"TYPHOID MARY" MEETS THE ADA: A CASE STUDY OF THE "DIRECT THREAT" STANDARD UNDER THE AMERICANS WITH DISABILITIES ACT

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Of all the stereotypes about illness and disease in American popular culture, none appears to be more well-known than "Typhoid Mary." Indeed, the phrase itself has transcended its historical genesis—one Mary Mallon (c. 1870-1938)—to mean anyone who is perceived as a "plague" carrier, widely transmitting a disease without showing its symptoms.[1] Beyond the myth, however, the real "Typhoid Mary" symbolizes the clash of the rights of the individual versus the collective rights of the public.

The Americans with Disabilities Act ("ADA")[2] is now at the heart of a battle between individual and collective rights. Congress enacted the ADA, in part, "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" by eradicating "the continuing existence of unfair and unnecessary discrimination and prejudice" that "result[s] from stereotypic assumptions not truly indicative of the individual abilities of

1. *See* THE NEW SHORTER OXFORD ENGLISH DICTIONARY 3442 (L. Brown Ed. 1993). For an illuminating and thorough survey of how "Typhoid Mary" has permeated the popular culture of the country, see JUDITH WALZER LEAVITT, TYPHOID MARY, CAPTIVE TO THE PUBLIC HEALTH 202-230 (1996). The phrase has also been frequently used as a tool of legal argument. *See, e.g.*, Smith v. Whatcott, 757 F.2d 1098, 1101 (10th Cir. 1985) (noting exception to disqualification rules for former government lawyers "to prevent [them] from becoming 'Typhoid Marys' upon their reentry into private practice"); Penthouse Int'l, Ltd. v. McAuliffe, 610 F.2d 1353, 1374 (5th Cir. 1980) (Clark, J., concurring) (stating, in a pornography case, that "[i]f [the prurient portion of a publication] is totally independent, it ought not to be carried, Typhoid Mary-like, into a community by other articles which show serious merit"); United States v. Ecker, 543 F.2d 178, 192 n.52 (D.C. Cir. 1976) (asserting analogy to Typhoid Mary in discussion of confinement of the mentally ill); Slocum v. United States, 515 F.2d 237, 238 n.1 (5th Cir. 1975) (stating in litigation over attempts to order destruction of mynah birds, that a "major fear is of the 'intermediate transmitter,' a sort of avian Typhoid Mary which receives and transmits the virus without itself becoming infected with the disease").

2. 42 U.S.C. §§ 12101-12213 (1994). The ADA is comprised of four "Titles." Title I contains provisions relating to employment and is the focus of this article. *See id.* §§ 12111-12117. Title II guarantees non-discrimination by a public entity in providing services, programs, or activities. *See id.* §§ 12131-12165. Title III imposes similar rules on any private entity whose operations affect commerce and are considered "public accommodations." *See id.* §§ 12181-12189. Title IV, which does not regulate additional subject matters, contains "miscellaneous provisions" relating to Titles I through III. *See id.* §§ 12201-12213.

such individuals to participate in, and contribute to, society."[3] Indeed, Congress has used the ADA as the legal mechanism to bring about the most profound change in societal attitudes toward "a discrete and insular minority"[4] since the Civil Rights Act of 1964.[5] On some issues, however, law, medical science, and public policy can intersect in ways that strain the ADA's effectiveness in accommodating these competing interests.

One mechanism by which the ADA attempts to accommodate such competing interests is by permitting employers that use "qualification standards" to demonstrate that the qualifications are lawful even though they may disadvantage protected individuals.[6] Qualification standards are the "personal and professional" job requirements established by the employer that "an individual must meet in order to be eligible for the position held or desired."[7] These attributes may include "skill, experience, education, physical, medical, safety and other requirements."[8] In a highly relevant though vague provision, the ADA states that 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."[9] The statutory definition of "direct threat" provides little additional insight—"'direct threat' means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation"[10]—and in fact raises more questions than it answers. For example, which events pose a cognizable "risk" to others? What risks are

3. *Id.* §§ 12101(a)(7), (9), (b)(1).

4. *Id.* § 12101(a)(7). Congress found that as a "discrete and insular minority," disabled individuals "have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals." *Id.* As noted below, however, Congress may have defined "disability" so broadly that the class of persons potentially encompassed within the statute's protection can hardly be described in a general sense as a "minority" group.

5. 42 U.S.C. §§ 2000e-2000e-17. *See generally* S. REP. NO. 872 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355. Senator Tom Harkin commented during final Senate discussion of the ADA that "history is going to show that in 1990, 26 years after the Civil Rights Act of 1964, 43 million Americans with disabilities gained freedom, dignity, opportunity—their civil rights." 136 CONG. REC. S9685 (daily ed. July 13, 1990) (statement of Sen. Harkin).

6. *See* 42 U.S.C. § 12113(a).

7. 29 C.F.R. § 1630.2(q) (1997).

8. *Id.*

9. 42 U.S.C. § 12113(b) (emphasis added).

10. *Id.* § 12111(3).

"significant"? What information is required to establish that a "significant risk" exists? What accommodations must be considered to "eliminate" the risk? How much risk must be "eliminated" before an accommodation is considered sufficient? How do the nature of the employment and the magnitude of the potential harm affect the analysis?

The case of Mary Mallon, the historical "Typhoid Mary," provides a framework and point of departure for analyzing the "direct threat" concept under the ADA. New York City's Public health authorities reacted to Mallon's situation in a decisive and severe manner. Blanket denial of employment in her chosen profession and a permanent virtual quarantine were her fate. The tradition handed down assumes that the approach taken was obvious and inevitable—beyond debate correct and best for the public good. But if Mallon's situation had arisen today, would the response of public health authorities pass muster under the ADA? This example provides an opportunity to evaluate how the "direct threat" concept has evolved in the seven years since the ADA's effective date at the hands of both the Equal Employment Opportunity Commission ("EEOC") and the federal courts. More importantly, it permits a close examination of whether the ADA provides an effective *process* for resolving "direct threat" questions or whether some other process is needed to evaluate issues under safety-based qualification standards that are inherently medical in nature.

This Article explores these issues in the following manner. Part I reviews the historical case of Mary Mallon and considers how she acquired her unfortunate moniker. This discussion includes a review of current medical knowledge regarding typhoid fever and the questions that Mallon's situation would raise today under the ADA. Part II discusses the legislative history of the "direct threat" provisions of the ADA along with the EEOC's implementation of the "direct threat" standard. Part III discusses the federal courts' application of the direct threat standard. In Part IV, principles derived from the analysis in Parts II and III are applied to the case of Mallon to elucidate the proper role of the "direct threat" standard in ADA jurisprudence. This analysis leads to the conclusion that the "direct threat" standard should not be left to application by the courts. Instead, the standard should be applied by a panel of medical experts acting within a multi-stage review procedure

that the EEOC is already empowered to impose.

I. WHO WAS THE REAL "TYPHOID MARY"?

At the turn of the century, science—in particular the revolution in bacteriology fired by now-legendary names such as Pasteur, Koch, and von Behring—rapidly reached a position of preeminence in government efforts to promote "the public health." In 1905, for example, the Supreme Court in *Jacobson v. Massachusetts*[11] upheld the conviction of a citizen of Cambridge, Massachusetts, who refused to comply with local health authorities' smallpox vaccination order. At his trial on charges of violating the order, the citizen argued that he should be able to present his doctor's testimony concerning the deleterious effects a previous vaccination had caused him. The trial court excluded all such evidence on the grounds that the public officers had already weighed the cost of the vaccination order to individuals against the benefit to society so that the only remaining issue was whether the citizen refused to comply. On appeal, the Supreme Court upheld a state's right to require universal health measures and rejected any attempt to demonstrate individual exceptions from compliance with such universal measures.[12] It was within this philosophical and legal framework that public health officials in New York City identified the individual who became synonymous with both the threat of infectious disease to public health and the power that government could wield in response.

Mary Mallon, who emigrated from Ireland to the United States, had the dubious distinction of being the first person in North America to be identified as a healthy typhoid fever carrier.[13] Typhoid fever is an acute infectious disease caused by

11. 197 U.S. 11 (1905).

12. *See id.* at 22-30.

13. *See* LEAVITT, *supra* note 1, at 14. Professor Leavitt notes that "[t]oday, clean water supplies and antibiotics have made typhoid fever a minor statistic in the full picture of disease dangers" with "fewer than 500 sporadic cases of typhoid fever per year" in the United States today. *Id.* at 26, 263. However, typhoid fever remains a significant health risk in other areas of the world. *See also* Centers for Disease Control, *Preventing Typhoid Fever: A Guide For Travelers* (last modified Dec. 2, 1998) <http://www.cdc.gov/nci-dod/diseases/bacter/typhoid.htm> ("In the United States about 400 cases occur each year, and 70% of these are acquired while travelling internationally. Typhoid fever is still common in the developing world, where it affects about 12.5 million persons each year."). Typhoid fever is also showing a world-wide resurgence as a complication of AIDS. As a leading treatise observes:

the *salmonella typhi* bacterium. The bacteria can enter the human body through contaminated food or water. Thereafter, the bacteria penetrate the small intestine and invade the bloodstream, where they can cause blood poisoning that transports infection into other parts of the body. Among the early symptoms of typhoid fever are headaches, general aches and restlessness, coughing, nosebleeds, bloody diarrhea or constipation, and fever.[14] In its more advanced stage, typhoid fever produces a rash on the torso.[15] Complications from the disease, such as heart failure and ulceration or perforation of the intestines, can be fatal.[16]

Among those who survive a bout with typhoid fever, a small percentage of individuals continue to harbor the typhoid bacilli. These are the "healthy carriers"—those who exhibit no outward symptoms of typhoid, but whose feces, urine, or bile contain the bacilli. Mallon was a healthy carrier; in fact, she maintained throughout her life that she never was sick with typhoid.

Approximately three percent of those who suffered typhoid fever around the turn of the century became healthy carriers.[17] By the 1930s, some health investigators concluded that healthy carriers were responsible for as much as ninety-six percent of typhoid distribution.[18] Mallon was the first identified, and

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> Owing to the relatively low incidence of typhoid fever in the United States, there is a paucity of information on the incidence of typhoid fever among patients with acquired immunodeficiency syndrome (AIDS). In Lima, Peru, where typhoid fever is endemic, the reported rate of *S. typhi* and *S. paratyphi* for individuals infected with human immunodeficiency virus (HIV) was estimated to be approximately 60 times that of the general population.

SHERWOOD L. GORBACH ET AL., INFECTIOUS DISEASES § 73, at 699 (2d ed. 1998) (footnote omitted). *See also* MARTIN J. BLASAR ET AL., INFECTIONS OF THE GASTROINTESTINAL TRACT, 328 (1995).

14. *See* Catherine Carey, *Mary Mallon's Trial of Typhoid*, 23 FDA CONSUMER 18 (1989). For a complete discussion of the symptoms, progress, and treatment of the disease, see A.B. CHRISTIE, INFECTIOUS DISEASES: EPIDEMIOLOGY AND CLINICAL PRACTICE 43-44, 100-164 (4th ed. 1987).

15. *See* Carey, *supra* note 14, at 18 n. 5.

16. *See id.* The reported mortality rate of typhoid fever in developing countries today is 10 out of 100 cases. *See id.* at 21.

17. *See* LEAVITT, *supra* note 1, at 49. *See also* BLASAR, *supra* note 13, at 327.

18. *See* LEAVITT, *supra* note 1, at 50-51. However, the "danger" from such individuals, even in Mallon's day, should not be exaggerated. As Professor Leavitt describes:

> Policy developers needed to keep in mind that typhoid carriers menaced other people's health only when susceptible persons *ingested* the pathogenic bacteria that the carriers harbored within their bodies. *Passing carriers in the street, sharing public transportation, or sitting beside them in school or at the theater were not dangerous activities.* As the state health authorities in New York wrote, "[a]

certainly most infamous, of the healthy typhoid carriers.[19] Her identification was the result of investigative efforts by George Soper, a civil engineer, who was hired by a wealthy Long Island family to investigate the source of a typhoid outbreak in their home.[20] Mallon had worked in the household as a cook and Soper focused on her as the source of the outbreak.[21] Soper eventually attributed twenty-two cases of typhoid to her.[22]

In March of 1907, Soper confronted Mallon at her home and asked her for samples of her feces, urine, and blood so that he could test them in a laboratory. Mallon threw him out. At that time, the science of bacteriology was emerging from its infancy. The concept of a healthy carrier of typhoid fever was not known to the general public, nor was it yet commonly accepted in the medical profession. Mallon was healthy and could not comprehend that she could spread disease through her cooking as Soper tried to convince her.

As a result of Soper's investigation, the New York City Health Department took Mallon into custody against her will. Soper obtained his samples, which tested positive for the typhi bacilli. The Health Department did not attempt to educate Mallon about the threat she posed, arrange for retraining so that Mallon could continue to have an economic livelihood, or provide a mentor to help Mallon through the difficult transition that the state demanded she make. To the contrary,

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> person of intelligence who is a carrier of typhoid bacilli, but who was willing to observe strictly certain essential precautions, may live and mingle with others and still need not be a source of danger to those about him." The formulation of rules, the officials concluded, thus should "restrict the activities of such persons to the smallest degree consistent with the protection of public health."

Id. at 53-54 (emphasis added).

19. Professor Leavitt attributes much of Mallon's infamy to social factors such as society's views toward immigrants, the so-called proper role of women, and class differences. *See id.* at 97. It is certainly difficult to imagine that a woman from a middle- or upper-income household would be subjected to the same kind of preemptory treatment today that Mallon experienced 90 years ago. However, it is also difficult today to imagine that a reasonable person with a condition analogous to Mallon's would continue to engage in activities dangerous to others.

20. Soper had taken an interest in bacteriology and had investigated outbreaks of typhoid fever in other communities. *See id.* at 14-15.

21. Soper's detective work was not exclusively "scientific"; he harbored serious social prejudices and moral judgments that he leveled as vigorously as medical evidence against Mallon. *See id.* at 96-114.

22. Soper fashioned a career off this single case. *See, e.g.*, George A. Soper, *The Work of a Chronic Typhoid Germ Distributor*, 48 J. AM. MED. ASS'N 2019 (1907); George A. Soper, *Typhoid Mary*, 45 THE MILITARY SURGEON 1 (1919); George A. Soper, *The Curious Career of Typhoid Mary*, 15 BULLETIN OF THE N.Y. ACADEMY OF MED. 698 (1939).

the Health Department took a more medieval approach—they essentially locked Mallon up and threw away the key.[23] Mallon was confined to an isolation cottage on the grounds of the Riverside Hospital on North Brother Island in New York. She was the *only* healthy carrier of typhoid fever in America to be placed in such isolation.[24]

Mallon located an attorney who filed a habeas corpus petition to obtain her release, but the action was not successful.[25] A new health commissioner did, however,

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23. Indeed, public response did not universally favor the City's methods or the newspapers' appellation of Mallon as "Typhoid Mary." One correspondent wrote sarcastically to the *New York Times*:

> If one unfortunate woman must be labeled "Typhoid Mary," why not send her other companions? Start a colony on some unpleasant island, call it "Uncle Sam's Suspects," there collect Measles Sammy, Tonsillitis Joseph, Scarlet Fever Sally, Mumps Matilda, and Meningitis Matthew. Add Typhoid Mary, request the sterilized prayers of all religionized germ fanatics, and then leave the United States to enjoy the glorious freedom of the American flag under a medical monarchy.

LEAVITT, *supra* note 1, at 83.

24. This reaction, unfortunately, was consonant with the emerging—yet still primitive—knowledge of public health matters early in this century in which intellectual non-scientists placed an almost blind faith in the "science" extant in the day. This faith, coupled with a fierce belief in "social Darwinism," or "survival of the fittest," is reflected in the infamous case of *Buck v. Bell*, 274 U.S. 200 (1927). In an opinion that is shocking to the modern reader, Justice Holmes characterized Buck as "a feeble-minded white woman . . . [who] is the daughter of a feeble-minded mother in the same institution, and the mother of an illegitimate feeble-minded child." *Id.* at 205. Buck had been sterilized pursuant to a state proceeding. *See id.* at 205-06. Justice Holmes summarily dismissed Buck's Fourteenth Amendment due process and equal protection challenges to the law providing for such a proceeding:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices . . . in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes . . . . Three generations of imbeciles are enough.

Id. at 207 (citation omitted).

25. Clarence Darrow did no better in a comparable case. *See* People ex rel. Barmore v. Robertson, 134 N.E. 815 (1922). In that case, municipal authorities in Chicago shut down the boarding house of a healthy typhoid carrier, nailed a placard to her front door that "warned all persons that a typhoid carrier resided in the house, and contained all the ordinary warnings and instructions found on such placards," and quarantined her "from going about the city of Chicago and from following her usual occupation of boardhousing keeper, for the reason that she is a carrier of typhoid bacilli." *Id.* at 816. Darrow filed a petition for a writ of habeas corpus to end the quarantine, on the grounds that the municipal authorities had exceeded their powers. *See id.* at 816, 820-21. The Illinois Supreme Court rejected Darrow's arguments, finding an appropriate delegation of state powers to municipal officials acting in accordance with state law. *See id.* Moreover, the court emphasized its fundamental disagreement

release Mallon in 1910, conditioned upon her oath that she would never work as a cook in the future. The commissioner stated publicly that "[s]he has been released because she has been shut up long enough to learn the precautions that she ought to take."[26] The commissioner also helped place Mallon in a much lower-paying laundry job.[27] Unfortunately, Mallon possessed few other marketable skills, and, in 1915, she returned to cooking under an assumed name at Sloane Maternity Hospital, the site of an outbreak of twenty-five new cases of typhoid fever.[28] She was sent back to the isolation cottage on North Brother Island, where she lived in supervised quarantine until her death in 1938.[29]

What if Mallon had worked in a fast-food restaurant in New York City today when typhoid fever exploded among her employers' workforce or customers? In light of differences in our society's view of disease and illness, how might her case have been handled today? What kind of legal rights might she enjoy, and what legal process is available to enforce those rights? To answer those questions requires careful consideration of the employment provisions of the ADA,[30] particularly the growing corpus of complex case law dealing with safety issues and the "direct threat" standard.

