAB. AND HUM. RESOURCES, 101ST CONG., S. REP. NO. 101-116, at 28–29 (1989–1990).

75. Hubbard, *supra* note 9, at 1313.

76. *Id.* at 1315.

77. See Dawn V. Martin, *How Will Police and Fire Departments Respond to Public Safety Needs and the Americans with Disabilities Act?*, 2 N.Y.U. J. LEGIS. & PUB. POL'Y 37, 110 (1999).

78. 42 U.S.C. § 12113(a).

The regulations describe "qualification standards" as "the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired."[79] Qualification standards should not be confused with a position's "essential functions." While essential functions are "the fundamental job duties" that an employment position performs,[80] qualification standards are the personal and professional attributes that enable successful job performance.[81] The ADA prohibits the use of qualification standards "that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities" unless, as noted above, these standards have been shown to be job-related for the position in question and are consistent with business necessity. [82]

A claim challenging a qualification standard is in the nature of a disparate impact claim.[83] That is, just as a facially neutral policy that disproportionately disadvantages members of a protected class can violate Title VII in the absence of a showing of business necessity,[84] a facially neutral qualification standard that disadvantages an individual with a disability may run afoul of the ADA absent a showing of business necessity.[85] Indeed, EEOC regulations describe qualification standards as a subtype of disparate impact subject to business necessity scrutiny.[86] But, the ADA's qualification standard limitation appears to be broader than its Title VII counterpart since it authorizes a challenge whenever a qualification standard has a negative impact on an individual with a disability—even in the absence of a showing that such impact falls disproportionately on disabled individuals.

2. Job Offer Withdrawal

A second business necessity context occurs in the pre-employment setting. Under section 12112(d)(2), an employer may not require a medical examination or make a disability-related inquiry prior to extending a conditional offer of employment.[87] At that point, an employer can require a medical examination, but may use the results of such examination "only in

79. 29 C.F.R. § 1630.2(q).

80. 29 C.F.R. § 1630.2(n)(1).

81. *See* Bates v. United Parcel Service, 511 F.3d 974, 990 (9th Cir. 2007).

82. 42 U.S.C. § 12113(a).

83. *See, e.g.*, Raytheon Co. v. Hernandez, 540 U.S. 44, 53 (2003); EEOC v. BNSF Ry. Co., No. C14-1488 MJP, 2016 WL 98510, at *5 (W.D. Wash. 2016).

84. 42 U.S.C. § 2000e-2(k).

85. 42 U.S.C. § 12112(b)(6).

86. *See* 29 C.F.R. §1630.15(b)–(c).

87. 42 U.S.C. § 12112(d)(2)–(3).

accordance with this subchapter."[88] Pursuant to section 12112(b)(6), this means that any negative use must be job-related and consistent with business necessity.[89] The regulations describe this limitation in a more explicit fashion:

Medical examinations conducted in accordance with this section do not have to be job-related and consistent with business necessity. However, if certain criteria are used to screen out an employee or employees with disabilities as a result of such an examination or inquiry, the exclusionary criteria must be job-related and consistent with business necessity.[90]

Accordingly, an employer may withdraw a conditional offer of employment only if its rationale for doing so meets the business necessity standard.

3. Examinations and Inquiries for Current Employees

The final business necessity context concerns the use of medical examinations and inquiries directed at current employees. Section 12112(d)(4)(A) provides:

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.[91]

Thus, for current employees, both the examination or inquiry and the use of any resulting information must meet the business necessity standard.

An EEOC enforcement guidance recognizes a limited exception permitting periodic medical examinations of employees in certain positions affecting public safety such as police officers, firefighters, and private security guards.[92] These periodic exams must be narrowly tailored to address specific job-related concerns.[93]

This enforcement guidance also provides a basic touchstone for determining when a disability-related inquiry or medical examination is job-related and consistent with business necessity. The guidance states:

Generally, a disability-related inquiry or medical examination of an employee may be "job-related and consistent with business necessity" when an employer "has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by

88. 42 U.S.C. § 12112(d)(3)(C).
89. 42 U.S.C. § 12112(b)(6).
90. 29 C.F.R. § 1630.14(b)(3).
91. 42 U.S.C. § 12112(d)(4)(A).
92. EEOC, Enforcement Guidance, *supra* note 30, at *10–11.
93. *Id.* at *10.

a medical condition; or (2) an employee will pose a direct threat due to a medical condition."[94]

B. Case Law

1. Qualification Standards

The leading case concerning the application of the business necessity defense to qualification standards is the Ninth Circuit's decision in *Bates v. United Parcel Service, Inc.*[95] United Parcel Service (UPS), a package delivery company, adopted a qualification standard requiring all of its package-car drivers to satisfy the DOT hearing standard, even though the standard is legally mandated only for higher-weight vehicles.[96] The Ninth Circuit used a three-step inquiry to determine the validity of the hearing qualification standard. The court first considered whether the plaintiffs were "otherwise qualified" for the driver position.[97] Since the lower court never resolved the qualification issue, the Ninth Circuit remanded that issue to the district court.[98] The *Bates* court nonetheless laid out the remaining analytical steps. As a second step, the Ninth Circuit determined that the qualification standard had the discriminatory effect of screening out individuals with hearing impairments.[99]

The final step of the Ninth Circuit's inquiry addressed whether the hearing standard, even if discriminatory, could be saved by the business necessity defense. The court described the business necessity defense in terms of the following elements:

To successfully assert the business necessity defense to an allegedly discriminatory application of a qualification standard, test or selection criteria, an employer bears the burden of showing that the qualification standard is (1) "job-related," (2) "consistent with business necessity," and (3) that "performance cannot be accomplished by reasonable accommodation."[100]

The *Bates* court explained that the "job-related" inquiry requires an employer to show a significant correlation between the qualification standard and the ability to perform the essential functions of the job in question.[101] The "consistent with business necessity" inquiry, meanwhile, requires an employer to show that the qualification standard substantially

94. *Id.* at *5.
95. 511 F.3d 974 (9th Cir. 2007).
96. *Id.* at 981.
97. *Id.* at 994.
98. *Id.*
99. *Id.*
100. *Id.* at 995.
101. *Id.* at 996.

promotes its business needs.[102] As a final matter, the court explained that the employer must demonstrate either that no reasonable accommodation currently available would cure the performance deficiency or that such an accommodation would impose an undue hardship.[103] The Ninth Circuit ultimately remanded the business necessity issue to the district court for a factual determination applying these guidelines.[104]

While an employer bears a high burden to establish a significant correlation between individual capabilities and the essential job duties of a position, the application of the business necessity defense in this context generally does not require an individualized assessment of each applicant or employee.[105] In addition, courts have recognized that the employer's burden is significantly lowered for a job that "requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great."[106] In the context of assessing the validity of a safety-sensitive qualification standard, courts "take into account the magnitude of possible harm as well as the probability of occurrence."[107] Not surprisingly, employers often tend to be successful in defending qualification standards for positions having safety-sensitive responsibilities.[108]

2. Job Offer Withdrawal

There is a paucity of court decisions construing the business necessity defense in the job offer withdrawal context. A few points, however, are clear. First, unlike the qualification standard context, the withdrawal of a conditional offer must rest upon an individualized assessment of the applicant in question.[109] An offer revocation without such an assessment will be struck down as lacking a business necessity justification.[110] Second, an employer may not withdraw a conditional offer based upon mere fear or speculation of future performance problems or injuries.[111] Courts, accordingly, have ruled that an employer violates the ADA by withdrawing

102. *Id.* (citing Bentivegna v. U.S. Dep't of Labor, 694 F.2d 619, 621–22 (9th Cir. 1982)).

103. *Id.* at 996–97.

104. *Id.* at 997.

105. *See* Parker v. Crete Carrier Corp., 839 F.3d 717, 722 (8th Cir. 2016); Littlefield v. Nev. Dep't of Pub. Safety, 195 F. Supp. 3d 1147, 1160 (D. Nev. 2016).