II. THE "DIRECT THREAT" STANDARD OF THE ADA

A. *Origins in the Rehabilitation Act:* School Board of Nassau County v. Arline

The "direct threat" standard had its genesis in litigation involving employees with contagious diseases under the

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with challenges of this type:

> One of the most important elements in the administration of health and quarantine regulations is a full measure of common sense. It is not necessary for the health authorities to wait until the person affected with a contagious disease has actually caused others to become sick by contact with him before he is placed under quarantine.

Id. at 820.

26. LEAVITT, *supra* note 1, at 66-67.

27. *See id.* at 66.

28. *See id.* at 66-67.

29. *See id.* at 199.

30. This article assumes a general familiarity with Title I (employment) of the ADA. For a comprehensive introduction to the ADA, see Thomas H. Christopher & Charles M. Rice, *The Americans with Disabilities Act: An Overview Of The Employment Provisions*, 33 S. TEX. L. REV. 759 (1992).

Rehabilitation Act of 1973.[31] In *School Board of Nassau County v. Arline*[32], Arline, a public school elementary teacher, sought reinstatement because she had been discharged after suffering several recurrences of tuberculosis. The local school board argued that Arline was not qualified to work in the schools because, it was alleged, she might transmit her chronic disease to children in her classroom.

The school board's position, however, failed to take into consideration the objective medical evidence either as to the etiology of tuberculosis generally or the prognosis of Arline's condition specifically. Nor did the school board seriously consider alternatives to keep Arline employed or to minimize the risk that it claimed existed. Significantly, the case seemed more rooted in primordial public health doctrine than enlightened medical science.

When the case came before the Supreme Court, the American Medical Association ("AMA") appeared as an amicus and argued for an objective framework for risk assessment. The Supreme Court adopted this framework and instructed the district court to apply it on remand.[33] Under the AMA's standard, an individual with an infectious disease is not otherwise qualified for employment as a public school teacher under Section 504 if she "poses a significant risk of communicating an infectious disease to others . . . [and] reasonable accommodation will not eliminate that risk."[34] Four elements structure this analysis:

> (1) the nature of the risk (how the disease is transmitted);
>
> (2) the duration of the risk (how long the carrier is infectious);
>
> (3) the severity of the risk (the potential harm to third parties); and

31. 29 U.S.C. §§ 701-796. Section 503 of the Act prohibits discrimination against individuals with disabilities by employers with federal contracts in excess of an annual monetary threshold and requires affirmative action to increase employment opportunities for disabled individuals. *See id.* § 793. Section 504 creates the same non-discrimination obligations as to entities participating in programs receiving federal financial assistance. *See id.* § 794.

32. 480 U.S. 273 (1987).

33. *See id.* at 287-88.

34. *Id.* at 287 n.16.

(4) the probability that the disease will be transmitted and will cause varying degrees of harm.[35]

The district court's treatment of the evidence on remand is illuminating. The district court began by extensively discussing the low probability of effective airborne transmittal of tuberculosis bacilli, the chemotherapy strategies available to battle the disease, and Arline's own specific treatment history.[36] Because the school board's decision to terminate Arline "was made solely on the basis of [Arline's] history of tuberculosis and not because of any misfeasance, malfeasance, inadequate performance, or inability to perform the essential functions of her teaching job,"[37] the district court addressed each of the risk assessment factors set out by the Supreme Court.[38] The court reached the following conclusions:

(1) Tuberculosis is not easily communicated, and Arline was undergoing effective antibiotic therapy. Indeed, "[b]efore the School Board decided to terminate [Arline], it had the results of at least ten additional cultures [of her sputum], all of which were negative [for colonies of tuberculosis bacilli]."[39]

(2) The negative cultures indicated that the chance of Arline communicating the disease to anyone was "extremely rare."[40]

(3) "[T]he medical community can state that th[e] [available] treatment has been found to be 98.6% efficient in eliminating the progression of infection to disease,"[41] and "a person who has a tuberculosis infection that progresses to disease, and is timely treated for that disease, will have a very little risk of

35. *See id.* at 288 (citing Brief for American Med. Ass'n as *Amicus Curiae* at 19). Several earlier cases in the federal appellate courts construed the proper standard under the Rehabilitation Act for defending safety-based exclusions of disabled employees. *Compare, e.g.*, Strathie v. Department of Transp., 716 F.2d 227 (3d Cir. 1983) (rejecting exclusion of hearing-impaired individual from school-bus driver's job because employer cannot make exclusions to avoid "all possible risks," only "appreciable risks"), *and* Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985) (requiring showing of reasonable probability of substantial harm, not merely an elevated risk, to sustain exclusion), *with* Doe v. New York University, 666 F.2d 761 (2d Cir. 1981) (holding that "any appreciable risk," even if "minimal," is a significant risk justifying exclusion).

36. *See* Arline v. School Bd. of Nassau County, 692 F. Supp. 1286, 1287-90 (M.D. Fla. 1988).

37. *Id.* at 1290.

38. *See id.* at 1291-92.

39. *Id.* at 1291.

40. *Id.*

41. *Id.*

> harm."[42] Accordingly, the risk posed by Arline "was . . . and is not severe."[43]
>
> (4) Given the minuscule probabilities involved, Arline "posed no threat of communicating tuberculosis to the schoolchildren she was teaching," and, based upon the unanimous opinion of expert witnesses, Arline was "cured."[44]

The court expressed the sum-total of the application of the *Arline* factors as follows:

> [T]he decision to terminate Plaintiff because of her history of tuberculosis was not based on reasonable medical judgments, but rather was based upon "society's accumulated myths and fears about [tuberculosis]." The accumulated myths and fears about tuberculosis are quite understandable given the frightening history of the disease. The United States Congress and the United States Supreme Court have spoken, however, and this Court must, and shall, uphold the law.[45]

The school board was ordered to reinstate Arline—a decade after she was fired—or to pay her over $750,000 front pay (assuming a retirement age of sixty-five).[46]

B. Importing Arline *into the ADA*

When Congress considered the legislation that became the ADA, it used *Arline* as a starting point for grappling with disqualification of employees due to safety risks.[47] The

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42. *Id.*

43. *Id.* at 1291-92.

44. *Id.* at 1292.

45. *Id.* (citation omitted). In the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28, Congress amended the Rehabilitation Act to codify *Arline* by providing that an individual with contagious diseases may still be "qualified" under the Act provided the individual does not present "a direct threat to the health or safety of other individuals," or if the individual "by reason of the currently contagious disease or infection, is unable to perform the duties of the job." Onishea v. Hopper, 126 F.3d 1323, 1328 n.3 (11th Cir. 1997) (quoting 29 U.S.C. § 706(8)(D) (1994)).

46. *See* Arline, 692 F. Supp. at 1292. *See also* Chalk v. United States Dist. Court, 840 F.2d 701 (9th Cir. 1988) (applying *Arline* and reversing district court's denial of preliminary injunctive relief to HIV-positive special education teacher whom school had transferred to non-classroom duties).

47. *See* H.R. REP. NO. 101-485, pt. 2, at 73 (1990); S. REP. NO. 101-116, at 27 (1989). Congress's reliance on *Arline* has been criticized on grounds that, whereas a recipient of federal funds should bear the cost of employing the disabled as a quid pro quo for receiving funds, the ADA covers enterprises receiving no federal funds whatsoever. *See Arline*, 480 U.S. at 289 (Rehnquist, J., dissenting). *See also* Thomas O. Brierton, *An Examination of the ADA's Direct Threat Defense*, 45 LAB. L.J. 618, 620 n.29 (1994). However,

legislative dialogue focused primarily on a limited category of potential safety-risk cases—contagious disease carriers, particularly HIV-positive individuals.[48] Congress engaged in substantial debate over a proposal, known as the Chapman Amendment, to allow employers in food-handling businesses to adopt blanket exclusions of individuals with certain contagious diseases, including AIDS patients and even HIV carriers.[49] Congress ultimately rejected the Chapman

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the express congressional purpose to eradicate disability discrimination would seem to provide a substitute for, and more substantial basis than, the "quid pro quo" model. Congress has relied on *Arline* in drafting other federal laws that address safety risks to individuals. *See* Arnold & Porter Legislative History, ADA Comm. Print 1990 (28B), at *1631 (noting Congress's reliance on *Arline* in drafting the Civil Rights Restoration Act of 1987, 29 U.S.C. § 706(8)(D), and Fair Housing Act Amendments of 1988, 42 U.S.C. § 3604(9)) (hereinafter " A&P Legis. Hist.").

48. *See, e.g.*, A&P Legis. Hist., *supra* note 47, ADA Comm. Print 1990 (28C), at *1895-96, *2210. Congress also discussed the applicability of the "direct threat" concept to protect drug-abusers and alcoholics. *See id.* at *1895, *2209, *2223-24, *2469, *2509. Ultimately, Congress compromised as to the latter group, excluding currently abusing drug addicts from the ADA's coverage. *See id.* at *2210 (discussing language now codified at 42 U.S.C. § 12114).

49. *See* 136 CONG. REC. H2473 ("It shall not be a violation of [the ADA] for an employer to refuse to assign or continue to assign any employee with an infectious or communicable disease of public health significance to a job involving food handling, provided that the employer shall make reasonable accomodation that would offer an alternative employment opportunity for which the employee is qualified and for which the employee would sustain no economic damage."). Dr. Louis Sullivan, President George Bush's Secretary of Health and Human Services, expressed vigorous opposition to this effort: "Any policy based on fears and misconceptions about HIV will only complicate and confuse disease control efforts without adding any protection to public health. We need to end discrimination rather than submit to it." 136 CONG. REC. S9686 (daily ed. July 13, 1990) (statement of Secretary Sullivan). Senator Herbert Kohl's statement evidences the contentiousness of this debate:

> We were asked to tolerate misperceptions. In one of the more difficult and remarkable debates on this bill, we were asked to allow the perpetuation of myths and tolerate the discrimination against certain employees while knowing that the nature of their disability would not pose a direct and serious threat to the public. That debate, perhaps more than any, was a testament to the dire need for this legislation.

136 CONG. REC. S9693 (daily ed. July 13, 1990) (statement of Sen. Kohl). However, the Chapman Amendment appeared more palliative than substantive to some. For example, Senator Edward Kennedy saw it as "simply explicat[ing] th[e] [direct threat] requirement specifically with regard to food handlers, *in order to allay any possible concerns on the part of the general public.*" 136 CONG. REC. S9696 (daily ed. July 13, 1990) (statement of Sen. Kennedy) (emphasis added).

> Mr. President . . . let me reaffirm that the ADA will in no way jeopardize the safety of our food system. The ADA already excludes workers whose diseases pose a direct threat to the health of others—so a food handler with typhoid fever could be fired under this bill. . . . [T]he ADA does not give special protection so Typhoid Mary can flip our hamburgers. All the Chapman amendment would have done is tell the Ryan White's of the world that they couldn't get summer jobs handling food. And, fortunately, we now have language from Senator Hatch that protects public safety based on science—not prejudice and unfounded fear.

Amendment in favor of an amendment proposed by Senator Orrin Hatch. Under the Hatch Amendment, Congress directed the Secretary of Health and Human Services to publish a list of infectious and communicable diseases that "are transmitted through handling the food supply,"[50] which the Secretary of Health and Human Services in turn delegated to the epidemiology branch of the Centers for Disease Control ("CDC").[51]

According to the Hatch Amendment, an employer "may refuse to assign or continue to assign . . . to a job involving food handling" any individual who has one of the listed diseases and who presents a significant risk of transmission that "cannot be eliminated by reasonable accommodation."[52] Senator Hatch's statement about safety issues in the ADA reflects this fairly narrow focus on contagious disease and foodhandling, yet provides little guidance for implementing the vague "direct threat" standard to address the other safety issues that may arise thereunder:

> I agree with the need to protect Americans' public health. This bill will do that in a manner that is based on science and medical research. If any person has an infectious or communicable disease that can be transmitted by handling food, the employer is authorized to take steps to remove the risk that such a disease would be passed to customers.[53]

Even the Hatch Amendment's relatively specific requirements in the context of food-handling positions are imprecise and subject to dispute. Take, for instance, comments made by Senator Kennedy in describing the analysis:

> The new section, section 103(d), provides that the Secretary of Health and Human Services must determine which infectious or communicable diseases pose a real, not

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Id. Ryan White was a young boy who received considerable media attention after he contracted the HIV virus from a blood transfusion and his public school attempted to exclude him on that basis. *See The "Miracle" of Ryan White*, TIME, Apr. 23, 1990, at 39; *Remembering Ryan White*, NEWSWEEK, Apr. 23, 1990, at 24.

50. 42 U.S.C. § 12113(d)(1).

51. *See* 56 Fed. Reg. 40897 (1991). Located in Atlanta, Georgia, the Centers for Disease Control ("CDC")—now known as the Centers for Disease Control and Prevention—is "the federal agency responsible for the control of contagious diseases." American Dental Ass'n v. Martin, 984 F.2d 823, 824 (7th Cir. 1993). The significance of the list issued by the CDC, pursuant to the ADA, is explored in applying ADA principles to the case of Mallon in Part IV.A, *infra*.

52. 42 U.S.C. § 12113(d)(2)(3).

53. 136 CONG. REC. S9685 (daily ed. July 13, 1990) (statement of Sen. Hatch).

> theoretical, risk of being transmitted through the handling of food. The Secretary should use the various scientific and medical expertise available through the Public Health Service. In turn, the determination of the Public Health Service should reflect a consensus of medical and public health opinion of true risk to the public, as opposed to perceived or theoretical risks of diseases that have not been found to be transmitted through the handling of food. The Public Health Service currently uses accepted public health methodologies and statistical practices regarding risks of transmission to make such determinations in its guidelines. These same methodologies and approaches should be used in implementing this subsection.[54]

Moreover, the general "direct threat" standard is substantially more ambiguous. Indeed, as the cases discussed in Part III, *infra*, indicate, the "direct threat" standard appears to be more flexible than many supporters of the ADA may have been prepared to acknowledge.[55]

C. Statutory Provisions and EEOC Interpretation of "Direct Threats"

1. The Statute and Regulations

The ADA applies only to individuals who are qualified for the employment they seek, hold, or from which they have been excluded—in other words, individuals who can perform the essential functions of the employment position "with or without reasonable accommodation."[56] Job qualifications and essential functions are established by the employer.[57] However, the ADA intervenes when an employer seeks to exclude an otherwise qualified individual from employment because of that individual's disability (or condition perceived as a disability). Qualification standards that exclude individuals with disabilities are permitted so long as the standards are (1) job-related; (2) consistent with business necessity; and (3) involve performance of essential functions that individuals who do not meet the qualification standards will be unable to

54. 136 CONG. REC. S9696 (daily ed. July 13, 1990) (statement of Sen. Kennedy).

55. *See id.* (distinguishing Hatch Amendment from "direct threat" standard, which "still applies to individuals with all types of disabilities, including individuals with contagious diseases").

56. 42 U.S.C. § 12111(8). *See also* 29 C.F.R. § 1630.2(n).

57. *See* 29 C.F.R. pt. 1630, app. § 1630.

perform even with reasonable accommodation.[58] Moreover, although health and safety regulations must be considered where applicable (for instance, medical qualifications for operators of trucks or airline pilots), the regulations do not pretermit the ADA analysis or render it wholly inapplicable.[59]

The only explicit qualification standard that the ADA provides is that an individual shall not pose a "direct threat" to the health or safety of other individuals[60] in the workplace.[61] A "direct threat" is defined as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[62]

2. The EEOC Technical Assistance Manual

The EEOC Technical Assistance Manual ("TAM")[63] provides

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58. *See* 42 U.S.C. § 12113(a). *See also* 29 C.F.R. § 1630.15(b)(1).

59. *See, e.g.*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC TECHNICAL ASSISTANCE MANUAL § I-4.6 (hereinafter "TAM"); EEOC v. Texas Bus Lines, Inc., 923 F. Supp. 965 (S.D. Texas 1996). The ADA does not prohibit an employer from requiring that an employee meet state- and federally-mandated job qualifications or from determining whether an employee meets those qualifications. In fact compliance with standards established by state and federal law are a defense to an ADA charge. *See* 29 C.F.R. § 1630.15(e). However, the employer must still consider "whether there is a reasonable accommodation, consistent with the standards of other Federal laws, that will prevent exclusion of qualified individuals with disabilities who can perform the jobs without violating the standards of those laws." TAM § I-4.6.

60. EEOC regulations interpret the standard to encompass the health or safety of the disabled individual in question, as well as that of other individuals. *See* 29 C.F.R. §§ 1630.2(r), 1630.15(b)(2). The lack of statutory language to support this position has caused some confusion in the unusual case in which the safety threat is only to the disabled employee himself, rather than to others. *See* 42 U.S.C. § 12113(a). Some authors have attacked the EEOC's formulation as manifestly unreasonable given the ADA's legislative history, which states that an employer's concern for the safety of the disabled employee may be paternalistic, representing the type of stereotyping (or pretext for discrimination) that the statute forbids. *See, e.g.*, Bryan A. Neal, *The Proper Standard for Risk of Future Injury Under the Americans with Disabilities Act: Risk to Self or Risk to Others*, 46 SMU L. REV. 483 (1992). Such analyses, however, are flawed. The EEOC has hardly endorsed "paternalism." To the contrary, the EEOC has observed that a threat to the disabled employee "must be strictly based on valid medical analyses or other objective evidence related to [the] individual." TAM § I-4.5. For example, according to the EEOC, "[a]n employer would not be required to hire an individual disabled by narcolepsy who frequently and unexpectedly loses consciousness to operate a power saw or other dangerous equipment, *if* there is no accommodation that would reduce or eliminate the risk of harm." *Id.* (emphasis added). In any event, in most safety-sensitive jobs, a significant threat to the disabled employee usually invariably poses a threat to others (such as co-workers, customers, and the public).