106. Allmond v. Akal Sec., Inc., 558 F.3d 1312, 1317 (11th Cir. 2009) (quoting Hamer v. City of Atlanta, 872 F.2d 1521, 1535 (11th Cir. 1989)).

107. EEOC v. Exxon Corp., 203 F.3d 871, 875 (5th Cir. 2000).

108. *See, e.g.*, *Parker*, 839 F.3d at 723–24 (over-the-road truck driver); Atkins v. Salazar, 677 F.3d 667, 681 (5th Cir. 2011) (park ranger); *Allmond*, 558 F.3d at 1317–18 (security officer).

109. *See* Holiday v. City of Chattanooga, 208 F.3d 637, 643–44 (6th Cir. 2000); EEOC v. American Tool & Mold, Inc., 21 F. Supp. 3d 1268, 1283 (M.D. Fla. 2014).

110. *Holiday*, 208 F.3d at 645–46; *American Tool*, 21 F. Supp. 3d at 1285.

111. Garrison v. Baker Hughes Oilfield Operations, Inc., 287 F.3d 955, 960 (10th Cir. 2002) (citing EEOC, Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act § 6.4 (1992)).

a job offer based upon a fear that an applicant will suffer future injuries, triggering worker's compensation liability.[112] On the other hand, an employer acts with business necessity when it revokes a conditional job offer based upon a "reasonably informed and considered decision" that an applicant's physical condition precludes successful job performance.[113] The cases illustrate a distinction between an employer's speculative assumption that a previously injured applicant will suffer a reoccurrence of the injury, which is insufficient to establish business necessity,[114] and an objectively based medical assessment finding that a previously injured applicant remains unable to perform the essential functions of the job, a determination that does equate with business necessity.[115]

3. Examinations and Inquiries for Current Employees

The Second Circuit Court of Appeals in *Conroy v. New York State Dept. of Correctional Services* described the business necessity defense for current employee inquiries in the following terms:

[I]n proving a business necessity, an employer must show more than that its inquiry is consistent with 'mere expediency.' An employer cannot simply demonstrate that an inquiry is convenient to its business. Instead, an employer must first show that the asserted 'business necessity' is vital to the business . . . . The employer must also show that the examination or inquiry genuinely serves the asserted business necessity and that the request is no broader or more intrusive than necessary. The employer need not show that the examination or inquiry is the only way of achieving a business necessity, but the examination or inquiry must be a reasonably effective method of achieving the employer's goal.[116]

Many other decisions have endorsed this view.[117]

Consistent with this approach, the Eleventh Circuit's 2013 decision in *Owusu-Ansah v. Coca-Cola Co.* illustrates a successful invocation of the business necessity defense.[118] In that case, Owusu-Ansah, a customer service representative, became agitated during a meeting with his manager, claiming national origin discrimination, banging a table with his fist, and stating that someone was "going to pay for this."[119] The employer

112. *Garrison*, 287 F.3d at 960–61; *American Tool*, 21 F. Supp. 3d at 1284–85.

113. Nevitt v. U.S. Steel Corp., 18 F. Supp. 3d 1322, 1335 (N.D. Ala. 2014).

114. *See, e.g.*, *Garrison*, 287 F.3d at 960.

115. *See, e.g.*, *Nevitt*, 18 F. Supp. 3d at 1327, 1335–36.

116. Conroy v. New York State Dep't of Correctional Servs., 333 F.3d 88, 97–98 (2d Cir. 2003).

117. *See, e.g.*, Wright v. Ill. Dep't of Children and Family Servs., 798 F.3d 513, 523 (7th Cir. 2015); Thomas v. Corwin, 483 F.3d 516, 527 (8th Cir. 2007); Scott v. Napolitano, 717 F. Supp. 2d 1071, 1083 (S.D. Cal. 2010).

118. 715 F.3d 1306 (11th Cir. 2013).

119. *Id.* at 1308–09.

responded by placing Owusu-Ansah on leave and requiring him to undergo a psychiatric evaluation.[120] Owusu-Ansah subsequently sued, claiming that the employer lacked an adequate basis for compelling the medical examination. The Eleventh Circuit, in its decision, focused on whether the examination was "job-related and consistent with business necessity."[121] The court described this defense in the following terms:

> We have said that "job-relatedness is used in analyzing the questions or subject matter contained in a test or criteria used by an employer" as a basis for an employment decision, while "[b]usiness necessity, in context, is larger in scope and analyzes whether there is a business reason that makes necessary the use by an employer of a test or criteria" for such a decision.[122]

Applying this standard, the Eleventh Circuit found that the examination was job-related in that the employer "had a reasonable, objective concern about Mr. Owusu-Ansah's mental state, which affected job performance and potentially threatened the safety of its other employees."[123] The court also concluded that the examination was consistent with business necessity since the employer had a legitimate interest in maintaining a safe work environment.[124] Finally, the court rejected Owusu-Ansah's argument that the employer needed to establish the existence of a direct threat in order to mandate the examination, stating that such a showing was not required where an employer has objective evidence that a medical condition could impair an employee's ability to perform essential job functions.[125]

With respect to behavior that could trigger a medical examination or inquiry, courts have held that behavior that is merely annoying or inefficient is insufficient to constitute business necessity.[126] On the other hand, a court has held that repeated erratic behavior did justify a mandated psychological examination.[127] Here again, courts are more apt to find business necessity for employees who are engaged in safety sensitive or dangerous jobs.[128]

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120. *Id.* at 1309–10. The examination indicated that Owusu-Ansah's profile was within normal limits, and he was authorized to return to work. *Id.* at 1310.

121. *Id.* at 1310.

122. *Id.* at 1311 (quoting Allmond v. Akal Sec., Inc., 558 F.3d 1312, 1317 (11th Cir. 2009)).

123. *Id.* at 1312.

124. *Id.*

125. *Id.* at 1313 (citing EEOC, Enforcement Guidance Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act, at *5 (2000)).

126. *See* Wright v. Ill. Dep't of Children and Family Servs., 798 F.3d 513, 524 (7th Cir. 2015); *see also* Kroll v. White Lake Ambulance Auth., 763 F.3d 619, 625 (6th Cir. 2014) (having an affair with a married coworker found not to justify an involuntary psychological examination).

127. Mickens v. Polk Cty. Sch. Bd., 430 F. Supp 2d 1265, 1279 (M.D. Fla. 2006).

128. *See* Brownfield v. City of Yakima, 612 F.3d 1140, 1146 (9th Cir. 2010) (police officer exhibiting repeated highly emotional behavior); *see also* Thomas v. Corwin, 483 F.3d 516, 527 (8th Cir.

As stated in *Conroy*, an examination or inquiry should be limited in scope and "no broader or more intrusive than necessary."[129] This issue often is relevant to the scope of return-to-work examinations. It is well-recognized that an employer has a valid business interest to determine whether an employee, who has been out on leave for medical reasons, can return to work capable of performing the essential functions of the job.[130] But return-to-work examinations do not warrant far-ranging disability-related inquiries and generally should be limited to assessing the specific medical condition that necessitated the leave of absence.[131] Thus, a federal district court in Kansas has held that an employer did not have a business necessity justification to require an employee who had been on leave following a stroke to disclose all of her legal prescription medications.[132]

C. A Unitary Business Necessity Standard?

The case law does not explicitly address whether the business necessity defense should be interpreted in a uniform manner across all three contexts. At least one commentator suggests that they should not. In a 2006 article, Professor Jarod S. Gonzalez argues that "because the interests underlying the regulation of qualification standards and medical examinations vary and the degree to which the law should protect those interests also varies, it would make sense for Congress to treat those interests differently through different conceptions of the business necessity defense."[133] More particularly, Professor Gonzalez maintains that because of the potential for significant safety emergencies in dangerous work environments, mandatory periodic medical examinations should be permissible whenever they serve a legitimate business purpose.[134] Such a standard is certainly lower than that recognized by the EEOC, which views periodic examinations as permissible only for a limited class of safety-sensitive positions.[135]

Some policy considerations arguably support a differential standard that would permit employers more flexibility to act in requiring a medical examination than in adopting qualification standards. Qualification standards sweep broadly to disqualify certain individuals without an

2007) (police officer exhibiting anxiety); Watson v. City of Miami Beach, 177 F.3d 932, 935 (11th Cir. 1999) (police officer exhibiting paranoia and hostility).

129. Conroy v. New York State Dep't of Correctional Servs., 333 F.3d 88, 98 (2d Cir. 2003).

130. *See* EEOC, Enforcement Guidance, *supra* note 30, at *10; Riechmann v. Cutler-Hammer, Inc., 95 F. Supp. 2d 1171, 1185 (D. Kan. 2000).

131. EEOC, Enforcement Guidance, *supra* note 30, at *10.

132. *Riechmann*, 95 F. Supp. 2d at 1186–87.

133. Jarod S. Gonzalez, *A Matter of Life and Death—Why the ADA Permits Mandatory Periodic Medical Examinations of "Remote Location" Employees*, 66 LA. L. REV. 681, 703–04 (2006).

134. *See id.* at 703–09.

135. *See supra* notes 93–94 and accompanying text.

individualized assessment of capabilities.[136] While qualification standards attempt to predict attributes necessary for successful job performance, medical examinations are grounded in real-time, objective concerns about work performance deficiencies.[137] Moreover, the consequences of the two practices are quite different. An employee who cannot meet a predesigned qualification standard is disqualified from the job, while an employee who is required to undergo a medical examination is only subject to an assessment of individualized capabilities.

In spite of these policy considerations, the current state of the case law appears to tilt in the opposite direction. In general, it is easier for an employer to show a generalized correlation between a qualification standard and successful job performance than it is for an employer to establish a specific objective basis for finding that an individual is unqualified for the job. Because an individualized assessment is required for medical examinations, but not for qualification standards, it is generally easier for an employer to meet the business necessity bar in the qualification standard context.

IV. THREE CONTENTIOUS ISSUES

This Part examines three contentious issues that have arisen concerning the application of the direct threat and business necessity defenses, namely: which party bears the burden of persuasion on the issue of direct threat, the permissible scope of medical inquiries related to sick leave usage, and the use of qualification standards that tend to screen out individuals with a history of drug or alcohol addiction. These issues share two attributes in common. First, each involves a struggle to base work decisions on objective indicia of successful job performance or a risk of harm as opposed to stereotypical assumptions about the capabilities of individuals with a disability. Second, the courts have adopted divergent views as to the treatment of each of these issues. The following sections describe the varying judicial views on each issue and recommend a policy-based path for possible future resolution.

A. Proving Direct Threat

The circuit courts of appeal are currently split as to which party bears the burden to prove the existence of a direct threat. This disagreement reflects the fact that the statute "points in two directions" on this issue.[138] On the one hand, the statute includes direct threat within section 12113,

136. *See supra* note 105 and accompanying text.

137. *See supra* notes 109–125 and accompanying text.

138. Jon L. Gillum, *Tort Law and the Americans with Disabilities Act: Assessing the Need for a Realignment*, 39 IDAHO L. REV. 531, 565–66 (2003).

which is entitled "defenses."[139] If direct threat is viewed as an affirmative defense, the usual burden of proof is on the defendant, i.e., the employer.[140] On the other hand, the statute also describes direct threat as a "qualification standard,"[141] and it is well established that a plaintiff-employee bears the burden to show that the employee is a qualified individual with a disability.[142]

1. Circuit Split

Four circuits have held that the burden of persuasion in a direct threat case always rests with the employer. The Eighth and Ninth Circuits view the existence of a direct threat as an affirmative defense and have concluded that the burden for establishing affirmative defenses always rests with the employer.[143] The Seventh Circuit agrees with this view, holding that "a public entity that asserts the reason it failed to accommodate a disabled individual was because she posed a direct threat to safety bears the burden of proof on that defense at trial."[144] The Second Circuit also relies on the affirmative defense logic to place the burden on the employer.[145]

The Eleventh Circuit, in contrast, has held that the employee bears the burden of proof in a direct threat case.[146] The Eleventh Circuit reached this conclusion by bundling the existence of a direct threat into the requirement that a disabled employee prove he is "otherwise qualified" for the job.[147]

Three circuits take a middle position that splits the burden of proof depending upon the matter at issue, but each circuit does so in a somewhat different manner. The Tenth Circuit has taken the most straightforward approach, finding that, in general, the direct threat defense is an affirmative defense that must be established by the employer.[148] But, the Tenth Circuit recognizes an exception for "where the essential job duties necessarily implicate the safety of others, then the burden may be on the plaintiff to show that she can perform those functions without endangering others."[149]

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139. 42 U.S.C. § 12113(b).

140. *See* Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1247 (9th Cir. 1999) ("[B]ecause [direct threat] is an affirmative defense, [the employer] bears the burden of proving that [the plaintiff] is a direct threat.").

141. 42 U.S.C. § 12113(b).

142. *See* EEOC v. Amego, Inc., 110 F.3d 135, 144 (1st Cir. 1997) ("It is the plaintiff's burden to show that he or she can perform the essential function of the job, and is therefore, 'qualified.'").

143. *See* EEOC v. Wal-Mart Stores, Inc., 477 F.3d 561, 571–72 (8th Cir. 2007); Hutton v. Elf Altochem N. Am., Inc., 273 F.3d 884, 893 (9th Cir. 2001).

144. Dadian v. Village of Wilmette, 269 F.3d 831, 840–41 (7th Cir. 2001).

145. *See* Hargrave v. Vermont, 340 F.3d 27, 35 (2d Cir. 2003).

146. *See* Moses v. Am. Nonwovens, Inc., 97 F.3d 446, 447 (11th Cir. 1996).

147. *Id.*

148. Jarvis v. Potter, 500 F.3d 1113, 1122 (10th Cir. 2007).

149. *Id.* (quoting from McKenzie v. Benton, 388 F.3d 1342, 1354 (10th Cir. 2004)).

The First Circuit takes a similar approach. The First Circuit has ruled that if essential job functions implicate the safety of others, the employee must demonstrate that she can perform them without endangering others.[150] However, if the direct threat is not tied to job functions, then it is purely an affirmative defense and the burden of persuasion lies with the employer.[151]

The Fifth Circuit, meanwhile, appears to slice the burden of proof from the opposite direction. In *Rizzo v. Children's World Learning Centers*, the Fifth Circuit ruled that the employee generally bears the burden of proving that she is a qualified individual who does not pose a direct threat to herself or others.[152] But, the Fifth Circuit went on to state that "when a court finds that the safety requirements imposed [by an employer] tend to screen out the disabled, then the burden of proof shifts to the employer, to prove that the employee is, in fact, a direct threat."[153]

2. Policy Discussion

The most appropriate resolution of this debate is to endorse the position placing the burden of proving direct threat on the employer as an affirmative defense. This outcome is desirable for a number of reasons.

First, the legislative history of the ADA suggests that Congress intended the employer to bear the burden of persuasion in direct threat cases. House Report 101-485, for example, in discussing qualification standards, states "if the applicant is otherwise qualified for the job, he or she cannot be disqualified on the basis of a physical or mental condition unless the *employer can demonstrate* that the applicant's disability poses a direct threat to others in the workplace."[154] Similarly, a conference committee report states that the employer may take into consideration such factors as the magnitude, severity, or likelihood of risk to other individuals in the workplace and that "the *burden would be on the employer* to show the relevance of such factors in relying on the qualification standard."[155]

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150. EEOC v. Amego, Inc., 110 F.3d 135, 144 (1st Cir. 1997).