61. *See* 42 U.S.C. § 12113(b); 29 C.F.R. § 1630.15(b)(2).

62. 42 U.S.C. § 12111(3); 29 C.F.R. § 1630.2(r).

63. TAM discusses the "direct threat" or "health or safety defense" in sections I-4.5-4.6 and I-6.2. Although courts need only consider such EEOC guidance as TAM as persuasive authority, *see* Meritor Savings Bank v. Vinson, 477 U.S. 57, 65 (1986), courts

a framework for the "direct threat" analysis, placing the burden on the employer to show "significant risk," which is defined as "a high probability of substantial harm."[64] That assessment "cannot be based on mere speculation *unrelated to the individual in question.*"[65] Rather, the specific risk must be identified and the employer has the burden to show what particular aspect of disability poses a direct threat. Drawing on *Arline*, TAM provides that an employer must focus on the following factors, which aim for a scientific assessment of risk:

> (1) duration of risk (whether the risk is present constantly or only intermittently);
>
> (2) nature and severity of potential harm;
>
> (3) likelihood that potential harm will occur; and
>
> (4) "imminence" of potential harm.[66]

In addition, the risks must be current, not speculative or remote. To determine whether a risk is "current," the TAM points to a three-point inquiry: whether there is (1) a "high probability of substantial harm;" (2) based on the individual's present ability to perform essential job functions; and (3) not based on speculation about future risk, including speculation that the disability may become more severe.[67]

In conducting this assessment, quite specific evidence must be considered. The analysis must be based on objective medical

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frequently look to TAM for guidance, *see* Buckley v. Consolidated Edison Co., 127 F.3d 270, 273 n.1 (2d Cir. 1997).

64. TAM § I-4.5. It is not clear from the text of the ADA that this burden should be placed on the employer. Although Congress included qualification standards in a section titled "Defenses," *see* 42 U.S.C. § 12113(b), an integral part of an ADA plaintiff's prima facie case is to prove that he is a "qualified individual with a disability." 42 U.S.C. § 12111(8). A plaintiff may not show that he is "qualified" if his condition poses a "direct threat to the health or safety of others." 42 U.S.C. § 12113(b). Logically, then, the burden should be on the plaintiff to prove that a disability does not pose a "direct threat." *See* EEOC v. Amego, Inc., 110 F.3d 135, 144 (1st Cir. 1997) (placing burden on plaintiff to show that she can perform the essential functions of the job without endangering others).

65. TAM § I-4.5 (emphasis added). "[B]lanket exclusions" usually "will not meet ADA requirements" because individualized determinations are required. TAM § I-4.4.

66. *See* TAM § I-4.5. The fourth factor, which considers the "imminence" of potential harm, is the area most likely to create conflicts between objective scientific and medical opinion and stereotypical views. For example, TAM specifically states that, "if the perceived risk to health or safety arises from the *behavior* of an individual with a *mental or emotional disability*, the employer must identify the *specific behavior* that would pose the 'direct threat.'" *Id.* (emphasis added).

67. *Id.*

or "other" evidence related to the individual.[68] Such evidence does not include "unfounded assumptions, fears, or stereotypes about the nature or effect of a disability or of disability generally."[69] Nor does it include "patronizing assumptions that an individual with a disability may endanger himself or herself by performing a particular job."[70] Instead, the employer must make a determination based "on a reasonable medical judgment that relies on the *most current* medical knowledge and/or the *best available* objective evidence."[71] Such evidence includes input from the disabled individual, the experience of the disabled individual in previous jobs, and documentation from medical doctors and other health care professionals "who have expertise in the disability involved and/or direct knowledge of the individual with the disability."[72]

Finally, even if there is a significant risk, reasonable accommodations must be considered to reduce the risk to within a margin of safety. A simple example provided in the TAM is whether a hearing-impaired individual could be employed as a mechanic in a bus garage. Although the heavily trafficked environment would appear to create a prima facie "direct threat" to the employee, TAM suggests a reasonable accommodation—a co-worker could be "designated to alert him with a tap on the shoulder if any dangerous situation should arise."[73]

In reality, however, questions of "reasonable accommodation" are far more difficult. Indeed, in "direct

68. *See id.*

69. *Id.*

70. *Id.*

71. *Id.* (emphasis added). The concepts of the "most current medical knowledge" and the "best available objective evidence" are central to the "direct threat" concept, yet also its weakest link. Science does not exist in a static state, but rather is a continuum. As a result, the body of "medical knowledge" and "objective evidence" upon which an employer is directed to rely is constantly changing and evolving.

72. *Id.* TAM states, "[w]here the psychological behavior of an employee suggests a threat to safety, *factual evidence* of this behavior also may constitute evidence of a 'direct threat.' An employee's violent, aggressive, destructive or threatening behavior may provide such evidence." TAM § I-4.5 (emphasis in original). This emphasis on individualized "particularity" is evident in other disability-related guidance from the EEOC. *See* EEOC, ENFORCEMENT GUIDANCE ON THE AMERICANS WITH DISABILITIES ACT AND PSYCHIATRIC DISABILITIES, NO. 915.002 (Mar. 25, 1997) (stating that an individual does not pose a direct threat in operating machinery merely because his or her medication may have the side effect of hampering concentration and coordination; the employer must assess the effect of medication on this particular individual).

73. TAM § I-4.5.

threat" cases, the determination of whether particular measures reduce an identified risk to "an acceptable level" can be more complex than the determination of whether a significant risk exists in the first place.[74] Moreover, if a "reasonable" accommodation is identified that reduces or even eliminates the risk, an employer is not required to provide that accommodation if doing so would impose "undue hardship."[75] Like the "direct threat" standard, the "undue hardship" concept is vague and amorphous. The ADA does not specifically define "undue hardship," but instead lists factors that bear on the question.[76] These factors include the employer's financial resources; the accommodation's "impact" on the workplace; the size, location, and type of the employer's business; and the number of employees in the workplace in which the proposed accommodation would be implemented.[77] If a proposed reasonable accommodation to reduce to an acceptable level the risk in a "direct threat" analysis would impose an undue hardship on the employer, then the employer may exclude the disabled person despite the *conceptual* availability of accommodation.[78]

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74. *See, e.g.*, EEOC v. Amego, Inc., 110 F.3d 135, 145-49 (1st Cir. 1997) (mental disability and drug addiction of mental health worker); Huber v. Howard County, 849 F. Supp. 407, 412 (D. Md. 1994), *aff'd mem.*, 56 F.3d 61 (4th Cir. 1995) (asthmatic firefighter); Lassiter v. Reno, 885 F. Supp. 869 (E.D. Va. 1995), *aff'd*, 86 F.3d 1151 (4th Cir. 1996), *cert. denied*, 519 U.S. 1091 (1997) (U.S. Marshal diagnosed with delusional paranoid personality disorder); Siefkin v. Village of Arlington Heights, No. 94C2404, 1994 U.S. Dist. LEXIS 13015 (N.D. Ill. Sept. 14, 1994), *aff'd*, 65 F.3d 664 (7th Cir. 1994) (police officer who failed to maintain proper insulin therapy in the past); Chandler v. City of Dallas, 2 F.3d 1385, 1395 n.52 (5th Cir. 1993) (diabetic public transportation driver); EEOC v. Complete Auto Transit, Inc., No. 95-CV-73247-DT, 1997 U.S. Dist. LEXIS 3121 (E.D. Mich. Jan. 9, 1997) (jury verdict reported in 9 DIS. COMP. BULL. 1, 6 (1997)). *See also* Witter v. Delta Air Lines, Inc., 966 F. Supp. 1193 (N.D. Ga. 1997), *aff'd*, 138 F.3d 1366 (11th Cir. 1998) (passenger airline pilot with history of psychiatric problems and outbursts outside and inside the cockpit).

75. 42 U.S.C. §§ 12111(10), 12112(b)(5)(A).

76. *See id.* §12111(10).

77. *See id.* §12111(10); 29 C.F.R. § 1630.2(p). *See also* 29 C.F.R. pt. 1630, app. § 1630.2(p) (providing examples). As Karin Guiduli has observed, "[a]lthough undue hardship is typically couched in financial terms, the defense is not limited to [proposed accommodations that make] excessive economic demands [on employees]. An accommodation will also impose undue hardship when it is 'extensive,' 'substantial,' 'disruptive,' or when it 'fundamentally alter[s] the nature or operation of the business.'" Karin A. Guiduli, *Challenges for the Mentally Ill: The 'Threat To Safety Defense Standard And The Use Of Psychotropic Medication Under Title I of the Americans With Disabilities Act of 1990*, 144 U. PA. L. REV. 1149, 1173 n.113 (1996).

78. *See, e.g., Amego*, 110 F.3d at 147-49; *Huber*, 849 F. Supp. at 412. *See also* discussion at notes 125-27, *infra*, and accompanying text.

III. CASES ADDRESSING "DIRECT THREAT" ISSUES: A STANDARD LOOKING FOR A PROCESS

Recent ADA decisions reflect a tension between the judiciary's assumption that Congress committed "direct threat" issues to the courts and the growing realization that litigation may simply be a vehicle for second-guessing decisions supported by the analyses of competent medical professionals. That tension is heightened by the inconsistency in the judiciary's application of the *Arline* factors that define the "direct threat" test—to the extent those factors are even discussed.

The cases that have examined the "direct threat" standard are best considered in the manner in which the cases arose—according to the kinds of employment at issue. The type of employment, rather than the nature of the actual or perceived disability, appears to have the greatest impact on the analysis. Indeed, had Mary Mallon not engaged in a foodhandling trade, her "disability" as an asymptomatic carrier of typhoid fever might never have changed the lives that it did nor transformed her name into legend.

The principal occupations that have thus far proven likely to give rise to direct threat issues are (1) public health care workers; (2) public safety officers; (3) transportation operators; (4) food handlers; and (5) industrial workers. The following sections review the courts' application of the "direct threat" standard to cases within these classifications.

A. Public Health Care Workers

The "direct threat" issue quickly became prominent in the cases of surgeons and other medical professionals who presented a risk of transmitting disease, particularly HIV, to patients. The courts have resolved these cases with little difficulty, although the empirical medical evidence supporting the decisions is often slim. In this category, courts err on the side of finding a "direct threat," often resolving the question on summary judgment without presenting medical facts and expert testimony to the fact-finder. In terms of applying the *Arline* factors, these cases generally hold that a surgeon or other medical professional poses a "direct threat," as a matter of law, if the gravity of the risk is sufficiently severe, even though the

risk is low or, based on current medical knowledge, not quantifiable.[79]

The Fifth Circuit considered the issue in the context of the risk of HIV transmission posed by a health care professional. In *Bradley v. University of Texas M.D. Anderson Cancer Center*,[80] a hospital reassigned a surgical assistant to a position in its procurement department after the surgical assistant revealed that he was HIV-positive. Asserting that this act was blatantly discriminatory, the surgical assistant sued the hospital. In analyzing his claims under Section 504 of the Rehabilitation Act, the court noted the following:

> The parties do not dispute the first three [*Arline*] factors. The nature of the risk is not at issue, as all parties recognize that blood entering a patient's body can transmit HIV. The duration of the infection is perpetual. And the virus inevitably leads to the fatal disease AIDS.[81]

The only issue concerned "the probability of transmitting the virus."[82] In addressing this issue, the court discussed the nature of the surgical assistant's work, which required working in and around "open [surgical] wounds."[83] Despite referencing a CDC finding that AIDS transmission by a health care worker was less likely than transmission of the Hepatitis B virus,[84] the court focused on the severity of the potential harm and the absence of an accommodation that would eliminate all risk of transmitting HIV to a patient:

> While the risk is small, it is not so low as to nullify the catastrophic consequences of an accident. A cognizable risk of permanent duration with lethal consequences suffices to make a surgical technician with [plaintiff's] responsibilities

79. For example, it has been recognized that, although the risk of HIV transmission by health-care professionals to patients is currently unquantifiable (and may in fact be small), the "duration of the risk [i]s perpetual and . . . the consequence of transmission [i]s catastrophic." Scoles v. Mercy Health Corp., 887 F. Supp. 765, 770 (E.D. Pa. 1994) (holding that HIV-positive plaintiff was not "qualified," as a matter of law, to perform the job of orthopedic surgeon).

80. 3 F.3d 922 (5th Cir. 1993).

81. *Id.* at 924.

82. *Id.*

83. *Id.*

84. *See id.* (referring to CDC finding contained in CDC, U.S. Dept. of Health and Human Services, *Recommendations for Preventing Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Patients During Exposure-Prone Invasive Procedures*, 40 MORBIDITY & MORTALITY WKLY. REP. 1 (1991)).

not "otherwise qualified."[85]

The Fourth Circuit reached a similar conclusion in *Doe v. University of Maryland Medical System Corporation*[86], affirming summary judgment for a hospital that permanently suspended an HIV-positive resident from surgical practice. Doe sued the hospital under Section 504 of the Rehabilitation Act and Title II of the ADA.[87] Specifically, the plaintiff claimed that the hospital's decision was based on an erroneous assumption that "most or all of the procedures Doe would perform as a neurosurgical resident fit within the [CDC's] definition of exposure-prone procedures."[88] Doe claimed that "only one neurosurgical procedure . . . qualified as exposure prone under the CDC Recommendations."[89]

Significantly, the court rejected Doe's argument because it refused to overturn a reasonable medical judgment:

> [W]e must consider the CDC's suggestion that HIV-positive surgeons should be allowed to practice invasive procedures in light of its further recommendation that hospitals may bar

85. *Id.* at 924-25. The Eleventh Circuit came to a different conclusion, however, in reviewing the Alabama Department of Correction's policy of excluding HIV-positive inmates from prison programs. *See* Onishea v. Hopper, 126 F.3d 1323, 1331 (11th Cir. 1997). In that case, the court refused to find a "direct threat" to inmate safety, noting that no matter how catastrophic the harm caused by HIV transmission, there was only "a small possibility of transmission . . . ." *Id.* The court distinguished "surgical field" cases like *Bradley* from prison cases where "determining the overall significance of the risk to third parties depends in large part on assessing the likelihood of behavior that would allow transmission of HIV," and chided the district court for applying "an 'any risk' standard" versus "a 'significant risk' standard" by "merely speculating" that certain inmate behavior might occur "without discussing the potential frequency" as evidenced by actual experience. *Id.* at 1332-34. As the Eleventh Circuit emphasized, such "hypothesiz[ing]" might "identify a conceivable pathway for transmission, but it does not amount to the quantitative analysis necessary to find a significant risk." *Id.* at 1334. This decision, however, was vacated for rehearing en banc, 133 F.3d 1377 (1998), and a divided en banc Eleventh Circuit upheld the state's exclusionary policy as, contrary to the panel's opinion, not "an 'any risk' standard" simply because it is "not a 'somebody has to die' standard" because "evidence of actual transmission of the fatal disease in the relevant context is not necessary to a finding of significant risk." 171 F.3d 1289, 1299 (11th Cir. 1999) (en banc). The tortured history and sharp judicial disagreements in *Onishea* are paradigmatic of the problem of committing direct threat issues to the judiciary.

86. 50 F.3d 1261 (4th Cir. 1995).

87. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. As a state-run university hospital, the defendant did not dispute that the hospital met the statute's definition of "public entity." *See University of Maryland*, 50 F.3d at 1265 n.8.

88. *University of Maryland*, 50 F.3d at 1264.

89. *Id.* at 1264.

> HIV-positive surgeons from performing those procedures identified by the hospital as exposure prone .... [Defendant hospital] concluded that all neurosurgical procedures that would be performed by Dr. Doe fit the definition of exposure prone procedures, and restricted his practice accordingly. We are reluctant under these circumstances to substitute our judgment for that of [the hospital]. The types of procedures in which Dr. Doe is engaged as a neurosurgical resident are not so clearly outside the characteristics of exposure-prone procedures identified by the CDC that we can conclude that deference to public health officials requires us to decide that Dr. Doe does not pose a significant risk.[90]

The court also noted that it was impossible to eliminate the risk through reasonable accommodation "because to do so would eliminate essential functions of employment"—namely, working in a surgical field.[91] Other HIV cases involving health care workers who work in and around open body cavities have followed *Bradley* and *University of Maryland.*[92]

The First Circuit case of *Abbott v. Bragdon*[93], and the subsequent United States Supreme Court opinion in *Bragdon v. Abbott*[94], provide further insight into the judicial analysis of "direct threats" in the health care setting. In this proceeding, a dentist refused to fill an HIV-positive patient's tooth cavity unless she consented to having the procedure performed in a hospital. The critical question concerned the degree of deference a court should give to a medical professional's judgment that a "direct threat" existed.[95]

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90. *Id.*

91. *Id.*

92. *See, e.g.*, Scoles v. Mercy Health Corp., 887 F. Supp. 765 (E.D. Pa. 1994) (granting summary judgment on ADA and Rehabilitation Act claims in favor of hospital that restricted surgeon's privileges to those patients to whom the surgeon disclosed his condition, although no clinical evidence of AIDS transmission in such circumstances was presented); Doe v. Washington Univ., 780 F. Supp. 628 (E.D. Mo. 1991) (granting summary judgment on Rehabilitation Act claim to dental school that declined to permit HIV-positive plaintiff to complete education); Mauro v. Borgess Med. Ctr., 886 F. Supp. 1349 (W.D. Mich. 1995) (entering summary judgment on ADA and Rehabilitation Act claims where a hospital excluded an HIV-positive medical technician on the basis of *Bradley* and *University of Maryland*).

93. 107 F.3d 934 (1st Cir. 1997), *vacated and remanded*, 118 S. Ct. 2196 (1998).

94. 118 S. Ct. 2196 (1998).