151. *Id.*

152. Rizzo v. Children's World Learning Ctrs., Inc., 173 F.3d 254, 259-60 (5th Cir. 1999).

153. *Id.* at 259–60.

154. H.R. REP. NO. 101-485, pt. 3 at 46 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 469 (emphasis added). The Second Circuit Court of Appeals, citing to this report, concluded that "the legislative history of the ADA . . . supports the premise that "[t]he plaintiff is not required to prove that he or she poses no risk." Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208, 220 (2d Cir. 2001).

155. 136 CONG. REC. H4582-02, H4598 (July 12, 1990), 1990 WL 97211 (Conference Report) (emphasis added); *see also* 136 CONG. REC. H2599-01, H2624 (May 22, 1990), 1990 WL 67606 (statement of Rep. Fish) ("If the employer determines, by objective evidence that is sufficiently recent as to be credible, and not from unsubstantiated inferences, that the applicant will pose a direct threat that is a significant risk to the health or safety of others, and that the threat cannot be eliminated by the provision of a reasonable accommodation, the employer may reject the applicant as an employee . . . . *The applicant or participant is not required to prove that he or she poses no risk.*") (emphasis added).

Second, placing the burden of proof on the employer would be consistent with the treatment afforded to the ADA's other defenses.[156] Employers bear the burden of establishing the existence of the business necessity defense[157] and the undue hardship defense.[158]

Third, the EEOC, the agency vested with the authority to enforce Title I of the ADA, appears to take the view that the burden of proof on the direct threat issue should be on the employer.[159] In this regard, the EEOC Enforcement Guidance on psychiatric disabilities states:

> An employer may refuse to hire someone based on his/her history of violence or threats of violence if it can show that the individual poses a direct threat . . . . To find that an individual with a psychiatric disability poses a direct threat, the *employer must identify* the specific behavior on the part of the individual that would pose the direct threat. This includes an assessment of the likelihood and imminence of future violence.[160]

Fourth, as a practical matter, the employer is in a better position than the employee to establish the existence or non-existence of a direct threat. Employers create jobs, define the responsibilities of a position, and hire those they deem capable of performing essential job functions. "The [employer] is certainly in the best position to furnish the court with a complete factual assessment of both the physical qualifications of the candidate and of the demands of the position."[161]

Finally, one of the principal objectives of Congress in enacting the ADA was to eradicate employment decisions "based on fear and stereotype."[162] While placing the burden of proof on employees who perform safety-sensitive job tasks may reduce disability-related safety risks, such an approach would be prone to enabling decisions based on fear and stereotype. Placing the burden of establishing the direct threat defense on the employer best assures an individualized assessment of actual safety and

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156. *See* Rene L. Duncan, *The "Direct Threat" Defense Under the ADA: Posing a Threat to the Protection of Disabled Employees*, 73 MO. L. REV. 1303, 1319 (2008) (comparing the direct threat defense to other defenses).

157. *Id.* at 1319–20.

158. *See* U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 400–01 (2002) (endorsing the position of lower courts that have placed the burden of showing undue hardship on the employer).

159. Bragdon v. Abbott, 524 U.S. 624, 642 (1998) ("It is enough to observe that the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'") (internal citation omitted).

160. EEOC, No. 915.002 Add., Enforcement Guidance: the Americans with Disabilities Act and Psychiatric Disabilities (1997) (emphasis added); *see also* EEOC, No. 915.002, Enforcement Guidance: Workers' Compensation and the ADA (2000) ("The employer can refuse to hire the person *only if it can show* that his/her employment in the position poses a 'direct threat.' . . . [T]he employer must demonstrate that the risk rises to the level of a direct threat.") (emphasis added).

161. Branham v. Snow, 392 F.3d 896, 907 n.5 (7th Cir. 2004).

162. H.R. REP. NO. 101-485, pt. 3, at 45, *as reprinted in* 1990 U.S.C.C.A.N. 445, 468.

health risks as opposed to a decision that may be based on stereotypes, false assumptions, or prejudices.

B. Sick Leave and Mandatory Doctor's Notes

It is not uncommon for employers to adopt sick leave reporting policies that seek to deter sick leave abuse and to determine fitness for duty. One traditional method is to require employees returning from sick leave absences to provide a doctor's note verifying the existence of a legitimate illness or injury. But the courts have differing views on when information required by a doctor's note policy constitutes a suspect disability-related inquiry.

1. Disability-Related Inquiries

As noted above, the ADA provides that an employer "shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity."[163] The EEOC's Enforcement Guidance on Disability-Related Inquiries and Medical Examinations (Enforcement Guidance or Guidance) provides more detail as to the scope of this prohibition.[164] The EEOC Enforcement Guidance states that only disability-related inquiries and medical examinations are subject to the ADA's restrictions.[165] According to the EEOC, a "disability-related inquiry" is a "question . . . that is likely to elicit information about a disability" including asking "an employee's . . . doctor . . . about an employee's disability."[166]

The EEOC Enforcement Guidance specifically addresses disability-related inquiries and medical examinations related to leave. It states that an employer is "entitled to know why an employee is requesting sick leave."[167] An employer "may ask an employee to justify his/her use of sick leave by providing a doctor's note or other explanation, as long as it has a policy or practice of requiring all employees, with and without disabilities, to do so."[168] The Guidance does not address, however, whether a doctor's note may require the inclusion of diagnostic information.[169] The Guidance

163. 42 U.S.C. § 12112(d)(4)(a).

164. EEOC, Enforcement Guidance, *supra* note 30.

165. *Id.* at *2.

166. *Id.* A "medical examination" is a procedure or test usually given by a health care professional or in a medical setting that seeks information about an individual's physical or mental impairments or health. *Id.* at *3.

167. *Id.* at *10.

168. *Id.*

169. See Lydia Petrakis, *Sick Leave Policies Requiring Medical Certification Violate the ADA and Rehabilitation Act: Why the Second Circuit Got It Right and the Sixth Circuit Got It Wrong*, 23 GEO.

further states that an employer may ask disability-related questions or require a medical examination when an employee who has been on leave for a medical condition wants to return to work when the employer has a "reasonable belief that an employee's *present* ability to perform essential job functions will be impaired by a medical condition or that [he or she] will pose a direct threat due to a medical condition" (emphasis in original).[170] However, any inquiries must be "limited in scope to what is needed to make an assessment of the employee's ability to work."[171]

2. Circuit Split

In *Conroy v. New York State Department of Correctional Services*,[172] a case in the Second Circuit, an employee of the New York State Department of Correctional Services (DOCS) sued her employer, claiming that the DOCS' sick leave policy violated the ADA.[173] The sick leave policy required employees to submit "general diagnoses" as part of a medical certification process upon returning to work.[174] The "general diagnosis" included in the certification had to be "sufficiently informative as to allow [the employer] to make a determination concerning the employee's entitlement to leave or to evaluate the need to have an employee examined . . . prior to returning to duty."[175] The policy further stated that, although certification was usually only required for absences of four days or more, a supervisor could request certification for "any absence charged to sick leave . . . regardless of duration."[176]

The *Conroy* court found the sick leave inquiry to be disability-related, stating that requiring a "'general diagnosis' may tend to reveal a disability" and "expose individuals with disabilities to employer stereotypes."[177] The court further stated that "even where a diagnosis alone is not sufficient to establish that an employee is disabled, the diagnosis may give rise to the *perception* of a disability."[178]

The court cited to the EEOC Guidance's definition of a "disability-related inquiry" which described the following as disability-related inquiries: asking employees "whether they have or ever had a disability; the

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MASON U. C.R. L.J. 365, 396 (2013) (stating that the "EEOC [Enforcement] Guidance refers to a 'doctor's note or other explanation,' but does not provide whether this note or explanation can disclose the nature of the illness").

170. EEOC, Enforcement Guidance, *supra* note 30, at *13.

171. *Id.*

172. 333 F.3d 88 (2d Cir. 2003).