95. *See id.* at 2209-10. A threshold question was whether infection with HIV qualified as a "disability" under the ADA. Both courts answered the question in the affirmative, holding that HIV, even when it has yet to progress to a symptomatic phase, is a "disability" because it substantially limits the individual's opportunities to engage in the major life activity of reproduction. *See id.* at 2201; *Abbott*, 107 F.3d at 939-42. The

The First Circuit affirmed the district court's entry of summary judgment against the dentist.[96] Prefacing its analysis, the court noted that the "goal in conducting a direct threat analysis . . . is to achieve a responsible balance, protecting [individuals] . . . from forced exposure to unacceptable health and safety risks while at the same time protecting disabled individuals from discrimination that is rooted in prejudice or baseless fear."[97] Accordingly, "any inquiry along these lines depends in one sense on what information permissibly may be weighed in the balance and in another sense on the extent to which particular kinds of evidence should be assigned extra weight (or, perhaps, decretory significance)."[98] More specifically, medical evidence about the dangers of treating HIV-positive patients that became available after the dentist's "refusal" (as the court chose to characterize it) to treat the plaintiff was not admissible on the issue of whether she constituted a "direct threat" that justified a "refusal" of treatment.[99] The only evidence the court would consider was that available to the dentist at the time of his decision:

> [W]hile healthcare providers can be expected to maintain a working knowledge of currently accepted thinking in their fields, they cannot be expected to anticipate either future scientific advances or the emerging wisdom of public health organizations. In short, by holding covered service providers to an objective standard featuring the best evidence available at the time they refuse to render treatment to disabled persons, the ADA holds the delicate balance between sometimes conflicting rights . . . . By the same token, to hold providers harmless after they have refused treatment based on nothing more than unfounded trepidation would run at cross-purposes with the central theme of the ADA. Fundamental fairness insists that providers in such circumstances ought not to be entitled to rely on subsequent understandings to shield them from the . . . consequences of discriminatory conduct.[100]

The court's decision to exclude after-acquired evidence

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view of "substantial limitation" taken by both courts is likely to permit significant expansion of the class protected by the ADA in future cases. *See Bragdon*, 118 S. Ct. at 2216 (Rehnquist, C.J., dissenting).

96. *See Abbott*, 107 F.3d at 949.

97. *Id.* at 943 (citing *Arline*, 480 U.S. at 287).

98. *Id.* at 943.

99. *See id.* at 944-46.

100. *Id.* at 944.

seems misguided. The "direct threat" analysis focuses on actual medical knowledge as opposed to the motivation of the employer. Because motivation, or other aspects of good faith, are not considered, the objective determination of "direct threat" should be based upon the most complete information available at any time, regardless of whether it was available previously. Even if the original decision was itself based on subjective considerations, later-developed objective evidence is relevant to determine whether a "direct threat" exists. This approach reflects the reality that medical knowledge is an ever-evolving continuum, not a static set of information. If properly formulated, the "direct threat" test should attempt to achieve an ultimately-correct medical conclusion, even if the original analysis was flawed.

On appeal, the Supreme Court affirmed the First Circuit's conclusion that HIV-positive status, whether asymptomatic or not, is an impairment that substantially limits the major life activity of reproduction.[101] The Court first set forth, in a precise manner, the "direct threat" issue on which it had granted certiorari:

> When deciding under Title III of the ADA whether a private health care provider must perform invasive procedures on an infectious patient in his office, should courts defer to the health care provider's professional judgment, as long as it is reasonable in light of then current medical knowledge?[102]

The Court had not revisited this issue since *Arline*, in which the Court "reserved 'the question whether courts should also defer to the reasonable medical judgments of private physicians.'"[103] The *Bragdon* Court distinguished the *Arline* inquiry as simply relating to "the possibility that *employers* could consult with physicians as objective third-party experts."[104] In this context, the Court ruled that courts "*should* assess the objective reasonableness of the views of health care professionals without deferring to their individual judgments."[105] The Court thus focused on the scientific or

101. *See Bragdon*, 118 S. Ct. at 2205.

102. *Id.* at 2209.

103. *Id.* at 2210 (quoting *Arline*, 480 U.S. at 288 n.18).

104. *Id.* (emphasis added).

105. *Id.* (emphasis added). The Court emphasized that a physician "receives no special deference simply because he is a health care professional." *Id.* The physician's

medical data that underlay the medical opinion at issue.[106] In doing so, however, the Court invited judges to substitute their analysis of the data for those of medical professionals.

The Court's discussion of the competing medical evidence at issue in *Bragdon* illustrates the flaw in the Court's analysis. On the one hand, the Court affirmed the First Circuit's decision to reject medical data evidence that allegedly was not "published" at the time Dr. Bragdon decided not to treat Abbott in an office setting.[107] On the other hand, the Court questioned the First Circuit's reliance on (1) the CDC Dentistry Guidelines, which recommended "universal precautions" to reduce the risk of disease transmission and (2) the American Dental Association Policy on HIV, which asserted that, based on scientific and epidemiologic evidence available *in 1991*, HIV-positive patients "may be safely treated in private dental offices when appropriate infection control procedures are [used]."[108] The Court expressed concern with the First Circuit's conclusion that "[w]hile [the CDC Dentistry Guidelines] do not state explicitly that no further risk-reduction measures are desirable or that routine dental care for HIV-positive individuals is safe, those two conclusions seem to be implicit in the guidelines' delineation of procedures for office treatment of HIV-positive patients."[109] According to the Supreme Court, however, "[the CDC Dentistry Guidelines] do not assess the level of risk."[110]

"good faith," according to the Court is irrelevant. *See id.* Apparently, to escape liability a physician must prove that his medical opinion was more than *facially* valid, but that it also was "right." This is revealed by the distinction between the Court's inquiry—whether the physician's views were "objectively reasonable" in a court's evaluation—and a standard that would defer to the physician's medical judgments—whether a reasonable health care professional could have reached the conclusion made by the physician. There can be no doubt that the Court rejected the latter formulation in favor of the former. In remanding the "direct threat" issue to the First Circuit, the Court stated that it was giving "the Court of Appeals the opportunity to determine whether *our* analysis of some of the studies cited by the parties would change its conclusion." *Id.* at 2213 (emphasis added). Although the Court recognized the notion that "'the existence, or nonexistence, of a significant risk must be determined from the standpoint of the person who refuses the treatment or accommodation,'" it made no real effort to evaluate the record evidence from a practitioner's perspective. *Id.* at 2210.

106. *See id.* at 2198-99.

107. This evidence consisted of affidavits submitted from the then-Director of the Division of Oral Health of the CDC, which "asserted it is safe for dentists to treat patients infected with HIV in dental offices if the dentist" observed the "universal precautions" identified by the CDC. *Id.* at 2201.

108. *Id.* at 2211 (quoting *Bragdon*, 107 F.3d at 946).

109. *Id.*

110. *Id.* The Court also discounted the American Dental Association's Policy on HIV because "the Association . . . is not a public health authority," and its Policy may have

The Court also noted some of the evidence presented by Dr. Bragdon, which included two studies in support of his concern about HIV transmission.[111] The Court, after injecting its commentary and analysis of the medical evidence, remanded the "direct threat" issue to the First Circuit to re-evaluate the evidence in light of "our analysis."[112]

The *Bragdon* decision appears to open a Pandora's box of opportunities in every "direct threat" case for courts to step in and evaluate medical and scientific evidence from their own non-professional notions of "objective reasonableness." The Court has thereby thrust the courts into the center of debates between segments of the medical and scientific community over the interpretation and evaluation of often highly specialized, complex, and sometimes enigmatic research evidence, which, evaluated out of the context of the norms and practices of the scientific sub-communities at issue, may be vulnerable to misinterpretation, misapplication, and over-simplification.[113]

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been based on "ethical and professional duties in addition to its scientific assessment of the risk to which the ADA refers." *Id.* at 2212.

111. *See id.* at 2204. The Court offered its assessment, however, that it "doubt[ed]" that even CDC-reported evidence that seven dental workers who had been exposed to the HIV-virus in their work and had also contracted HIV "would meet the objective, scientific basis for finding a significant risk to [Dr. Bragdon]." *Id.* at 2212. The Court cited no medical analysis to suggest this assessment *in dictum*; rather, this is another example of the problematic nature of the courts sitting in judgment of what can be "medically reasonable" in light of a still little-understood and very complex immuno-physiological condition such as AIDS. Indeed, the Court gave little shrift to the "catastrophic consequence" of HIV transmission in its apparent decision to construe a lack of evidence of the mechanics of transmission as a presumption against Dr. Bragdon's precaution, rather than adopting the opposite, equally plausible, and more realistic position that the catastrophic nature of contracting HIV and the opportunities for dental workers to be exposed to HIV-positive patients' body fluids raises a presumption that such a risk of transmission *exists* unless it is *disproven*. *See id.* at 2212. This was the better reasoned approach taken by the courts in *Bradley* and *University of Maryland*. *See supra* notes 80-91 and accompanying text. See also the criticism of the *Bragdon* majority's approach in *Onishea v. Hopper*, 171 F.3d 1289, 1298 (11th Cir. 1999) (en banc).

112. *Bragdon*, 118 S. Ct. at 2213.

113. It is interesting that the Court apparently arrogated unto itself the role of evaluating the relative merits of conflicting conclusions from a limited database of verifiable information, which might prove to support Dr. Bragdon's view as much as it might refute it, and cited W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 187 (5th ed. 1984). *See Bragdon*, 118 S. Ct. at 2210-11. Assuming that it is even appropriate to borrow from the law of negligence in assessing employment discrimination issues, the PROSSER AND KEETON citation points to a different conclusion than the one for which the Court cites it:

> The courts have been compelled to recognize that there are areas in which even experts will disagree. Where there are different schools of medical thought, and alternative methods of acceptable treatment, it is held that the

On remand, the First Circuit made a desultory "reevaluation" of its original decision on Dr. Bragdon's "direct threat" defense, not the kind of objective reconsideration the Supreme Court had instructed.[114] Speculating about how Dr. Bragdon should have interpreted one of the CDC studies—as if he had been a lawyer rather than a solo dental practitioner—the First Circuit again affirmed the summary judgment against the doctor.[115] Nonetheless, the First Circuit indicated that it would be prepared to affirm a physician's professional judgment provided that the physician had existing medical knowledge to buttress that judgment.[116] The court stated that "[t]he state of scientific knowledge concerning this disease is evolving, and we caution future courts to consider carefully whether future litigants have been able, through scientific advances, more complete research, or special circumstances, to present facts and arguments warranting a different decision."[117]

> dispute cannot be settled by the law, and the doctor is entitled to be judged according to the tenets of the school the doctor professes to follow . . . [provided that it is] the line of thought of a respectable minority of the profession.

KEETON, *supra*, at 187 (citing POPE, MORAL ESSAYS, Epistle III, Line 1 (1732)). Significantly, Justice Ginsburg, in her concurring opinion in *Bragdon*, noted her agreement, "in view of the 'importance [of the issue] to health care workers,' that it *is wise to remand, erring . . . on the side of caution.*'" *Bragdon*, 118 S. Ct. at 2214 (Ginsburg, J., concurring) (citations omitted) (emphasis added). Although the majority recognized the idea of determining risk "from the standpoint of the person who refuses the treatment or accommodation," *id.* at 2210, only Chief Justice Rehnquist's dissent actually applied that standard to the facts of the case:

> While it is not entirely certain whether [the seven] dental workers [reported by the CDC] contracted HIV during the course of providing dental treatment, the potential that the disease was transmitted during the course of dental treatment is relevant evidence. . . . Given the "severity of the risk" involved here, *i.e.*, near certain death, and the fact that no public health authority had outlined a protocol for *eliminating* this risk in the context of routine dental treatment, it seems likely that [Dr. Bragdon] can establish that it was objectively reasonable *for him* to conclude that treating respondent in his office posed a "direct threat" to his safety.

Id. at 2217 (Rehnquist, C.J., dissenting) (concluding that summary judgment against Dr. Bragdon was inappropriate) (second emphasis added).

114. *See* Abbott v. Bragdon, 163 F.3d 87, 88 (1st Cir. 1998). *See also Onishea*, 171 F.3d at 1298 (noting that "[o]n remand, the First Circuit" in *Abbott* "has simply reaffirmed its earlier conclusions").

115. *See id.* at 90.

116. *See id.*

117. A number of courts have cited to *Bragdon* in a "direct threat" analysis since the Court announced its decision. *See* Kathleen S. v. Dep't of Public Welfare, 10 F. Supp. 2d 476 (E.D. Pa. 1998) (denying injunction pending appeal of judgment finding that the state had segregated and discriminated against residents of a psychiatric hospital when it failed to provide appropriate community placements, and specifically rejecting the direct-threat defense raised by the state); Burroughs v. City of Springfield, 163 F.3d 505,

While the Supreme Court in *Abbott* returned to the "direct threat" standard's *Arline* heritage in communicable diseases, the "direct threat" test has yet to be applied extensively in reported decisions involving individuals with psychiatric disabilities, which are much more elusive to analyze than the epidemiology of tuberculosis or AIDS.[118] One of the most significant circuit

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508 (8th Cir. 1998) (applying a "reasonable medical judgment" standard to conclude that a municipality's decision to remove a diabetic person from duty as a police officer after he suffered two hypoglycemic events while on duty "was appropriately based on objective evidence and reasonable medical judgment"); Montalvo v. Radcliffe, 167 F.3d 873 (4th Cir. 1999) (upholding bench trial determination under Title III of the ADA that child who suffered from AIDS could be excluded from a martial arts class because of risk of HIV transmission to other students during combat in "hard-style karate class[es]"); Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243 (9th Cir. 1999) (reversing summary judgment that retail store sales associate posed a "direct threat" to anyone merely because she suffered from a "fainting disorder that caused episodes during which she lost consciousness"). Significantly, *Montalvo* viewed speculative evidence of HIV transmission much more generously than the Supreme Court did in *Bragdon*. Citing no studies or other scientific research, the *Montalvo* panel simply drew its own conclusions from two excerpts of testimony from the parties' medical and non-medical witnesses: (1) that there is "a high frequency of minor but bloody abrasions among the students" of the karate class and (2) that "blood-to-blood contact is a means of HIV transmission." *Montalvo*, 167 F.3d at 877-78. The appellate court, like the district court, simply combined these two pieces of testimony to conclude that "although the exact mathematical probability of transmission [of HIV] is unknown, the mode of transmission is one which is likely to occur in [the defendant's] combat-oriented group karate classes because of the frequency of bloody injuries and body contact." *Id.* at 878. Seemingly in contrast to the concerns rejected by the First Circuit and the Supreme Court in *Bragdon*, the *Montalvo* court justifies its gloss on this slender reed of record evidence by emphasizing that "the gravity of one factor might well compensate for the relative slightness of another," for example, "when the disease at risk of transmission is, like AIDS, severe and inevitably fatal, even a low probability of transmission could still create a significant risk." *Id. See also Onishea*, 171 F.3d at 1298 (11th Cir. 1999) (en banc) (criticizing *Bragdon* as merely providing "helpful hints . . . [that] do not shed much light on the amount or nature of the evidence that is *necessary* to prove a risk to be 'significant'") (emphasis in original).

For an overview of ADA issues related to HIV-positive employees, see R. Bradley Prewitt, *The 'Direct Threat' Approach To The HIV-Positive Health Care Employee Under The ADA*, 62 MISS. L.J. 719, 742 (1993) ("In most cases, businesses will have to accommodate the HIV-positive worker, especially if such businesses do not have similar transmission risks as in the health care context.").

118. The EEOC has similarly devoted little discussion to the application of the "direct threat" standard to individuals who have psychiatric disabilities within the meaning of the ADA. The EEOC primarily emphasizes basic "direct threat" principles such as (1) an employer "may not use safety concerns to justify exclusion of persons with [psychiatric] disabilities when persons without disabilities would not be excluded in similar circumstances; (2) "[a]n individual does not pose a 'direct threat' simply by virtue of having a history of psychiatric disability or being treated for a psychiatric disability" or "solely because s/he takes a medication that may," as a side effect, "diminish concentration or coordination for some people," and (3) "the employer must identify the specific behavior that would pose the direct threat," and that a previous "[a]ttempt[ed] suicide does not mean that an individual poses an imminent risk of harm to him/herself when s/he returns to work." ENFORCEMENT GUIDANCE, *supra* note 72, at 33. The EEOC also addresses the difference between (1) a lawful "direct threat" determination made by the employer based on expert evaluation of an individual

court decisions applying the "direct threat" standard considers an elusive claim of psychiatric disability in *EEOC v. Amego, Inc.*[119] The First Circuit was called upon to apply the direct threat standard to the risk posed by a mentally-ill mental health care worker. The plaintiff was employed by a non-profit organization that cared for severely learning- or mentally-disabled individuals.[120] She suffered from severe depression and bulimia requiring psychopharmacological treatment.[121] The employer removed her from her position after a series of events stemming from her mental illness, including a suicide attempt.[122] The employee filed a charge of discrimination with the EEOC, which, after investigating the charge, filed suit against the employer under the ADA.

The court held that the plaintiff, as a matter of law, failed to establish an ADA violation because "[t]he employer's judgment here about the risks of future behavior by an employee is based on past behavior and reasonable indicia of future behavior."[123] The court focused on the fact that the plaintiff had tried to commit suicide by overdosing on the same drugs she was dispensing to patients; that she had overmedicated a number of patients with these drugs; that mental counseling for the plaintiff had not helped; and that the plaintiff's health care providers could not provide "confidence-building" reassurance about plaintiff's ability to perform her duties safely.[124] The

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employee's situation and (2) an unlawful determination based on "a medical text generally discussing the employee's illness." *See, e.g.*, Ofat v. Ohio Civil Rights Comm'n, No. 94-J-31, 1995 WL 310051 (Ohio Ct. App. May 17, 1995). However, on more difficult issues, such as when an employer can refuse to hire someone based on that person's history of violence or threats of violence, the EEOC provides limited advice. *See* ENFORCEMENT GUIDANCE, *supra* note 72, at 34 ("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.").

119. 110 F.3d 135 (1st Cir. 1997).

120. *See id.* at 136-37.

121. *See id.* at 138.

122. *See id.* at 138-41.

123. *Id.* at 145.