173. *Id.* at 91–92.

174. *Id.* at 92.

175. *Id.*

176. *Id.*

177. *Id.* at 95–96.

178. *Id.* at 96 (emphasis in original).

kinds of prescription medications they are taking; and, the results of any genetic tests they have had" or asking an "employee's co-worker, family member, or doctor about the employee's disability."[179] In contrast, questions about an employee's general well-being, ability to perform job functions, or use of illegal drugs are not disability-related.[180] The court compared the DOCS' "general diagnosis" requirement to these examples, concluding that the DOCS' policy was "much more akin to the examples of prohibited inquiries."[181] As a result, the court ruled that the policy was prohibited under the ADA unless justified by "business necessity" and remanded that issue to the district court.[182]

In *Lee v. City of Columbus*, the Sixth Circuit examined an employer directive that required employees returning from sick leave to submit a physician's note indicating "the 'nature of the illness' and whether the employee is capable of returning to regular duty."[183] The Sixth Circuit held that simply asking an employee to describe the "nature" of his or her illness is "not necessarily a question about whether the employee is disabled."[184]

The *Lee* court criticized the *Conroy* holding, stating that by "finding suspect any routine or general inquiry simply because it 'may tend to reveal' an employee's disability, the *Conroy* court has unnecessarily swept within the statute's prohibition numerous legitimate and innocuous inquiries that are not aimed at identifying a disability."[185] The court placed importance on the employer's intent in adopting the reporting requirement and found that there was "no evidence that [the] inquiry [was] intended to reveal or necessitates revealing a disability."[186]

The Sixth Circuit stated that, even if the directive could be characterized as a disability-related inquiry, since it was a workplace policy applicable to all employees, disabled or not, it would not be prohibited by the ADA.[187] The court cited to the EEOC Enforcement Guidance which states that "an employer is entitled to know why an employee is requesting sick leave" and may ask an employee to provide a doctor's note so long as the policy requires "all employees" to do so.[188] The Sixth Circuit stated that

179. *Id*. (citing EEOC, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations, at *3–4).

180. *Id.* (citing EEOC, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations, at *4).

181. *Id.* at 96.

182. *Id.* at 97. The court found that a genuine issue of material fact existed with respect to DOCS' business necessity defense, which required the court to remand for further discovery on that issue. *Id.*

183. 636 F.3d 245, 247 (6th Cir. 2011).

184. *Id.* at 254–255.

185. *Id.* at 255.

186. *Id.*

187. *Id.*

188. *Id.*

"on the basis of this Guidance, other courts and the EEOC have held that an employer's request for employees to supply information justifying the use of sick leave is not an improper medical inquiry under the Rehabilitation Act or the ADA."[189]

In *EEOC v. Dillard's Inc.*,[190] the EEOC filed suit against the retailer Dillard's in the Southern District of California on behalf of several former employees, alleging that their employment had been terminated for failing to provide doctors' notes specifying the medical condition that caused their absences. The attendance policy in question stated that employees were allowed up to three unexcused absences; however, a fourth unexcused absence would result in the employee's termination from employment. For an absence to be "excused" under the policy, the employee was required to submit a physician's note that explains "the nature of the absence (such as migraine, high blood pressure, etc.)"[191] The EEOC claimed that the attendance policy was a disability-related inquiry. The *Dillard's* court adopted the EEOC's view and rejected the Sixth Circuit's approach in *Lee*, finding that requiring disclosure of the condition that caused an absence "invites intrusive questioning into the employee's medical condition, and tends to elicit information regarding an actual or perceived disability."[192]

Finding the attendance policy disability-related, the court then noted that Dillard's could attempt to justify the disclosure requirement by showing that the requirement was job-related and consistent with business necessity. However, while Dillard's had argued that the sick leave policy enabled it to confirm the legitimacy of the absence and was necessary to ensure that the employee's return to work did not put workplace safety at risk, the court stated that no evidence had been submitted to support these assertions.[193]

Although the court did not accept Dillard's' defense of its policy, it did suggest an example of a policy that would not violate the ADA. The court stated that "Dillard's could have required its employees to submit a doctor's note specifying the date on which the employee was seen, stating that the absence from work was medically necessary, and stating the date on which such employee would be able to return to work."[194] The court was concerned by Dillard's lack of explanation as to why it was necessary to identify the underlying medical condition rather than simply accepting a

189. *Id.* at 256.

190. No. 08cv1780–IEG(PCL), 2012 WL 440887 (S.D. Cal. Feb. 9, 2012).

191. *Id.* at *1.

192. *Id.* at *4. *Accord* Penn. State Troopers Ass'n v. Miller, 621 F. Supp. 2d 246, 253 (M.D. Penn. 2008); Transp. Workers Union of Am., Local 100 v. N.Y.C. Transit Auth., 341 F. Supp. 2d 432, 438, 447 (S.D.N.Y. 2004).

193. *Dillard's*, 2012 WL 440887 at *5.

194. *Id.* at *4.

doctor's note that verified that the employee has a medical condition that required absences for a specific amount of time.[195]

3. Policy Discussion

The validity of a sick leave reporting policy depends on a two-part test: 1) do the reporting requirements constitute a disability-related inquiry, and 2) if so, can the employer establish that the inquiry is job-related and consistent with business necessity?[196] As discussed below, inquiries that require individualized diagnostic information are not consistent with the business necessity requirement.

The Second Circuit in *Conroy* found that a requirement that a doctor's note provide a "general diagnosis" of the reason for an absence was disability-related,[197] while the Sixth Circuit in *Lee* found that requiring a description of the "nature" of an illness was not disability-related.[198] Not much weight should be given to the difference in wording of the two requirements since they essentially require the same information—a medical description of an absent employee's underlying medical condition.[199] Indeed, the Ninth Circuit in *Dillard's* concluded that both requirements were equally disability-related.[200]

The principal difference between the *Conroy* and *Lee* outcomes was that the Sixth Circuit in *Lee* construed the EEOC Enforcement Guidance as permitting a universal reporting policy without considering the diagnostic nature of the reporting requirement. But that view misreads the EEOC Enforcement Guidance. A reporting policy that is not universal is suspect if it treats individuals with disabilities more stringently than other employees.[201] But a policy that may require the disclosure of disabilities is disability-related even if it is required of all employees.[202]

A reporting policy that requires an employee to provide a doctor's note describing the nature of an illness or a general diagnosis is a requirement that is likely to elicit information about the existence of a disability. The requirement is akin to asking an employee to provide a list of all prescription drugs being taken, an inquiry that both the EEOC Enforcement

195. *Id.* at *5.

196. *See supra* notes 163–166 and accompanying text.

197. Conroy v. New York State Dep't of Correctional Servs., 333 F.3d 88, 95–96 (2d Cir. 2003).

198. Lee v. City of Columbus, 633 F.3d 245, 254–55 (6th Cir. 2011)..

199. *See* Petrakis, *supra* note 169, at 385 ("a statement including a general diagnosis or the nature of the illness is likely to elicit information about a disability because it requires a description from the doctor").

200. *Dillard's*, 2012 WL 440887, at *4.

201. *See* EEOC, Enforcement Guidance, *supra* note 30, at *10.

202. *See* Petrakis, *supra* note 169, at 414 (arguing that a reporting policy that is applicable to all employees nonetheless is disability-related and has a discriminatory effect if it tends to reveal disabilities).

Guidance[203] and case law[204] find to be disability-related. Both types of inquiries ask for broad-based information about health status that may have a significant correlation with individual impairments. And, as the *Conroy* court noted, asking for general diagnostic information implicates the policy danger of exposing individuals with disabilities to employer stereotypes.[205]

Neither *Conroy* nor *Lee* reached the business necessity issue. But the *Conroy* decision does indicate that the employer in that case urged two business justifications for the general diagnosis requirement: 1) to determine if an employee is abusing sick leave, and 2) to determine if an employee can safely return to work with the capacity to perform job-related duties.[206]

The reasoning of a Pennsylvania federal district court suggests that these purported justifications are unlikely to be sufficient to establish a business necessity defense. In *Pennsylvania State Troopers Association v. Miller*, a union representing state police officers challenged a policy requiring absent troopers to notify their supervisor of the nature of their injury or illness.[207] The court found that such a requirement constituted a disability-related inquiry and turned to the business necessity issue.[208] The employer claimed that its policy was necessary in order to arrange for adequate shift coverage and to determine individual fitness for duty.[209] The court rejected the first purported justification on the grounds that the employer could assess staff coverage needs through alternative, less intrusive means.[210] The court also rejected the second alleged justification, finding that the reporting policy was not narrowly tailored to employees who are genuinely at risk of substandard job performance.[211] The court concluded that the reporting policy falls short of business necessity because it "operates based upon members' *use of sick leave* rather than upon the member's *medical condition or employment duties*."[212]

The policies at issue in *Conroy* and *Lee* likely suffer from similar deficiencies. As noted by the court in *Dillard's*, an employer's concern about sick leave abuse could be addressed by a less intrusive reporting policy that focuses on the medical necessity of absences along with an anticipated return date to work, as opposed to a description of an

203. EEOC, Enforcement Guidance, *supra* note 30, at *3.
204. Roe v. Cheyenne Mountain Conference Resort, 920 F. Supp. 1153, 1154–55 (D. Colo. 1996).
205. Conroy v. New York State Dep't of Correctional Servs., 333 F.3d 88, 96 (2d Cir. 2003).
206. *Id.* at 94, 98.
207. 621 F. Supp. 2d 246, 250 (M.D. Penn. 2008).
208. *Id.* at 253.
209. *Id.* at 254, 256.
210. *Id.* at 255–56.
211. *Id.* at 259–60.
212. *Id.* at 260 (emphasis in original).

employee's underlying medical condition.[213] Similarly, the *Conroy* and *Lee* policies broadly regulate sick leave usage as opposed to a more tailored focus on employee capabilities and job duties. In short, the business necessity defense should not justify the disability-related inquiries in question.

C. Policies that Exclude Applicants with a History of Addiction

A third area of uncertainty concerning these defenses relates to employer policies that permanently exclude applicants with a history of drug or alcohol problems. Although there is not an abundance of court decisions on this topic, a majority of the cases that do exist have ruled that an employer having such a policy does not violate the ADA as long as there is a business necessity for the policy. In contrast, the Supreme Court has suggested that such a policy might be suspect under a disparate impact theory, and a recent decision by a district court in the Eighth Circuit shows the potential for growth in that direction.[214]

1. Case Law

A starting point for assessing this issue is the Supreme Court's decision in *Raytheon Co. v. Hernandez*.[215] In 1991, a calibration service technician quit in lieu of discharge after testing positive for cocaine use.[216] He successfully completed a rehabilitation program and applied to be rehired two years later. The employer rejected his application, stating that the company had an "unwritten policy of not rehiring former employees whose employment ended due to termination or resignation in lieu of termination."[217] While the district court granted the employer's motion for summary judgment, the Ninth Circuit Court of Appeals reversed. The court of appeals stated:

Hughes's unwritten policy against rehiring former employees who were terminated for any violation of its misconduct rules, although not unlawful on its face, violates the ADA as applied to former drug addicts

213. *Dillard's*, 2012 WL 440887, at *4–5 (S.D. Cal. Feb. 9, 2012).

214. For the purposes of the analysis that follows, it will be assumed that individuals with a drug or alcohol addiction who are not currently using illegal drugs qualify as disabled for ADA purposes. Although this was not always the case, *see, e.g.*, Sullivan v. Neiman Marcus Group, 358 F.3d 110 (1st Cir. 2004), most such individuals now have standing as disabled either under the "record of" prong of the disability definition, *see e.g.*, MX Group, Inc. v. City of Covington, 293 F.3d 326, 339–40 (6th Cir. 2002), or under the expanded coverage of the ADA Amendments Act, *see, e.g.*, EEOC v. Old Dominion Freight Line, Inc., Civil No. 11-2153, 2013 WL 3230670, at *3 (W.D. Ark. 2013).

215. 540 U.S. 44 (2003).

216. Hernandez v. Hughes Missile Sys. Co., 298 F.3d 1030, 1032 (9th Cir. 2002), *vacated sub nom.* Raytheon Co. v. Hernandez, 540 U.S. 44 (2003).

217. *Id*.

whose only work-related offense was testing positive because of their addiction.[218]

The court concluded "[i]f Hernandez is in fact no longer using drugs and has been successfully rehabilitated, he may not be denied re-employment simply because of his past record of drug addiction."[219]

The Supreme Court vacated the decision, finding that the Ninth Circuit had "erred by conflating the analytical framework for disparate-impact and disparate-treatment claims."[220] Since Hernandez had not pled a disparate impact claim, the legality of the employer's policy should have been decided solely on disparate treatment grounds.[221] The Court explained:

> [T]he Court of Appeals ignored the fact that petitioner's no-rehire policy is a quintessential legitimate, nondiscriminatory reason for refusing to rehire an employee who was terminated for violating workplace conduct rules. If petitioner did indeed apply a neutral, generally applicable no-rehire policy in rejecting respondent's application, petitioner's decision not to rehire respondent can, in no way, be said to have been motivated by respondent's disability.[222]

Despite the Supreme Court's ruling, the Ninth Circuit's decision arguably provides some evidence that this jurisdiction might view such a blanket no-rehire policy as having a disparate impact on recovering or former drug addicts and, therefore, constitute an ADA violation in the absence of a showing of business necessity.[223] That is, if correctly pled, a disparate impact claim may be viable in this context.

A recent district court decision takes this view a step further. In *EEOC v. Old Dominion Freight Line, Inc.*, a truck driver reported to his employer, Old Dominion, that he believed he was having problems with alcohol and wanted to pursue treatment.[224] The employer told the truck driver he needed to participate in a treatment program, but that it had a policy of banning anyone with an alcohol problem from ever returning to a driving position.[225] When the truck driver was not able to afford a treatment program, the employer fired him.[226] The United States District Court for Western Arkansas ruled for the employee, viewing Old Dominion's no-return policy

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218. *Id.* at 1036 (citing EEOC, TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT §§ 8.2, 8.5 (1992)).

219. *Hughes Missile Sys. Co.*, 298 F.3d at 1036.

220. *Raytheon*, 540 U.S. at 51.

221. *Id*.

222. *Id.* at 54–55.

223. *See* PETER A. SUSSER & PETER J. PETESCH, DISABILITY DISCRIMINATION AND THE WORKPLACE 758 (2d. ed 2011).