124. *See id.* at 145-46. The *Amego* court became the first Court of Appeals to issue a definitive ruling on who bears the burden of proof on the "direct threat" issue. The court refused to attach any significance to the listing of "direct threat" as a qualification standard under the "defenses" section of the Act, 42 U.S.C. § 12113 (1994). The court held that an ADA plaintiff must prove his or her qualifications as part of the prima facie case. *See Amego*, 110 F.3d at 142. Therefore, when one of those qualifications is to exercise responsibility for ensuring the safety of others entrusted to his or her care, it is the employee's burden—*not* the employer's—to prove that he or she *does not* pose a direct threat. *See also*, note 411, *infra*.

plaintiff had proposed as a "reasonable accommodation" that all of her medication-related duties be eliminated. Amego responded that it would still be "necessary to hire another Behavior Therapist to be paired with her to ensure that she would never be left alone with a client who needed medication" and to hire "an additional supervisor to ensure that [the plaintiff] did not have access to client medications."[125] The court, however, rejected the plaintiff's proposed accommodation because "the expense of hiring these additional staff would be too great for a small nonprofit like Amego to be reasonably expected to bear."[126] The court also rejected "rearranging [the plaintiff's] assignment to clients so that she was never with a client who required medication" because medication was required for almost every patient and "[a]ssigning [the plaintiff] to that one client would disrupt Amego's crucial one-staff-member-to-two-clients ratio, or result in the need for an additional Behavior Therapist. Both options would alter the basic operations of Amego and go beyond the scope of a reasonable accommodation."[127]

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125. *Amego*, 110 F.3d at 148.

126. *Id.*

127. *Id.* The court did not undertake an extensive discussion of whether the plaintiff should have been allowed a second chance if her mental condition could be regulated by psychotropic medication. As Professor Guiduli explained in her study of the "direct threat" standard as applied to mental illness, "[m]ental illness is often treated with psychotropic medication, and this medication presents a compelling solution for treating and accommodating a mentally ill employee while reducing any possible threat both to the individual and to others in the workplace." Karin A. Guiduli, *Challenges For The Mentally Ill: The 'Threat To Safety' Defense Standard And The Use Of Psychotropic Medication Under Title I Of The Americans With Disabilities Act of 1990*, 144 U. PA. L. REV. 1149, 1183 (1996). The author makes a number of thoughtful observations about the employer's and employee's obligations in the process of accommodating psychiatric disabilities with medication, *id.* at 1183-87, that transcend the discussion undertaken a year later by the EEOC. *See* ENFORCEMENT GUIDANCE, *supra* note 72, at 23-32. In addition, the author provides an overview helpful to understanding the challenges to employment faced by those with psychiatric disabilities. *See* Guidali, *supra*, at 1154-63.

For further discussion on the relationship between mental disabilities and the ADA, see Karin Mika & Denise Wimbiscus, *Responsibilities of Employers Toward Mentally Disabled Persons Under The Americans With Disabilities Act*, 11 J. LAW & HEALTH 173, 188 (1996-97) (comparing "direct threat" standard and prohibitions on medical inquiries, noting that "[t]his puts the employer in the intriguing position of being in compliance with the law to dismiss a potentially violent person (under the rationale that the employee is not qualified) [while not] . . . encourag[ing] solving a problem with suggesting psychologist or psychiatric help"); Mary E. Sharp, *The Hidden Disability That Finds Protection Under The Americans With Disabilities Act: Employing The Mentally Impaired*, 12 GA. ST. U. L. REV. 899, 923-26 (1996) (observing that "although employers should not discriminate, employers should not be expected to assume an 'undue' financial burden of caring for the mentally disabled").

Similarly, a more deferential approach was adopted in *Judice v. Hospital Service District No. 1.*[128] In *Judice,* a recovering alcoholic neurosurgeon, seeking reinstatement of staff privileges at a hospital after a state licensing board conditionally reinstated his medical license, claimed that "the hospital's request for a second opinion" concerning his addictive condition and "his risk of relapse" was discrimination in violation of Title II of the ADA.[129] The court upheld as "objective[ly] reason[able]" the hospital's conclusion that it should have a second medical opinion by an addictionologist to determine whether "the objectively reasonable risk Dr. Judice posed" of recidivism into alcoholism "was insignificant."[130]

Dr. Judice had flatly refused to participate in a medical review process. Refusals by individuals to participate in independent medical reviews should be dispositive. Such refusals effectively prevent an employer's extra-judicial processes for assessing "direct threat" issues from operating.

B. Public Safety Officers

The cases reported under the ADA and the Rehabilitation Act involving police officers, firefighters, and other safety and law enforcement agents have typically focused on the unusual demands of such employment and the potential for harm created by entrusting officers with potentially dangerous instrumentalities such as weapons and automobiles. Courts have emphasized that (1) the employee must be ready to perform essential duties at all times in highly stressful situations and (2) the suggested accommodations have simply

128. 919 F. Supp. 978 (E.D. La. 1996).

129. *Id.* at 980. Title II of the ADA prohibits any "public entity" from subjecting a qualified individual with a disability to discrimination because of that disability. 42 U.S.C. § 12132 (1994). The court, however, relied on Title I of the ADA for its analysis, because the threat-to-safety concept (called "actual risk" in the regulations implementing Title II, 28 C.F.R. § 35, app. A (1995)) under Title II "is largely analogous to the concept of 'direct threat'" under Title I. *Judice,* 919 F. Supp. at 982.

130. *Judice,* 919 F. Supp. at 983-84. The court rejected Dr. Judice's position because the hospital's "request for a second opinion was made after professional consultation, and was supported by a professional addictionologist of undisputed repute." *Id.* at 983. Thus, the court concluded that "the hospital's demand for a second evaluation of risk was reasonable and warranted" and was reinforced by "his repeated encounters with alcohol" as well as the licensing board's "impos[ition] [of] strict conditions of oversight [of Dr. Judice] for five years." *Id.* at 984.

been insufficient.

In *Huber v. Howard County*,[131] the court granted summary judgment against an asthmatic plaintiff who, seeking to become a professional firefighter, sued under Section 504 of the Rehabilitation Act.[132] The court noted that the plaintiff was not otherwise qualified given a physician's affidavit explaining that because of "the demands on firefighters at the scene of a fire—rapidly fluctuating temperature conditions, work at or near maximal heart rates, and exposure to toxic substances—there is no medical plan which, if followed by [plaintiff], would enable him to serve without a risk of future harm to himself or others."[133]

The court emphasized that the plaintiff was not "otherwise qualified" despite eight years service as a volunteer firefighter, because such service "is not necessarily indicative of his future performance given the unpredictable nature of asthma, which in [plaintiff's] case, according to his own expert, is cold and exercise induced, conditions which are faced by firefighters."[134] The court ruled that the plaintiff could not "perform a most essential function of a career firefighter, namely to be available, in a healthy physical condition at any, random moment during a shift—'in spite of his handicap.'"[135]

The court rejected suggested accommodations such as having "other firefighters, who are trained to use a stethoscope, evaluate [plaintiff] on a daily basis to determine whether he is having a wheezing problem" or having paramedics at the scene of a fire to "listen to [plaintiff's] lungs to see if there is a wheezing problem."[136] The court concluded that the employer "would have to increase its staffing requirements . . . to have enough active firefighters at the scene" and observed that "[a]n accommodation which permits an employee to work only

131. 849 F. Supp. 407 (D. Md. 1994), *aff'd mem.*, 56 F.3d 61 (4th Cir. 1995).

132. *See id.* at 408-09.

133. *Id.* at 410. This "direct threat" analysis, however, applies only where firefighting is found to be an *essential* job function. *See, e.g.*, Hamlin v. Charter Township of Flint, 165 F.3d 426, 430-32 (6th Cir. 1999) (affirming $500,000 jury verdict for dismissed assistant fire chief because safety-based exclusion premised on plaintiff's cardiac limitations was inapplicable in light of jury's conclusion that firefighting is not an essential job function).

134. *Huber*, 849 F. Supp. at 412.

135. *Id.* at 413.

136. *Id.*

when his or her impairment permits is not reasonable in a job, such as firefighting, where active attendance and immediate, undelayed participation is crucial."[137]

Hepatitis B stood between a U.S. Marshal who had been placed on disability status and his efforts to return to duty in *Fedro v. Reno*.[138] Fedro had contracted the disease through workplace contact, and, after three years of "disability retirement," he sought to return to work as a full time Criminal Investigator.[139] The Marshals Service personnel officer directed Fedro to obtain a complete medical report from his physician.[140] The physician expressed concern that Fedro's infection posed a "direct threat" to others because an altercation might result in exposure to the Marshal's blood and transmission of the Hepatitis-B virus.[141] The Marshals Service concluded that "Fedro could not be placed in a law enforcement job in which there would not be a likelihood of violent confrontation."[142]

The district court's grant of summary judgment to the government was affirmed on the basis, inter alia, that Fedro's evidence was insufficient to countervail his physician's statement.[143] Fedro had offered the opinion of a Program Manager for the Office of Personnel Management ("OPM"), who had reviewed his situation and concluded that Fedro could safely and efficiently perform the essential duties of a U.S. Marshal because (1) "the likelihood of a U.S. Marshal being involved in an altercation in which there was an exchange of blood is practically nil" and (2) by enrolling "Fedro under its reemployment priority list . . . for law enforcement officer positions," the Marshals Service contradicted its position on Fedro's reemployment because "[a]n employee is not eligible for [reemployment] if he has residual disabilities that would be considered disqualifying."[144] Fedro also proffered a letter from another OPM employee who had surveyed three physicians

137. *Id.*
138. 21 F.3d 1391 (7th Cir. 1994).
139. *See id.* at 1392-93.
140. *See id.* at 1392.
141. *See id.* at 1392-93.
142. *Id.* at 1393.
143. *See id.* at 1396-97.
144. *Id.* at 1393-94.

and prepared a summary of "his conversation with the physicians in which he reported that all agreed that the risk of infecting other individuals as a result of a physical confrontation was slight."[145] The appellate court viewed this evidence as insufficient in light of the nature of the job and the medical opinion of Fedro's physician.[146]

In *Lassiter v. Reno*[147], a twenty-two-year veteran of the Marshals Service was disqualified after developing paranoid personality disorder. Lassiter began to believe that a neighbor's family and others were conspiring to burglarize his home, reported those beliefs to local police, staked out his own house, and finally "hid" in the house "armed with an automatic weapon, two magazine rounds, a night-vision scope, and a bulletproof vest."[148] Lassiter was detained pursuant to court order for psychiatric evaluation and thereafter voluntarily submitted to psychiatric treatment.[149] The court noted that even after treatment, Lassiter "continued to believe that individuals around him were conspiring against him."[150] Relying on a psychiatric diagnosis of "delusional paranoid personality disorder"[151] and the psychiatrist's opinion that Lassiter should not perform any duties that required him to carry a weapon and thus was "medically unfit for duty as a Deputy U.S. Marshal," the Marshals Service terminated Lassiter's employment, and Lassiter sued the Marshals Service under the ADA.[152]

The *Lassiter* court found that, as a matter of law, a Deputy

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145. *Id.* at 1394.

146. *See id.*

147. 885 F. Supp. 869 (E.D. Va. 1995), *aff'd*, 86 F.3d 1151 (4th Cir. 1996), *cert. denied*, 519 U.S. 1091 (1997).

148. *Id.* at 871.

149. *See id.*

150. *Id.*

151. Delusional paranoid personality disorder is not defined as such by the criteria of the American Psychiatric Association's DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) ("DSM-IV"). Paranoid personality disorder is described generally as a "pervasive distrust and suspiciousness of others such that their motives are interpreted as malevolent," including "suspect[ing], without sufficient basis, that others are . . . harming . . . him" and "read[ing] hidden . . . threatening meanings into benign remarks or events." DESK REFERENCE TO THE DIAGNOSTIC CRITERIA FROM DSM-IV § 301.0 (1994). Delusional disorder is discussed separately as related to schizophrenia and is marked by, among other things, the apparent ability to function and behavior not obviously odd or bizarre, "[a]part from the impact of the delusion(s) or its ramifications." *Id.* § 297.1

152. *Lassiter*, 885 F. Supp. at 871.

U.S. Marshal diagnosed as suffering from "delusional paranoid personality disorder" presented a "reasonable probability of substantial harm" if he were permitted to carry a firearm in performing the essential functions of "transporting prisoners, providing security for courtrooms, and seizing drug-related assets pursuant to federal drug and forfeiture laws."[153] The court rejected Lassiter's attempt to create a factual issue from conflicting expert testimony "as to whether plaintiff suffers from a delusional paranoid personality disorder or merely a paranoid personality disorder."[154] The heart of this ruling was expressed not in terms of a detailed balancing under the *Arline* factors, but rather with an unarticulated focus on the severity of harm that could result from a cognizable potential for misuse of a dangerous instrumentality:

> This court agrees with defendants, however, that arguing whether plaintiff is delusional does not raise genuine issues of material fact in this case. Even assuming plaintiff suffers only from a paranoid personality disorder, such an affliction constitutes a "basic" disorder within the meaning of [the Marshals Service's] medical qualifications. Additionally, plaintiff's medical history establishes that permitting plaintiff to carry a firearm would pose a "reasonable probability of substantial harm" to plaintiff and to others.[155]

Significantly, despite the ADA's command that disqualifications on safety-related rationale be supported by the best available medical evidence, the court in *Lassiter* did virtually nothing to explore the existence of meaningful links between Lassiter's behavior, the physicians' diagnoses, and current thought in the psychiatric profession about the risks posed by individuals such as Lassiter. There was no discussion,

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153. *Id.* at 874.

154. *Id.* The Marshals Service's medical qualifications disqualify anyone who has "'mental instability or history of a basic personality disorder.'" *Id.* The court accepted this criterion as to Lassiter's employment with no further inquiry whether it was job-related and consistent with business necessity as applied to the circumstances presented by Lassiter. *Compare* 42 U.S.C. § 12112(b)(6)(1994). For example, the court did not ponder whether it should make a difference that Lassiter apparently had not expressed this aberrant behavior while on duty, or that he had not threatened anyone with a weapon. Nor did the court look to the fact that, after Lassiter was hospitalized, he "continued to believe that individuals around him were conspiring against him," to whether he now understood that he had mental illness and comprehended that his previous behavior was a societally unacceptable response, or even to whether he was likely to repeat the misconduct. *Lassiter*, 885 F. Supp. at 871.

155. *Id.*

for example, of whether Lassiter might be allowed to return to work if he agreed to continuing intensive therapy. No consideration was given to whether therapy might substantially improve his condition. Moreover, there was no evaluation of whether chemotherapy might ameliorate his condition sufficiently to permit him to return to duty. Indeed, although Lassiter suggested that he could have been reasonably accommodated by being "permitt[ed] . . . to work in his former position with repeated follow-up psychiatric treatment," the court rejected that suggestion out of hand, apparently with no record evidence to refute it.[156] Instead, the court tacitly deferred to the professional judgment of the Marshals Service's psychiatrist.[157]

Similar concerns about the use of a dangerous instrumentality—this time, a squad car—provided an analytic shortcut in *Siefken v. Arlington Heights*.[158] Siefken was a diabetic police officer who had driven a squad car erratically and then collapsed into a coma due to a hypoglycemic episode. He was fired a week later. He then sued.

In granting the motion to dismiss filed by Siefken's employer, the district court surveyed the problem with many ADA cases in this area: "[T]he legal arguments of the parties depend in large measure upon how they characterize the circumstances."[159] Siefken contended that he was terminated because he was diabetic; the police department argued that Siefken "was terminated because of his conduct, not because of his condition."[160] The court framed the issue in the following manner: "[W]hether or not a termination based on a severe hypoglycemic episode which led to vehicle use that created a

156. *Id.* at 875 (citations omitted). Specifically, the court responded to this argument as follows:

> Although [the Marshals Service's psychiatrist] did suggest that plaintiff could return to general employment at [the Service] with ongoing counseling, he never testified that plaintiff could resume his former position and carry a firearm with such follow-up treatment. Thus, permitting plaintiff to work as a Deputy U.S. Marshal while undergoing treatment would not be a reasonable accommodation of plaintiff's disability.

Id.

157. *See id.* at 871, 874-75.

158. No. 94 C 2404, 1994 U.S. Dist. LEXIS 13015 (N.D. Ill. Sept. 14, 1994), *aff'd*, 65 F.3d 664 (7th Cir. 1995).

159. *Id.* at *2.

160. *Id.*

grave risk to the employee and others" violated the ADA or the Rehabilitation Act.[161] The court invoked the direct threat analysis, stating that Siefken's employer had the burden "to prove that any accommodation is unreasonable and that [Siefken] poses a direct threat to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services."[162]

The *Siefken* court found it significant that the officer had known of his diabetic condition for a number of years and had controlled it on previous occasions.[163] Moreover, the court rejected the plaintiff's argument that this incident was a one-time lapse and that "he now knows how to control his diabetes and therefore this kind of thing will not happen again."[164] The employer's motion to dismiss plaintiff's claims under the ADA and the Rehabilitation Act was granted because the court concluded that "a hypoglycemic episode as severe as the one here, admittedly due to poor control, permits the defendant to conclude that the plaintiff is not qualified to be a police officer. It does not have to take a second chance."[165]

When the Seventh Circuit affirmed the district court's order, it did not review the *Arline* multifactor analysis in detail or engage in a discussion of the direct threat standard. It merely cited *Arline* and other cases in a footnote in support of the proposition that "disabled persons that present a significant potential for harm to others in the workplace cannot state a cause of action under the ADA."[166] Instead, the court explained that the village hired Siefken assuming that "Siefken could monitor his medical condition sufficiently to allow him to perform the duties of a patrol officer" and "fired him only when he proved them wrong."[167] Thus, the Seventh Circuit's view

161. *Id.* at *3.
162. *Id.* at *4.
163. *See id.* at *3.
164. *Id.* at *3.
165. *Id.* at *7.
166. Siefken v. Arlington Heights, 65 F.3d 664, 667 n.4 (7th Cir. 1995).
167. *Id.* at 666-67 (citations omitted). The court elaborated:

> Under the ADA, an employer must make reasonable accommodations to enable a disabled employee to perform his job duties. When asked what accommodation Siefken would request, his counsel replied, "A second chance." But this is not an accommodation, as envisioned in the ADA. As we recently stated, "It is plain enough what 'accommodation' means. The

was that "when an employee knows that he is afflicted with a disability, needs no accommodation from his employer, and fails to meet 'the employer's legitimate job expectations' due to his failure to control a controllable disability, he cannot state a cause of action under the ADA."[168] The Seventh Circuit, however, probably did not intend to enunciate such a broad and sweeping a rule. The implicit, but unspoken key, to *Siefken* is the potentially dangerous instrumentality at the heart of a road patrol officer's job—the police cruiser. If Siefken had been an officer assigned to desk duty or worked in any other position that did not require operation of a hazardous implement, it seems unlikely that a court would have upheld, as a matter of law, his discharge for a single lapse in a medication regime.