224. EEOC v. Old Dominion Freight Line, Inc., Civil No. 11-2153, 2013 WL 3230670, at *2 (W.D. Ark. June 26, 2013).

225. *Id.*

226. *Id.* at *2–3.

as being an impermissible qualification standard that was not substantiated by an individualized assessment of the driver. The court concluded that while it appreciated "Old Dominion's safety concerns, its no-return policy—which fails to even consider the possibility of accommodation—cannot be justified either on [direct threat] public safety concerns or business necessity considerations."[227]

In contrast to *Old Dominion*, most courts that have confronted a similar scenario have ruled for the employer. A 2000 decision issued by the Fifth Circuit initiated the majority line of cases. In *EEOC v. Exxon Corp.*, the employer, following the disastrous Exxon Valdez oil tanker accident, adopted a policy that permanently removed any employee who had undergone treatment for alcoholism or drug addiction from certain "safety-sensitive, little-supervised positions."[228] As discussed below, the Fifth Circuit agreed with the employer and determined that the validity of this qualification standard should be tested with reference to the business necessity defense rather than the direct threat defense.[229] The court remanded the business necessity issue with the instruction that the district court should weigh the magnitude of possible harm as well as the probability of occurrence, and determine whether the rate of recidivism among recovering addicts constituted a safety risk sufficient to prove business necessity.[230]

The next decision in this line of cases was *Lopez v. Pacific Maritime Association*.[231] When Santiago Lopez first applied in 1997 to work for Pacific Maritime Association (PMA) as a longshoreman, he tested positive for marijuana and was disqualified from further consideration due to PMA's "one-strike rule."[232] Lopez later became sober and reapplied for the same position in 2004, but because of the one-strike rule, his application was rejected.[233]

Lopez sued PMA, asserting both disparate treatment and disparate impact claims. The Ninth Circuit Court of Appeals rejected both claims. The court first held that the one-strike rule did not facially discriminate against recovered drug addicts since "[n]othing in the record suggests that Defendant targeted or attempted to target recovered drug addicts, as distinct from recreational users."[234] The court also rejected the disparate impact claim, stating:

227. *Id.* at *6.
228. 203 F.3d 871, 872 (5th Cir. 2000).
229. *See id.* at 875. *See infra* at notes 255–58 and accompanying text.
230. *Exxon Corp.*, 203 F.3d at 875.
231. 657 F.3d 762 (9th Cir. 2011).
232. *Id.* at 764.
233. *Id*.
234. *Id.* at 765.

To create a genuine issue of fact under the [disparate impact] theory . . . Plaintiff must have produced evidence from which a fact-finder reasonably could conclude that the one-strike rule results in fewer recovered drug addicts in Defendant's employ, as compared to the number of qualified recovered drug addicts in the relevant labor market. . . . The record contains neither statistical nor anecdotal evidence to that effect.[235]

The third decision in this line of cases closely mirrored the *Lopez* fact scenario. In *Lopreato v. Select Specialty Hospital-Northern Kentucky, LLC*, two nurses in recovery were not hired because of a company practice of only hiring nurses with a clean license.[236] The district court rejected the nurses' disparate treatment claim, concluding "Select's decision with respect to Lopreato and Taylor was motivated by a neutral company policy not to hire nurses with any form of licensing restriction."[237] Citing to *Raytheon Co. v. Hernandez*, the district court granted the employer's motion for summary judgment, stating that the employer's practice of "not hiring nurses with a restricted license was evident from the very beginning [and] . . . justifiable under the circumstances."[238]

2. Rationale for Excluding Rehabilitated Applicants

A. Business Necessity

Although these qualification standard cases generally have not required an individualized assessment of job applicants in determining whether an exclusionary policy is supported by business necessity, the EEOC suggests that such may be necessary before denying a job opportunity to an individual with a history of addiction. The EEOC's Technical Assistance Manual provides the following example:

> A law enforcement agency might be able to show that excluding an individual with a history of illegal drug use from a police officer position was necessary, because such illegal conduct would undermine the credibility of the officer as a witness for the prosecution in a criminal case. However, even in this case, exclusion of a person with a history of illegal drug use might not be justified automatically as a business necessity, if an applicant with such a history could demonstrate an extensive period of successful performance as a police officer since the time of drug use.[239]

A number of decisions have found policies that permanently exclude applicants with a history of alcoholism or drug addiction to be permissible

235. *Id.* at 767.

236. No. 12–217–DLB–JGW, 2014 WL 6804221, at *8 (E.D. Ky. Dec. 3, 2014).

237. *Id.* at *10.

238. *Id.*

239. EEOC, Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act § 8.7, at VIII-5 to -6 (1992).

based upon business necessity grounds.[240] These courts have concluded that at least in the case of "safety sensitive" positions such as truck drivers, nurses, or longshoremen, a history of alcoholism or drug addiction could lead to a valid exclusion of an applicant pursuant to a safety-based exclusionary policy.[241] The Fifth Circuit in *Exxon Corp.,* for example, stated that "[i]n cases where an employer has developed a general safety requirement for a position, safety is a qualification standard no different from other requirements defended under the ADA's business necessity provision."[242] Here, the apparent policy concern is that individuals with a history of addiction may pose an unacceptable safety risk in certain safety-sensitive positions due to the potential for recidivism.[243]

B. Direct Threat

A second basis used by the courts to allow policies that permanently exclude applicants or employees with a history of alcoholism or drug addiction is the direct threat defense. If an applicant with an alcohol- or drug-related addiction poses a significant health or safety risk that cannot be eliminated by a reasonable accommodation, an employer may refuse to employ that individual without violating the ADA.[244]

To justify such an exclusion on direct threat grounds, an employer must establish that there is a high probability that the employee or applicant would start using drugs or alcohol again. This showing must be made through an individualized assessment of the person's particular history of addiction, the likelihood of recidivism, and the nature of the job at issue.[245]

3. Overlapping Defenses

The Fifth Circuit's decision in *EEOC v. Exxon Corp.* illustrates that the direct threat and business necessity defenses have the potential to overlap in application. On March 24, 1989, the Exxon Valdez oil tanker struck Prince

240. *See, e.g.*, EEOC v. Exxon Corp., 203 F.3d 871 (5th Cir. 2000); Lopez v. Pac. Mar. Ass'n, 657 F.3d 762 (9th Cir. 2011); Lopreato v. Select Specialty Hosp. N. Kentucky, LLC, No. 12–217–DLB–JGW, 2014 WL 6804221, at *8 (E.D. Ky. Dec. 3, 2014).

241. *Id.*

242. 203 F.3d at 874.

243. *See id.* In spite of this concern, it appears that relapse rates for individuals with substance addictions are roughly same as for those with other chronic diseases such as diabetes, hypertension, and asthma. *See* NAT'L INST. ON DRUG ABUSE, PRINCIPLES OF DRUG ADDICTION TREATMENT 11 (3d ed. 2012).

244. *See, e.g.*, Bekker v. Humana Health Plan, Inc., 229 F.3d 662, 670 (7th Cir. 2000) (medical doctor who saw patients while under the influence of alcohol); Williams v. Widnall, 79 F.3d 1003 (10th Cir. 1996) (Air Force employee who threatened co-workers while drunk). *See also* SUSSER & PETESCH, *supra* note 223, at 759.

245. *See* Technical Assistance Manual, *supra* note 239, § 8.7, at VIII-6 ("merely citing general reports or statistics of recovering addict recidivism rates" is insufficient to establish the existence of a direct threat.).

William Sound's Bligh Reef, spilling 10.8 million gallons of crude oil into the water and producing one of the world's largest man-made environmental disasters.[246] The Captain of the Exxon Valdez was drinking heavily the night of the accident and was not at the controls of the ship when it struck the reef.[247] As a result of this incident, Exxon paid out $125 million in criminal fines and $900 million in civil penalties.[248] Exxon responded by adopting a policy disqualifying individuals who had undergone treatment for substance abuse from certain safety-sensitive and little-supervised positions.[249] This policy affected nearly ten percent of Exxon's workforce.[250]

The EEOC sued, claiming that Exxon's policy violated the ADA.[251] Exxon defended their policy alleging that it promoted safety, furthered environmental protection, and diminished the potential for future liability.[252] The EEOC moved for partial summary judgment, claiming that Exxon could defend the policy only by using the direct threat defense.[253] The EEOC's position was grounded in an Interpretive Guidance provision stating:

> With regard to safety requirements that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, an employer must demonstrate that the requirement, as applied to the individual, satisfies the "direct threat" standard in § 1630.2(r) in order to show that the requirement is job-related and consistent with business necessity.[254]

The district court agreed with the EEOC and granted partial summary judgment.

On appeal, the Fifth Circuit disagreed with the EEOC's contention that a safety standard is permissible only if it satisfies the direct threat defense. The court noted that ADA section 12113(a) permits employers to adopt qualification standards that "screen out or tend to screen out an individual" if consistent with business necessity,[255] and that a number of courts have applied the business necessity defense to safety-based qualification

246. *In re Exxon Valdez*, 236 F. Supp. 2d 1043, 1045 (D. Alaska 2002).

247. *Id.* ("Joseph Hazelwood[] was in command of the Exxon Valdez. . . . Captain Hazelwood was a skilled mariner, but he was an alcoholic. Worse yet, he was a relapsed alcoholic; and before departing Valdez Alaska . . . he had, more probably than not, consumed sufficient alcohol to incapacitate a nonalcoholic.").

248. Exxon Valdez Oil Spill Trustee Council, *Settlement*, http://www.evostc.state.ak.us/index.cfm?FA=facts.settlement (last visited April 5, 2017).

249. EEOC v. Exxon Corp., 203 F.3d 871, 872 (5th Cir. 2000).

250. *Id.*

251. *Id.* at 872.

252. *Id.*

253. *Id.* at 875.

254. 29 C.F.R. pt. 1630 App. § 1630.15(b)–(c).

255. *Exxon Corp.*, 203 F.3d at 872; *see also* 42 U.S.C. § 12113(a).

standards.[256] The court stated that the ADA's language "suggest[s] that business necessity applies to across-the-board rules, while direct threat addresses a standard imposed on a particular individual."[257] The court, accordingly, resolved the apparent overlap as to the application of the two defenses as follows:

> We hold that an employer need not proceed under the direct threat provision of § 12113(b) in such cases [where an employer has developed a standard applicable to all employees of a given class] but rather may defend the standard as a business necessity. The direct threat test applies in cases in which an employer responds to an individual employee's supposed risk that is not addressed by an existing qualification standard.[258]

The Fifth Circuit stated that the two defenses "do not present hurdles that comparatively are inevitably higher or lower," but rather simply require different proof in different contexts.[259] In spite of this statement, it seems clear that employers generally would prefer to have safety standards tested by the business necessity defense rather than the direct threat defense. The former defense can be established by showing a predictive correlation between a qualification standard and successful job performance,[260] while the direct threat defense requires proof that a particular individual is likely to pose a significant risk of substantial harm.[261] As noted above, it is easier for an employer to show a generalized correlation between a qualification standard and safety than it is to establish a specific objective basis for showing that an individual actually presents a significant risk of harm.

4. Policy Discussion

The addiction exclusion issue is complicated by the fact that it implicates two possible claims and two possible defenses. Most often, courts have found that the exclusionary policies at issue did not constitute disparate treatment. So, for example, the no rehire policy in *Hernandez* was found not to constitute disparate treatment because the disqualification was premised on past misconduct rather than on disability status.[262] Instead, a disparate impact or qualification standard claim is more likely to gain

256. *Exxon Corp.*, 203 F.3d at 874–75.

257. *Id.* at 873.

258. *Id.* at 875.

259. *Id.* In terms of the different contexts, the Fifth Circuit stated:

> Direct threat focuses on the individual employee, examining the specific risk posed by the employee's disability. In contrast, business necessity addresses whether the qualification standard can be justified as an across-the-board requirement. *Id.*

260. *See supra* notes 98–101 and accompanying text.

261. *See supra* notes 30, 59 and accompanying text.

262. *See supra* note 218 and accompanying text.

traction, although the former claim requires statistical proof which, as illustrated in *Lopez*, may be difficult to establish.[263]

The principal question, then, is what defense should be applicable if a prima facie disparate impact or qualification standard claim is established? The approach adopted by the Fifth Circuit in *Exxon* has some practical appeal. Under that approach, the direct threat defense would apply to an individual disqualification, while the business necessity defense would apply to an across-the-board disqualification.[264]

The *Exxon* formula, however, comes with one major policy shortcoming: a blanket qualification standard could disqualify even those individuals who are not likely to pose a safety threat. In the context of Exxon's policy, for example, the business necessity defense, if applied without any individualized assessment, would not provide any mechanism by which an individual with a long period of sobriety and a minimal likelihood of recidivism could refute the presumption of unfitness for the job. Such a result seems inconsistent with the ADA's goal of dispelling stereotypes and group-based assumptions.[265] It also seems inapt for Exxon's policy which operates directly on disability status rather than on some neutral qualification standard.[266]

A preferable approach is something akin to how the EEOC views business necessity in the context of criminal records. According to a 2012 EEOC Enforcement Guidance, an employer who rejects an applicant because of a prior criminal conviction must show that its decision was justified by a consideration of the nature and gravity of the offense, the timeliness of the conviction, and the nature of the job in question.[267] In most circumstances, the employer must also give the screened-out individual the opportunity for an individualized assessment.[268] This consists of providing the individual notice that he or she has been screened-out based on a criminal conviction and an opportunity to demonstrate that his or her particular circumstances warrant an exception to the exclusion.[269] The Guidance states that the employer must consider the additional information discovered in the individualized assessment when determining whether the

263. *See supra* note 231 and accompanying text.

264. *See* EEOC v. Exxon Corp., 203 F.3d 871, 875 (5th Cir. 2000).

265. *See supra* notes 19, 159 and accompanying text.

266. *See* Kenny Meixelsperger, EEOC v. Exxon*: Corporate Responsibility or Blatant Discrimination*, 53 BAYLOR L. REV. 253, 263 (2000).

267. EEOC, Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, at *21 (Apr. 25, 2012), hpps://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

268. *Id.* at 21, 26. The Guidance notes that the individualized assessment is not required if an employer can show that its targeted screen is narrowly tailored to identify criminal conduct that has a demonstrably tight nexus to the position in question. *Id.*

269. *Id.* at 26.

criminal records screen, as applied, is job-related and consistent with business necessity.[270]

A similar approach is appropriate for employer policies that disqualify individuals with a substance addiction. An employer generally should have the right to establish qualification standards that have a sufficient business necessity nexus to safety and job performance. But, if such a policy either directly or indirectly tends to screen out individuals with a substance addiction, the employer should be required to give the individual an opportunity for an individualized assessment. Analogizing to the EEOC's guidance regarding past criminal records,[271] factors that might be relevant to an individualized assessment in the context of substance addiction are the nature of the job in question, the length of the individual's period of sobriety, and the steps taken by the individual to deter recidivism. Ultimately, an employer should consider this additional individualized information when determining whether the exclusion is job-related and consistent with business necessity.

V. CONCLUSION

Although they receive less attention than other parts of the ADA's anti-discrimination formula, the direct threat and business necessity defenses are important pieces of the ADA's regulatory regime. Together they provide a needed safety valve to permit employers to carry out core business functions in spite of the statute's anti-discrimination ban.

These two defenses share common attributes in terms of enabling employers to reduce health and safety risks, and some courts tend to view them as parallel in substance.[272] But, the two defenses are distinct in focus. An apt analogy may be drawn to the opposite ends of a telescope. The direct threat defense provides a narrow view that analyzes whether a specific individual poses a significant threat of substantial harm to safety or health. The business necessity defense, on the other hand, takes a broader view and examines whether an impairment or attribute generally correlates with unacceptable job performance. Their commonality, as noted by the Fifth Circuit in *Exxon*, is that they each "ensure that the [workplace] risks are real and not the product of stereotypical assumptions."[273]

Beyond attempting to delineate the contours of these two defenses, this article examines three contentious issues on which the courts have offered conflicting views. This article recommends policy-based solutions for each issue. First, the burden of proof on the direct threat issue should be borne by

270. *Id.* at 21.

271. *See supra* note 267 and accompanying text.

272. *See supra* note 3 and accompanying text.

273. EEOC v. Exxon Corp., 203 F.3d 871, 875 (5th Cir. 2000).

the employer. Second, employers should refrain from requiring employees to provide diagnostic information when returning from sick leave. Finally, an employer policy that disqualifies individuals with a history of addiction should be permissible only if an individualized assessment supports the exclusion. These solutions appropriately focus on the reality of workplace risks rather than the undesirable impact of stereotypical assumptions.