In contrast to the above cases, the court in *Stillwell v. Board of Police Commissioners*[169] focused on a blanket exclusion from serving as an armed security guard any individual who did not possess both hands. The Board refused to process the security guard license application of Stillwell, who was "born without a left hand," because "they assumed that with only one hand he cannot perform the full and unrestricted duties required of a police officer."[170] Because "[u]nder the Board's licensing scheme he was not given the opportunity to demonstrate his physical abilities," Stillwell sued under Title II of the ADA.[171]

The court granted summary judgment in favor of Stillwell, dismissing the Board's "direct threat" justifications and

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employer must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work." Siefken is not asking for an accommodation; he is not asking the Village to change anything. He is asking for another chance to allow him to change his monitoring technique. But the ADA does not require this.

Id.

168. *Id.* at 667; *accord* Brohm v. JH Properties, 947 F. Supp. 299 (W.D. Ky. 1996) (termination of anesthesiologist who allegedly fell asleep while assisting in surgical procedures due to sleep apnea).

169. 872 F. Supp. 682 (W.D. Mo. 1995).

170. *Id.* at 683. The court noted that:

Specifically, Defendants assert that two hands are required to successfully perform defensive tactics such as handgun retention, lateral vascular neck restraint, knife defense, and handcuffing. Defendants also allege that a one-handed guard with a gun is more likely to use deadly force on another person than a guard with two hands.

Id.

171. *Id.*

declaring them to amount to nothing more than a stereotype.[172] In the court's view, Stillwell "was given no individualized consideration by the Board."[173] This lack of consideration, the court found, was in direct violation of the "direct threat" test articulated in *Arline*[174] as well as regulations implementing Title II.[175]

There are other instances, however, where courts tend to recognize that some impairments create obvious risks that officials do not have to have a great deal of objective evidence on which to act and may instead rely on apparent threats to safety that could have fatal consequences. This approach is well illustrated in *Layser v. Morrison*[176]. The plaintiff, Layser, was a college campus security officer who carried a firearm while on duty.[177] After receiving unsatisfactory performance ratings and failing to obtain a promotion, Layser "had a dream [in which] he walked into [the campus security chief's] office, pulled his revolver out of the holster, and pointed the gun at [the security chief's] forehead."[178] Layser was so disturbed by this dream that he sought out psychological help; the psychologist was so

172. *See id.* at 685.

173. *Id.* at 686. The court noted that

> Plaintiff submits that he can safely handle both a revolver and a shotgun, has been trained in weapon retention and handcuffing, and can effectively apprehend suspects. The Board took none of this into account in making its licensing decision. Instead of allowing Plaintiff to prove his physical abilities, his application was summarily denied when the Board learned of his anatomical loss.

Id.

174. *See id.* at 686-87. The court also admonished that "[s]uch an exclusionary policy is highly suspect" precisely because it does not "giv[e] consideration on a case-by-case basis to accurately determine what risks, if any, [are] pose[d] to [the applicants] or the public." Id. at 686-87. *See also* Bombrys v. City of Toledo, 849 F. Supp. 1210, 1216-19 (N.D. Ohio 1993) (blanket exclusion of insulin-dependent diabetics from positions as police officers violates ADA because "[a]n individualized assessment is absolutely necessary if persons with disabilities are to be protected from unfair and inaccurate stereotypes and prejudices").

175. 28 C.F.R. § 35.130(b)(8) (1997) provides that "[a] public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability[,] or any class of individuals with disabilities[,]from fully and equally enjoying any service, program, or activity, *unless such criteria can be shown to be necessary for the provision* of the service, program, or activity being offered." *Id.* (emphasis added). As previously noted, regulations implementing Title I of the ADA require an employer to prove that such exclusionary criteria are job-related and consistent with business necessity, unless the criteria are established by federal law. *See supra* notes 58-59 and accompanying text.

176. 935 F. Supp. 562 (E.D. Pa. 1995).

177. *See id.* at 565.

178. *Id.*

concerned by the revelation of Layser's dream that he privately warned the security chief; and the security chief, not surprisingly, forced Layser to surrender his firearm and to go on paid leave until the psychologist cleared him to return to work.[179] The security chief and Layser's psychologist subsequently reached agreement on a set of conditions under which Layser could return to duty with minimal risk, including placing Layser in a dispatcher's position without a firearm and requiring him to undergo a second psychological evaluation.[180] One year later, after the required psychological opinion was submitted, the security chief returned Layser to partial duty and reissued his firearm.[181] Layser, however, sued the college, contending that his rights under the ADA had been violated by placing him in the unarmed dispatcher's position for one year.[182]

Entertaining a variety of arguments on which it could grant summary judgment against Layser, the court concluded that, based on the knowledge available to the college at the time its security chief was contacted by Layser's psychologist, Layser posed a direct threat to the health and safety of the security chief and others.[183] The court did not engage in a detailed analysis of the *Arline* factors. Instead, it noted that not only had the psychologist "fea[red] Layser would, in fact, act on his images of shooting [the security chief] in the head," but Layser himself made contemporaneous statements in state worker's compensation proceedings that "'I told him [the psychologist] that I had never really felt like this before, and that as an armed police officer, I felt that I should not go to work until I got better control of the stress and anger that was bothering me . . . I told him that I didn't know what was happening to me, but that I feared that if I had to go to work right now and deal with [the security chief] or others that I was angry with . . . I might end up in trouble.'"[184] On this basis, the court concluded that the college "had provided sufficient submissions to illustrate

179. *See id.* at 565.
180. *See id.*
181. *See id.*
182. *See id.* at 565-66.
183. *See id.* at 569-70.
184. *Id.* at 569.

the potential harm [that] Layser posed was significant."[185] With no contrary evidence proffered by Layser, the court ruled that the direct-threat defense "preclude[d] Layser's claim."[186]

C. Transportation Workers

The early disability cases involving transportation workers focused on regulations promulgated by the Federal Highway Administration ("FHA") concerning safe operation of motor vehicles.[187] In one of the first of these cases, *Chandler v. City of Dallas*[188], the city adopted a driver-safety program establishing physical standards for city employees whose jobs intrinsically involved driving on the public roads. The program was based on FHA regulations which, in part, provided that a person is physically qualified to drive a motor vehicle if he or she has no established medical history or diagnosis of diabetes mellitus currently requiring insulin for control and has visual acuity at the standards set forth in the regulations.[189] The plaintiffs were two individuals who had been employed by the city in job classifications covered by the program. One had diabetes and the other was visually impaired in one eye. They sued the city on behalf of two certified classes under the Rehabilitation Act and similar state law.[190] After a district court judgment in favor of plaintiffs, the city won a reversal on appeal.[191] The Fifth Circuit held that the plaintiffs could not prove their qualifications in the face of the city's reliance on the FHA's standards in developing the city's driver safety program.[192]

The court noted that although the FHA had "received several petitions for reconsideration" of its medical regulations, no change was made to "the standards for diabetes and vision."[193] After observing that the courts "have uniformly held that insulin dependent diabetics present an unacceptable risk" for "positions involving driving or other high risk activities,"[194] the

185. *Id.*
186. *Id.* at 570.
187. 49 C.F.R. § 391.41(b) (1998).
188. 2 F.3d 1385 (5th Cir. 1993).
189. *See* 49 C.F.R. § 391.41(b).
190. *See Chandler*, 2 F.3d at 1389.
191. *See id.* at 1389, 1397.
192. *See id.* at 1394.
193. *Id.* at 1394-95.
194. *Id.* at 1395 & nn.50-51.

court held that

> as a matter of law, a driver with insulin dependent diabetes or with vision that is impaired to the extent discussed in the [FHA regulations] presents a genuine[,] substantial risk that he could injure himself or others. We echo the sentiment expressed by this court in *Collier* [*v. City of Dallas*, an unpublished opinion]: "Woe unto the employer who puts such an employee behind the wheel of a vehicle owned by the employer which was involved in a vehicular accident."[195]

The court, however, recognized the "hope . . . that medical science will soon progress to the point that 'exclusions on a case by case basis will be the only permissible procedure; or, hopefully, methods of control may become so exact that insulin-dependent diabetics will present no risk of ever having a severe hypoglycemic episode.'"[196] Although the court noted that the plaintiff who experienced two severe hypoglycemic reactions during his employment had not demonstrated that such an advancement had been made, it also emphasized that insulin-dependent diabetics could not be excluded from driving positions *if* they could show that there were reasonable accommodations available to permit them to perform the essential driving functions with an acceptable margin of safety.[197] Moreover, referring to *non*-insulin dependent diabetics, the court noted that they might make such a showing "by presenting evidence regarding how they could readily monitor their blood sugar levels and maintain them at proper levels during work so as to reduce or eliminate the risk of a hypoglycemic reaction while driving."[198] The *Chandler* court, however, did not venture to provide any suggestion as to what

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195. *Id.* at 1395 (citing Collier v. City of Dallas, No. 86-1010, slip op. at 3 (5th Cir. Aug. 19, 1986), and 49 C.F.R. § 391.41) (footnote omitted).

196. *Id.* at 1395 n.52. This time may well have come. In *Kapche v. City of San Antonio*, No. 98-50345, 1999 U.S. App. LEXIS 9700 (5th Cir. May 20, 1999), the panel vacated and remanded a summary judgment against a police officer applicant rejected under a per se exclusion of insulin-dependent diabetics. *Id.*, at *2. The panel questioned the district court's reliance on *Chandler* and *Daugherty v. City of El Paso*, 56 F.3d 695 (5th Cir. 1995), in light of medical and technological advances and changes in DOT medical standards for non-commerical driviers, and directed the district court to re-evaluate the exclusion. Id., at *1, *19-*22. *But see* Gonzalez v. City of Braunfels, No. 98-50290, 1999 U.S. App. LEXIS 9699, *12 (5th Cir. May 20, 1999) (upholding exclusion of diabetic officer based on "individualized" determination). These decisions simply reaffirm the volatility of the judiciary's "direct threat" analyses.

197. *See id.*

198. *Id.* at 1395 n.56 (citing Wood v. Omaha Sch. Dist., 985 F.2d 437, 438-39 (8th Cir. 1993)).

kinds of measures an *insulin*-dependent diabetic individual might invoke to demonstrate, or at least to raise a factual issue as to, the existence of a reasonable accommodation. Nor did the court state whether such a plaintiff must show that an accommodation "would eliminate *any* safety risk inherent in their driving," or whether a plaintiff merely must show a reduction in the risk.[199] The latter clearly presents serious issues of (1) quantifying the risk in the first place; (2) quantifying the reduction in that risk likely to be effected by a proposed accommodation; and (3) quantifying whether the risk, even as reduced, presents the margin of safety that the employer and the public have a right and need to demand.[200] These are crucial issues of primarily medical science that must be resolved in the future, for they are central to a reasoned analysis under the *Arline* factors.

By contrast, however, the Fifth Circuit rejected a "safety-based" argument in *Rizzo v. Children's World Learning Centers*.[201] Rizzo was a hearing-impaired van driver for preschool children. She was reassigned after her employer, acting on complaints from students' parents that she would be unable to hear a child choking in the back of the van, requested that Rizzo provide certification from her audiologist verifying that it was safe for her to drive the van. Rizzo's audiologist stated

199. *Id.* at 1395 (emphasis added).

200. In *Daugherty v. City of El Paso*, 56 F.3d 695 (5th Cir. 1995), the court held that a diabetic employee was not a "qualified individual" for a bus driver position. The court found that the employee "was not qualified to perform the essential functions of a city bus driver once he was diagnosed as an insulin-dependent diabetic." *Id.* at 697. The plaintiff in *Daugherty*, unlike the plaintiff in *Chandler*, proposed two "accommodations": (1) obtaining a waiver from the Department of Transportation regulations under which his insulin-dependent diabetes was a disqualifying condition, or (2) reassigning him to another position on the city payroll. *See id.* The court found that an insulin-dependent diabetic as a matter of law presents a direct threat as defined in the ADA. *See id.* at 698. The court further observed that "[a] waiver of Department of Transportation regulations would in no way address the concerns stated in *Chandler*; it might avoid the legal impediment to [plaintiff's] desire to continue to drive a bus, but it would not alter his medical condition." *Id.* at 698. As to the issue of reassignment, the court stated, "we do not read the ADA as requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled. It prohibits employment discrimination against qualified individuals with disabilities, no more and no less." *Id.* at 700. *See also* Wood v. Omaha School District, 25 F.3d 667 (8th Cir. 1994) (granting summary judgment because insulin-using diabetics posed too great a safety risk to qualify as drivers of school vans); Serrapica v. City of New York, 708 F. Supp. 64 (S.D.N.Y. 1989), *aff'd*, 888 F.2d 126 (2d Cir. 1989) (granting summary judgment for city that declined to allow insulin-dependent diabetics to operate sanitation trucks).

201. 84 F.3d 758 (5th Cir. 1996).

that she could hear emergency vehicles, but "did not discuss whether Rizzo could hear a child choking at the back of the van."[202] Subsequently, the employer transferred Rizzo to cafeteria duty.[203] Rizzo sued, claiming, among other things, that "because of her hearing impairment, she was . . . wrongfully perceived to be a direct threat to the health or safety of herself or others in the work place."[204] The Fifth Circuit declined to treat this as a case of circumstantial, as opposed to direct, evidence of discrimination:[205]

> In the instant case there is direct evidence that Children's World made an employment decision because of a disability. Children's World does not deny that Rizzo was removed from driving duties because of her hearing impairment. Therefore, we need not engage in the *McDonnell Douglas* presumption in order to infer discrimination: Children's World admits that it discriminated. Children's World, however, contends that it had a reason to discriminate. It argues that Rizzo's driving of the van would pose a direct threat to the children, because she might not be able to hear if one of them were choking.[206]

The court rejected the employer's reliance on cases such as *Chandler* and *Daugherty*, noting the absence of any "statute or

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202. *Id.* at 760.

203. *See id.* at 761.

204. *Id.* at 761.

205. In the absence of direct evidence that a protected characteristic was a motivating factor in an employment action, the courts generally apply the now-familiar burden shifting analysis established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). When direct evidence of an unlawful motive is present, a mixed-motive analysis is generally employed. *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977). In a *Mt. Healthy*-type case, where legitimate and unlawful reasons are both present, the employer must carry the burden to prove it would have made the same decision anyway even absent the illegitimate factors. *See* Monteiro v. Poole Silver Co., 615 F.2d 4, 9 (1st Cir. 1980) ("[I]t is by now clear, where motives are mixed, that the impermissible motive must be a determinative factor in the employer's decision"). The *Poole* court upheld the discharge of an employee against claims that the discharge was retaliatory under Title VII where the court found insubordination and refusal to work to be the motivating reasons, although "it also found [an] insincere accusation of discrimination to be a factor in the termination." *Id.* at 9 n.7. Of course, other options are present in an ADA case, including a showing that the employee was a direct threat or that her limitations could not be accommodated without causing undue hardship. *See* 42 U.S.C. §§ 12113(b), 12112(b)(5)(A).

206. *Rizzo*, 84 F.3d at 762. Significantly, although acknowledging that part of plaintiff's prima facie case is to show that she is qualified and that "[a]n employee who is a direct threat is not a qualified individual with a disability," the court nonetheless held "[a]s with all affirmative defenses, the employer bears the burden of proving that the employee is a direct threat." *Id.* at 763, 764.

regulation regarding hearing-impaired drivers."[207] The court emphasized that "[n]o evidence was presented regarding the ability of anyone to hear a choking child while driving a van . . . . Whether a person who can hear emergency vehicles, but cannot hear a choking child, is a direct threat is a question of fact."[208]

By contrast, the court granted summary judgment for the employer in *Newman v. Chevron U.S.A.*[209], in a case where the court was willing to assume the existence of danger without actual evidence as to the degree of risk posed by the plaintiff. Newman drove a tanker truck to make gasoline deliveries to Chevron service stations. He suffered from a mental impairment that was diagnosed as post-traumatic stress disorder ("PTSD"), the result of a recreational boating accident involving a fatality.[210] Newman suffered a number of concentration and memory lapses while operating the truck, including incidents in which he improperly mixed different grades of gasoline, lost orientation as to location and time while driving on an interstate highway, and failed to report damage to his unit caused by backing into a sign.[211] Eventually, Chevron terminated him because it concluded, based on the report of a third party, that Newman had remembered more than he would admit and "was only covering . . . up to avoid termination."[212] Newman asserted he was unlawfully terminated based on his PTSD condition and filed an ADA suit.[213]

The court analyzed the summary judgment motion by focusing on the issue of whether the plaintiff could establish "that he is a 'qualified individual.'"[214] The opinion was based on

207. *Id.* at 764.

208. *Id.* at 764. The court noted, however, that "the factfinder should of course weigh heavily the fact that Rizzo drives a van carrying small children. That any potential harm will befall children, the most vulnerable members of our society, will greatly impact the consideration of '[t]he nature and severity of the potential harm.'" *Id.* (quoting 29 C.F.R. § 1630.2(r) (1998)).

209. 979 F. Supp. 1085 (S.D. Tex. 1997).

210. *See id.* at 1086-87.

211. *See id.* at 1086.

212. *Id.* at 1088.

213. *See id.*

214. *Id.* at 1090 n.3. The court did, however, make it clear that it did not view itself as a super-personnel manager, for, "[r]egardless of the sagacity of employment decisions, erroneous or even arbitrary personnel decisions do not offend the ADA because that

a direct threat analysis, although the court neither used the label "direct threat" nor explicitly analyzed the *Arline* factors:

> [T]he Court finds that Plaintiff is not qualified for the position from which he was terminated because he cannot perform the essential function of driving a gasoline truck. Although Defendant has failed to provide a job description and has failed to brief this point, the Court notes from the pleadings that Plaintiff was hired as a gas delivery driver. By his own admission, Plaintiff's tasks included driving an eighteen-wheeled semi-tractor trailer from the terminal, where his truck was loaded with highly flammable gasoline, to retail service stations, where this highly flammable fluid was put into underground storage tanks. *Regardless of one's mental state, hauling flammable gasoline over the open road is extremely dangerous. Undertaken with a condition that causes loss of concentration and memory, such activity approaches utter recklessness and blatant disregard for the safety of others* . . . . Although someone with Plaintiff's condition can likely do a plethora of other tasks, driving a gasoline truck weighing several tons loaded with flammable liquid is certainly not one of them. Plaintiff is not qualified for the position of gas delivery driver as a matter of law.[215]

The court's analysis has a strong intuitive appeal to common-sense notions of safety and danger. However, it entirely omits an *Arline*-type analysis. Little or no medical information is evaluated. Neither party appears to have focused on the case from that perspective. Indeed, the outcome might be attributable to the failure of the plaintiff's attorney to develop a sufficient record of medical evidence or medical opinion to give pause to the district judge. Instead, the district judge acted as a medical Solomon, dispensing his own brand of risk assessment. However much relief we might feel from the judge refusing to

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statute only prevents employment decisions motivated by a discriminatory motive." *Id.* at 1092.

215. *See id.* at 1090 (emphasis added) (citing *Daugherty v. City of El Paso*, 56 F.3d 695, 698 (5th Cir. 1995), *cert. denied*, 516 U.S. 1172 (1996), for the proposition "that an individual is not qualified for a job if there is a genuine substantial risk that he could be injured or could injure others and the employer cannot modify the job to eliminate that risk"). The court elaborated in *Newman* on the nature and severity of the risk as follows:

> During deliveries, Plaintiff drove his truck over the interstate, endangering not only himself but many others in the process. Plaintiff admitted "waking up" while proceeding down the freeway, not knowing where he was or where the time went. In his deposition, Plaintiff admitted that it was possible that he could run over someone with his truck and not notice it. Indeed, by his own admission, Plaintiff's driving in such condition created "a possibility of extreme danger."

Id. at 1090.

return Newman to the road, the problem remains that the *Arline* Court never intended for federal courts to act as medical review officers dispensing homespun risk analyses.

Although not a "direct threat" case per se, the decision in *Campbell v. Federal Express Corp.*[216] addressed a fundamental issue not tackled in other cases involving transportation workers—the role of a court when there are extra-judicial procedures by which an employee's medical qualifications may be determined by medical or regulatory experts. The *Campbell* court refused to find that a driver had established that he satisfied medical standards established for drivers of motor carriers by the United States Department of Transportation when the medical opinion of the physician employed by a carrier, DHL/Worldwide Express, who had hired him differed from the opinion obtained from a physician by another carrier, Federal Express, which had rejected him for employment.[217] Noting that "Federal Express was not bound to accede to determinations made by medical professionals retained by its competitors," but instead was "entitled to rely on the determinations made by its medical professionals," the court dismissed Campbell's ADA lawsuit because he had not completed the available tripartite medical review process to establish his qualifications.[218] The court stated that "[i]n a case where there are conflicting medical evaluations, such as the conflict . . . between the DHL and Federal Express examination outcomes, the driver may submit an application for resolution of the conflict to the Director of the Office of Motor Carrier Research and Standards."[219] The court observed that "[i]t is exactly because reasonable medical judgments as to such subjective assessments, made in good faith, may reasonably

216. 918 F. Supp. 912 (D. Md. 1996).

217. *See id.* at 914-16. The Federal Express medical consultant had examined the applicant and concluded that he could not meet the "power-grasping" requirements of the standards. The competitor's medical examination did not report that to be an issue. The applicant had severely injured his hand several years earlier in an industrial accident. *See id.* at 914-16.

218. *Id.* at 918.

219. *Id.* at 918 (citing 49 C.F.R. § 391.47). The Director is an official of the Bureau of Motor Carrier Safety in the Federal Highway Administration of the U.S. Department of Transportation. *See id.* at 917. The Bureau is responsible for establishing and overseeing the application of "minimum qualifications for persons who drive commercial motor vehicles" for regulated carriers. 49 C.F.R. §§ 391.1, 391.41, 391.43 (1998). *See also* 49 U.S.C. § 31102(b)(1) (giving the Secretary of Transportation the power to prescribe the qualifications for motor carrier drivers).

differ, that an . . . exhaustion requirement [that the applicant submit the dispute to the Director] is justified here."[220] The court also significantly observed that "[i]t is not reasonable to conclude that Congress could have intended that juries would serve as the ultimate arbiters of the meaning and application of DOT regulations."[221]

In a curious and somewhat ironic turn of events, a major maritime disaster—the foundering of the oil tanker *Exxon Valdez* off the coast of Alaska in 1989—led to limited judicial sanction for what the drafters of the ADA sought to proscribe: a blanket exclusion rule. The rule at issue in *EEOC v. Exxon Corp.*[222] was the exclusion of "all employees who currently have a substance abuse problem and all employees with a *history* of substance abuse from working in" positions in which "(1) there is a high exposure to catastrophic public, environmental, or employee incident[s]; (2) the person in such position performs a key and direct role in the operating process where failure could cause a catastrophic incident; and (3) there is either no direct supervision or very limited supervision."[223] Ten percent of positions at Exxon (or approximately 1500) were designated as safety-sensitive.[224]

The EEOC sued Exxon because of this rule, asserting that it was "invalid on its face because it violate[d] the ADA by not providing for individualized assessment."[225] Exxon, however, argued that there must be an exception to the "individualized assessment" requirement of the ADA "where individualized assessment would be impractical or impossible," as in the case of a rehabilitated substance abuser whose "risk of relapse . . . is too great for certain types of jobs such that individual assessment is futile."[226] This controversy focused on the direct threat standard and the kinds of evidence that may be considered to support a qualification rule that excluded

220. *Campbell*, 918 F. Supp. at 918.

221. *Id.* at 919. The Court also noted that there was no "evidence in the record that Federal Express relied on medical recommendations as a pretext to hide . . . discriminatory intent, or otherwise acted in bad faith." *Id.*

222. 967 F. Supp. 208 (N.D. Tex. 1997).

223. *Id.* at 209-10 (emphasis added).

224. *See id.* at 210.

225. *Id.*

226. *Id.*

individuals based on safety concerns.[227] The court noted the lack of authority "addressing whether individualized assessments are required when such assessments would be impractical or impossible."[228] Noting that the "direct threat" issue generally requires an individualized assessment, the court held that the blanket exclusion at issue did not necessarily violate the ADA "if an employer can establish that it is impossible or impractical to individually assess each employee affected by the policy."[229] Nevertheless, the court emphasized that the employer "must still satisfy the direct threat test by showing that [rehabilitated employees as a group constitute] a significant risk of substantial harm to themselves or others that cannot be reduced or eliminated by reasonable accommodation."[230] In a subsequent opinion as discovery progressed in the case, the court ruled that, contrary to the EEOC's position, a history of substance abuse does not create a per se disability and, therefore, discovery should be taken as to each individual plaintiff's situation.[231] Accordingly, the court denied the parties' cross-motions for summary judgment and directed evidence to be developed on the principal issues it had identified.[232]

Thereafter, the court reconsidered the EEOC's summary judgment motion, in which the EEOC asserted, inter alia, that "the safety-driven nature of Exxon's policy triggers the stringent 'direct threat' test tailored to defending safety-based qualification standards" and that "when a policy, like Exxon's, is grounded in safety, the business necessity defense can only be satisfied by establishing that the individuals excluded from the positions pose a direct threat to the health or safety of other individuals in the workplace."[233] Exxon asserted that its policy was to be judged solely by the "business necessity rule,"[234] and

227. *See id.*

228. *Id.* at 212. The court, did, however, cite to the Fifth Circuit's decision in *Daugherty* which upheld the blanket exclusion of insulin-dependent diabetics from positions driving city vehicles, based on governmental regulations specifically listing insulin-dependent diabetes as a *per se* disqualification.

229. *Id.* at 214.

230. *Id.* at 213.

231. *See* EEOC v. Exxon Corp., 973 F. Supp. 612, 613-14 (N.D. Tex. 1997).

232. *See Exxon*, 967 F. Supp. at 213.

233. EEOC v. Exxon Corp., 1 F. Supp. 2d 635, 639 (N.D. Tex. 1998).

234. *See* 42 U.S.C. § 12113(a) (1994). Under the "business necessity rule," an employer's qualification standard that tends to screen out individuals with disabilities

that "its 'concerns for the environment, potential tort and criminal liability, unique corporate citizenship concerns and commitments' combine[d] to vindicate its policy under the ADA."[235] However, the court rejected Exxon's view, "discern[ing] no rationale behind the policy other than safety."[236] Noting that "the issue before the Court" was one of first impression—"whether Exxon is relegated to defending its safety-based policy as 'consistent with business necessity' under the rigorous direct threat standard or whether the Act permits the more broad-based business necessity defense urged by Exxon"—the court "f[ound] that the statute itself, its legislative history, and corresponding regulations, militate in favor of finding that safety-related qualification standards cannot be justified absent a showing that the affected employees constitute a direct threat."[237]

Moreover, the court conceded that "[t]he Act, while addressing in general terms the legal justification for qualification standards which screen out the disabled, does not address the specific question at issue in this case—whether a safety-based policy like Exxon's may be defended under the general business necessity standard set forth in [42 U.S.C.] § 12112(b)(6) and § 12113(a) without satisfying the direct threat test."[238] The court thus took refuge in the ADA regulations issued by the EEOC.[239] The court's decision, however, boils down to its reliance not on an EEOC regulation, but on the EEOC's Interpretative Guidance, which opines that "qualification standards justified by safety concerns are defensible as job-related and consistent with business necessity *only when the individual poses a direct threat to the health or safety of others.*"[240] The court defended the EEOC's opinion by interposing the *ut res magis valeat quam pereat* principle of statutory construction:

> If, as Exxon argues, the ADA permits a defense of safety related policies short of the direct threat test, then the

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violates the ADA unless the employer can establish that the standard is both job-related and consistent with business necessity. *See* TAM § IV.4.4.

235. *Exxon*, 1 F. Supp. 2d at 639.

236. *Id.* at 639 n.3.

237. *Id.* at 639-40.

238. *Id.* at 640.

239. *See id.* at 641.

240. *Id.* (citing 29 C.F.R. pt. 1630, app. § 1630.15(b)(c)) (emphasis added).

> insertion of the direct threat requirement would seem to serve no purpose. It defies logic that an employer would choose to defend a safety-based policy under the direct threat test when it may utilize the less exacting business necessity standard to exclude an employee or group of employees who present safety hazards.[241]

The court also maintained that the ADA's legislative history supports that interpretation because it adopted the *Arline* standard for the ADA direct threat test—"manifest[ing] a clear Congressional intent to apply a stringent standard to safety-based qualification . . . standards that tend to screen out the disabled based on speculative risks of harm."[242] But it appears that the *Exxon* court became entangled in the web of rationalization it attempted to spin:

> The House Report advises that job criteria be tied to concrete functions of the job—mobility and dexterity for jewelry store security officers are consistent with business necessity if the ability to perform such tasks is necessary to carry out the essential functions of the job. As compared to safety-based qualification standards, determining business necessity under these circumstances appears to be a much more straightforward undertaking because the qualification standard is directly tied to the tasks necessary to do the job. Safety-based qualification standards, on the other hand, are not directly tied to the performance of a concrete function of the job, rather, they are based upon concerns about the *safe* performance of the essential functions of the job. Because these standards are not directly measured against the tasks necessary to complete the job, they are particularly susceptible to employer speculation and stereotyping—precisely what the authors of the ADA's legislative history through the adoption of *Arline* sought to prevent. In other words, because safety-based qualification standards are, by their nature, more susceptible to employer speculation than qualification standards directly tied to the essential functions of the job, the direct threat test appears the appropriate standard by which [to] carry out the principles embodied in

241. *Id.* at 642. The principle of statutory construction at work here is as old as Blackstone, who explained that "[o]ne part of a statute must be so construed by another, that the whole may if possible stand." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 89 (1767).

242. *Exxon*, 1 F. Supp.2d at 644. The court added another gloss to the legislative history, stating that "it is safety based qualification standards as opposed to other types of qualification standards that are most susceptible to employer speculation and stereotyping and, thus, most in need of exacting review." Id. at 644 (citing H.R. REP. NO. 485, 101st Cong., 2d Sess., (II), at 56 (1990), 1990 U.S.C.C.A.N. 303).

the legislative history and *Arline*.[243]

The court therefore granted summary judgment against Exxon "to the extent . . . [Exxon] rel[ies] on factors other than the direct threat standard."[244]

The *Exxon* court's analysis draws a sharp distinction between "typical" job qualifications and "safety-related" job qualifications. For typical jobs that do not involve much risk to the employee, the employee's co-workers, or the public—for example, a computer programmer, a waiter in a restaurant, or a supermarket stocker—a "safety-related" job qualification will usually be suspect at least, and more likely unsustainable. However, for jobs that are inherently safety-sensitive, it could be argued that "safety" is not a separate set of qualifications, but rather is inherent—and closely related to if not virtually indistinguishable from the duties that make up the essential functions of that job. The *Exxon* court's attempt to distinguish essential duties of highly safety-sensitive jobs, such as captain or pilot of an oil tanker, does not address the plausible argument that in such occupations, there is no meaningful difference between the ability *to perform* the essential job functions and the ability to perform those functions *safely*.

The *Exxon* treatment of a shipper's effort to set standards for commercial tanker captains may have far reaching consequences for another safety-sensitive industry—air carriers.[245] Interestingly, there have yet to be reported ADA

243. *Id.* at 644. The court insisted that what it called non-safety related concerns—such as potential liability—are not factors to be considered in assessing a qualification standard related to safety. However, the court *conceded* that other courts have recognized such factors in considering "business justification" defenses related to *fetal* safety under Title VII. *Id.* at 645. Moreover, the *Exxon* court's position is directly contrary to the Fifth Circuit's consideration of just such a factor in analyzing the diabetic-driver restrictions under what implicitly was a "business necessity" standard in *Chandler*, 2 F.3d at 1395. *See also* EEOC v. American Airlines, 48 F.3d 164 (5th Cir. 1995). In rejecting binding Circuit precedent out of hand, the court could only weakly offer that "they were either decided under Title VII, which contains no direct threat test, or turned on issues other than those presently before the court." *Exxon*, 1 F. Supp. 2d at 640 n.4.

244. *Exxon*, 1 F. Supp. at 645. Exxon sought interlocutory appeal of this order pursuant to 28 U.S.C. § 1292(b), but the court denied Exxon's motion. *See* EEOC v. Exxon, Nos. 3:95-CV-1311-H, CA-3:95-CV-2537-H, 1998 U.S. Dist. LEXIS 19743 (N.D. Tex. May 6, 1998). This is an odd decision, however, given that the court itself characterized its ruling as one of first impression, and given its conflict with Circuit precedent.

245. For a view of what the ADA had in store for airlines from the perspective of the early period after the ADA's passage, see John A. Conway, *The Americans With*

cases[246] by airline pilots who have been disqualified from flight duty either under the Federal Aviation Administration's regulations setting forth medical qualifications for the various classes of medical certificates it administers,[247] or under more exacting standards that air carriers may implement in the interest of maintaining greater safety.[248] The closest cases to examine analogous issues in any detail are Age Discrimination

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Disabilities Act: New Challenges In Airline Hiring Practices, 59 J. AIR L. & COM. 945, 970 (1994) ("It is currently uncertain whether the courts will give airlines the same broad discretion to determine hiring policies under the ADA as they did under the Age Discrimination in Employment Act of 1967.").

246. Two cases filed by airline pilots under the ADA did not result in any new analysis of the safety issues raised by their claims. *See* Witter v. Delta Air Lines, Inc., 966 F. Supp. 1193 (N.D. Ga. 1997), *aff'd*, 138 F.3d 1366 (11th Cir. 1998) (granting summary judgment for employer because pilot with history of psychiatric problems and outbursts outside and inside the cockpit did not establish that he had or was perceived as having a disability); Isola v. Delta Air Lines, Inc., No. H-95-1013 (S.D. Tex. Sept. 30, 1996) (finding issue of fact for trial whether exclusion of first officer from flight duty based on risk that his rare spinal cancer could metastasize to the brain violated the ADA).

247. *See* 14 C.F.R. Part 67 (1996). "All commercial airline pilots must initially qualify for a Class I flight certificate from a[n] [aeromedical examiner, or "AME"] certified [by the] Federal Air Surgeon [a delegate of the FAA Administrator]. In addition to this minimum FAA requirement, each airline normally establishes additional hiring criteria and medical qualifications for its candidate pilots." Conway, *supra* note 245, at 970. Prior to the ADA, this was justified by statutory obligations imposed upon air carriers.

248. Some airlines require that pilots either satisfy airline medical personnel that they meet the FAA's standards or that pilots meet even higher medical standards set by the airlines themselves because of the obligation to operate "with the highest possible degree of safety in the public interest." Robinson v. American Airlines, 722 F. Supp. 757, 765 (D.D.C. 1989), *aff'd*, 908 F.2d 1020, 1023 (D.C. Cir. 1990); Delta Air Lines, Inc. v. Airline Pilots Ass'n, 686 F. Supp. 1573, 1576 (N.D. Ga. 1987), *aff'd*, 861 F.2d 665 (11th Cir. 1988), *cert. denied*, 493 U.S. 871 (1989). *See also* Sutton v. United Airlines, Inc., 130 F.3d 893 (10th Cir. 1997). *But see* Aloha Islandair, Inc. v. Tseu, 128 F.3d 1301 (9th Cir. 1997). "[T]he primary function of an airline is to transport passengers *safely* from one point to another." Diaz v. Pan Am. World Airways, 442 F.2d 385, 388 (5th Cir. 1971) (emphasis added). In the past, outside of the ADA context, courts have recognized that when dealing with aviation safety issues involving the assessment of risks posed by a pilot, the "nature and severity of the potential harm" is the preeminent consideration, and even a very slight increase in the risk—one that "*might jeopardize the life of* one *more person than might otherwise occur*"—is considered to be intolerable. Murnane v. American Airlines, Inc., 482 F. Supp. 135, 147 (D.D.C. 1979), *aff'd* 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982) (emphasis added). *Murnane* upheld an airline's position that "a policy of hiring only pilots younger than forty years of age enhances the safety of [the carrier's] operation and reduces the risk to . . . passengers." *Id.* at 145. *Murnane* refused to interfere with an air carrier's determination about pilot qualifications if that "might jeopardize the life of one more person that might otherwise occur" because "safety . . . is of such humane importance that the employer must be afforded substantial discretion in selecting specific standards which, *if they err at all, should err on the side of preservation of life and limb.*" *Id.* at 147 (emphasis added). Significantly, however, this is exactly the kind of analysis rejected by the *Exxon* court in analyzing safety considerations in qualifications for serving as, *inter alia*, an oil-tanker captain.

in Employment Act ("ADEA")[249]cases such as *EEOC v. American Airlines, Inc.*[250] In *American Airlines*, the Fifth Circuit forcefully rejected the EEOC's attempt to recharacterize as unlawful discrimination an airline's efforts to ensure aviation safety. American's policy was to hire as pilots only those candidates young enough to be likely to progress to the rank of captain in light of FAA regulations which require captains and first officers to cease "pilot in command" service at age 60.[251] The EEOC challenged the safety rationale. Applying ADEA standards, the Fifth Circuit noted that the airline's heightened job requirements "must be reasonably necessary to the essence of [its] business—here the safe transportation of . . . passengers from one point to another. The greater the safety factor, measured by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications designated to ensure safe[ty]."[252] The court recognized that this approach "'adjusts to the safety factor' by ensuring that the employer's restric[tions] [on] job qualifications are 'reasonably necessary' to further the overriding interest in public safety."[253] Rejecting the EEOC's contention that such an approach is "based on a now impermissibly deferential acceptance of [an airline's] safety rationale for its hiring practices" as "perverse construction . . . both counterintuitive and illogical," the court cautioned, using the words of a previous decision in this area, that

> the airline industry is one in which safety is of the utmost importance. The staggering death tolls and resulting human

249. 29 U.S.C. §§ 621-634 (1988).

250. 48 F.3d 164 (5th Cir. 1995) (affirming summary judgment against EEOC on collateral estoppel grounds based on rulings upholding airline's hiring practices in earlier cases).

251. *Id.* at 165. The airline's challenged hiring policy included the following procedure:

> Under the years-to-Captain rule, American periodically projected the length of time necessary for a newly hired pilot to progress through the cockpit positions and to attain the position of Captain. American based its projections on the number of pilots employed, the expected retirement and attrition rates, and the number of aircraft expected to be in the fleet. The estimated years-to-Captain are subtracted from sixty (the FAA mandatory retirement age) to determine the age cutoff for pilot applicants during the relevant hiring period.

Id. at 166. "For example, if American projects that it would take 15 years to become Captain, the age cutoff for pilot applicants would be 45." *Id.* at 166 n.2.

252. *Id.* at 170 (citation omitted).

253. *Id.*

> suffering which have followed some of our nation's horrible air disasters attest to this fact. Therefore, in our judgment, the airline industry must be accorded great leeway and discretion in determining the manner in which it may be operated most safely. *This is in accord with America's view that 'safe' is not sufficient.* Rather, the "safest" possible air transportation is the ultimate goal. *Courts, in our view, do not possess the expertise with which, in a cause presenting safety as a critical element, to supplant their judgments for those of the employer.*[254]

But the *Exxon* court would likely reject this approach, and instead would heavily favor individual applicants under a "direct threat" analysis over leaving airlines free to do anything that might reasonably be expected to reduce, no matter how slightly, the certain risk of serious harm from an airline accident, which is virtually always catastrophic.[255]

Indeed, the ADA appears to afford a new line of attack on long-accepted safety axioms as the law is expanded. For example, individuals who sought to challenge visual acuity requirements for airline transport pilots under state and federal disability law have generally failed.[256] It appeared well accepted that correctable variations in a person's vision do not constitute disabilities. However, a federal court in Pennsylvania has recently permitted a rejected state police officer candidate with uncorrected 20/200 vision to proceed with a disability discrimination claim arising out of his exclusion from the training academy because he did not meet the state's visual acuity requirements.[257] Emboldened by such reasoning, pilots for a regional airline who held FAA air transport and medical certificates sued United Airlines under the ADA because United imposed a higher standard for visual

254. *Id.* at 170-71 (quoting *Murnane*, 667 F.2d at 101) (emphasis added).

255. See the prescient prediction of such vexing interplay between traditional notions of airline safety and the new focus of the ADA on "the individual" and the apparent demand for fact-specific documentation of risk and "concrete medical evidence." Conway, *supra* note 245, at 975-76.

256. *See, e.g.*, Bauer v. Republic Airlines, Inc., 442 N.W.2d 818 (Minn. Ct. App. 1989); Squire v. United Airlines, Inc., 973 F. Supp. 1004 (D. Colo. 1997); Sutton v. United Airlines, Inc., No. 96-5-121; 1996 U.S. Dist. LEXIS 15106, at *8-*9, *13 (D. Colo. Aug. 28, 1996), *aff'd*, 130 F.3d 893 (10th Cir. 1997), *cert. granted*, 119 S. Ct. 790 (1999) (radial keratotomy). *But see* Aloha Islandair, Inc. v. Tseu, 128 F.3d 1301 (9th Cir. 1997) (discussing a state disability discrimination law).

257. *See* Wilson v. Pennsylvania State Police Dep't, 964 F. Supp. 898 (E.D. Pa. 1997).

acuity on its pilots.[258] The court in *Sutton v. United Airlines, Inc.*[259] dismissed their lawsuit on the grounds that millions of Americans had eyesight no better than plaintiffs, and to expand the ADA's coverage to plaintiffs would render the ADA definitions of disability and its underlying policies "meaningless."[260] On appeal, the Tenth Circuit ruled that although their uncorrected vision (in excess of 20/200)[261] was an ADA-qualified impairment of the major life activity of seeing, it did not substantially limit that activity or the major life activity of working because it was correctable by eyeglasses.[262] Indeed, the court recognized that advances in medical science can further narrow the disabling effects of impairments, noting that "eye surgery, such as radial keratotomy, may have" an effect "on the permanency or long-term impact of" a "visual impairment" and that "as technology advances so must our consideration of these questions."[263]

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258. *See* Sutton v. United Airlines, Inc., 130 F.3d 893 (10th Cir. 1997), *cert. granted*, 119 S.Ct. 790 (1999). The notion that an air carrier may set safety-related employment standards more stringent that those imposed by federal regulators has been criticized in the post-ADA era. *See, e.g., Aloha Islandair*, 138 F.3d at 1303 ("A discriminatory hiring practice cannot be couched as a mere qualification standard, even if it invokes a concern for safety as its animating force."); Air Trnasport Ass'n of Am. v. San Francisco, 992 F. Supp. 1149, 1184 (N.D. Cal. 1998) (disability discrimination laws "do not implicate safety concerns because the reasonable accommodation standard takes safety into consideration and because federal requirements for flight personnel already guarantee that employees will be certified for service only if they will not pose a safety risk").

259. 1996 U.S. Dist. LEXIS 15106, *8-*9, *13.

260. *See id.* at *15.

261. United required its pilots have at least 20/100 uncorrected vision. *See id.* at *3.

262. *See Sutton*, 130 F.3d at 902-06. Plaintiffs claimed that without corrective lenses, "they would 'effectively be unable to see' well enough to conduct normal everyday activities such as driving, watching television, or shopping." *Id.* at 895. The panel specifically rejected EEOC guidelines that assert that the effect of all impairments must be gauged without consideration of remedial medications or devices, even commonplace examples such as corrective lenses. *See id.* at 902. The court noted that the EEOC's interpretation appeared to be contrary to the statutory command that the impairment in fact be substantially limiting. *See id.* at 902. *But see id.* at 901 n.7; Harris v. H & H Contracting Co., 102 F.3d 516, 520-21 (11th Cir. 1996). As the *Sutton* court explained it:

> Plaintiffs cannot have it both ways. They are either disabled because their uncorrected vision substantially restricts their major life activity of seeing, and, thus, they are not qualified individuals for a pilot position with United, or they are qualified for the position because their vision is correctable and does not substantially limit their major life activity of seeing.

Sutton, 130 F.3d at 903. The Supreme Court has granted certiorari to determine whether "ameliorative" measures should be considered in determining the existence of a disability. *See* Sutton v. United Air Lines, Inc., 119 S. Ct. 790 (1999).

263. *Sutton*, 130 F.3d at 901 n.6.

Sutton provides a paradigm of legal issues that, although intertwined with safety considerations, do not necessarily or inevitably require analysis under the "direct threat" standard.[264] Indeed, the *Sutton* court recognized that even if plaintiffs could have established that their impairment entitled them to protection under the ADA,

> we note that while the FAA may not believe there is a safety concern regarding pilots with uncorrected vision of 20/100 or worse, that alone does not prevent United from presenting evidence to the contrary, were it necessary to refute a prima facie case of discrimination. As long as United does not practice illegal discrimination, we discern no reason why United cannot maintain a higher standard for safety than the FAA. It must be remembered that the FAA sets the minimum criteria for a pilot's license, not the maximum.[265]

Cases such as *Sutton* also point out the potential volatility of any "direct threat" determination, which at its core depends on "the most current medical knowledge" and "the best available objective evidence."[266] For example, several years ago, the American Diabetes Association petitioned the FAA to change its regulations to permit insulin-dependent diabetics to receive FAA-required medical certificates to serve as pilots.[267] FAA

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264. In a curious effort to bootstrap their way into an ADA claim, plaintiffs also claimed that the airline regarded them as disabled as to the life activity of working because of "stereotypical" fears about safety that precluded them from employment as "global airline pilots" not only at United, but also at the other "major" airlines that adhered to higher vision standards for pilots, "blocking plaintiffs from seeking the same class of employment elsewhere in the industry." *Id.* at 903. United responded that plaintiffs "merely 'failed to meet the rational job-related safety requirements of the positions they sought.'" *Id.* at 904. The court declined to concern itself with what "the airline industry as a whole" regards and instead "concerned [itself] with whether United regard[ed] plaintiffs as 'disabled.'" *Id.* at 905.

265. *Id.* at 906. The district court emphasized that "[e]ven if the plaintiffs were disabled within the meaning of the statute, the ADA does not authorize the court to compel the airlines to alter the qualifications for passenger airline pilots." *Sutton*, 1996 U.S. Dist. LEXIS 15106, at *18.

266. TAM § I-4.5; 29 C.F.R. § 1630.2(r) and app. § 1630.2(r) (1997).

267. *See* Petition For Rulemaking And For Other Agency Action Of American Diabetes Ass'n, at 1-2 (filed Feb. 21, 1991), published at 56 Fed. Reg. 10383 (1991). The FAA has three kinds of pilot certificates it issues and three kinds of medical certificates that are required for each:

> 1. Airline transport pilot certificate (required for passenger airline pilots)—Class I Medical Certificate, whose standards are set forth in 14 C.F.R. § 67.13 (recodified at 14 C.F.R. § 67.101-115 (1998));
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> 2. Commercial pilot certificate (required for pilots of non-passenger commercial aircraft)—Class II Medical Certificate, whose standards are set forth in 14 C.F.R. § 67.15 (recodified at 14 C.F.R. § 67.201-215 (1998)); and
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> 3. Private pilot, recreational pilot, student pilot, and flight instructors

regulations precluded issuance of any FAA medical certificate to individuals with an "established medical history or clinical diagnosis of diabetes mellitus that requires insulin or any other hypoglycemic drug for control."[268] For some disqualifying conditions, FAA regulations permitted the Federal Air Surgeon (the FAA official ultimately responsible for certifying the medical compliance of airmen) to grant a special application for a medical certificate "if the person shows to the satisfaction of the Federal Air Surgeon that the duties authorized by the class of medical certificate applied for can be performed without endangering public safety during the period in which the authorization would be in force."[269] But the FAA articulated a policy in 1982 that no certificate would be issued to any person with "an established medical history or clinical diagnosis of diabetes that is controlled by the use of insulin" because "[t]he FAA has not found circumstances under which such an individual may be certificated without significant risk of impairment of his or her faculties from an undetected drop in the level of blood sugar."[270] The FAA, however, did not close the door permanently: "If future medical advances should make certification possible, factors will be developed."[271]

Medical advances are precisely what the Association in 1991 argued had occurred.[272] In sum, the Association urged that insulin-dependent diabetics be eligible for special issuance medical certificates in all three classes because "significant medical advances have been accomplished which now enable [insulin-dependent diabetic] individuals . . . to delay and diminish the long-term complications of diabetes, to achieve improved dietary management and to determine their blood glucose concentration at any time or place and take appropriate measures as needed," with an emphasis on "self-management techniques which lead to dramatically improved metabolic

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certificates—Class III Medical Certificate, whose requirements are set forth in 14 C.F.R. § 67.17 (recodified at 14 C.F.R. § 67.301-315 (1998)).

14 C.F.R. § 61.23(a)(1)-(3) (1998). Class I Certificates are valid for 6 months; Class II for 12 months; Class III for 24 or 36 months, depending on whether the holder is age 40 or over. 14 C.F.R. § 61.23(c) (1998).

268. 14 C.F.R. §§ 67.13(f)(i), 67.15(f)(i), 67.17(f)(i) (recodified at 14 C.F.R. §§ 67.113(a), 67.213(a), 67.313(a) (1998)).

269. 14 C.F.R. § 67.19(a) (recodified at 14 C.F.R. § 67.401(a) (1998)).

270. 47 Fed. Reg. 16298, 16301-02 (1982).

271. *Id.*

272. *See* Petition, *supra* note 267, at 17-36.

control of diabetes."[273] The Association proposed strict protocols for determining which diabetics were eligible—on a case-by-case basis—and how those who were approved would be monitored, both by the FAA, and by the individuals themselves while in flight, who would be required to periodically check their blood sugar levels and to consume snacks to help them maintain proper blood glucose levels.[274]

After notice,[275] the FAA announced a limited special issuance program limited to private and recreational pilots.[276] The rationale stated by the FAA was that "a student, recreational, or private pilot [would be allowed] to accept reasonable risks to his or her person and property that are not acceptable in the exercise of commercial or airline transport pilot privileges," considered in light of "the need to protect the public safety of persons and property in other aircraft and on the ground."[277] Even this limited policy change was vigorously opposed by a wide range of professional FAA-designated medical examiners and several prominent associations of endocrinological experts.[278] Moreover, the FAA clearly articulated the general nature of the medical risk:

> This policy was based on concerns about the long-term medical risks associated with diabetes, including cardiovascular, neurological, ophthalmological, and renal pathologies. Of even greater concern, especially in the aviation environment, was the immediate risk posed by hypoglycemia or low blood glucose. Every diabetic is at some risk for hypoglycemia which can produce impaired cognitive function, seizures, unconsciousness, and death. Moreover, functional incapacitation associated with hypoglycemia may occur insidiously and may not be recognized by the diabetic or by other observers. Diabetics using insulin are at greater risk for hypoglycemia than those treated by diet or oral hypoglycemic agents.[279]

Despite the recognition of the risk, the danger posed by the instrumentality involved (an aircraft in flight), and the

273. *Id.* at 17-18.

274. *See id.* at 10-15.

275. *See* 59 Fed. Reg. 67246 (1994).

276. *See* Policy Statement, 61 Fed. Reg. 59282 (1996). This program is codified at 14 C.F.R. § 67.401.

277. *Id.* at 59282, 59285.

278. *See id.* at 59286.

279. *Id.* at 59282.

potentially catastrophic consequences of an error in diagnosis or self-monitoring by a pilot (which could be as mundane as failing to bring enough glucose-boosting snacks along for the flight), the FAA did not engage in an explicit *Arline*-type analysis. Instead, it focused primarily on the individual pilot's assumption of the risk to himself—as opposed to others—and faith in the success of the medical science that prompted the policy change. In terms of risk evaluation, however, it is difficult to understand what calculus of life should be applied—why it was more acceptable to the FAA to risk a private pilot crashing a small plane under virtually identical circumstances where it was unwilling to risk the crash of a passenger jet or a C-130 cargo plane?[280] The logic of this rule-making suggests that agencies like the FAA may stir economic and political considerations into a determination that should be limited entirely to medical evidence evaluated by medical professionals.

Flight attendants with impairments also present issues under the ADA. Unlike for pilots, the FAA has promulgated no regulations regarding any physical qualification for flight attendants.[281] Instead, these determinations have traditionally been left up to the airlines. Although flight attendants do not operate aircraft, they do have important functions in ensuring passenger safety that may have to be performed on a moment's notice such as dealing with unruly passengers; ensuring that passengers follow safety regulations; assisting passengers who become ill, need oxygen, or are injured during turbulence; and coordinating evacuation of an aircraft during an emergency.

Although the courts have reported no decisions evaluating safety issues involving flight attendants under the ADA or the Rehabilitation Act,[282] *Amariglio v. National R.R. Passenger Corp.*

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280. Of course, the odds may differ substantially because of the far greater number of flying hours logged by air transport and commercial pilots, as well as the greater frequency with which the latter categories of pilots encounter demanding flight conditions. The catastrophic results if the risk eventuates, however, would seem to make the "odds" issue less significant.

281. FAA regulations speak only to the complement of flight attendants required. *See* 14 C.F.R. § 121.391 (1993). For a detailed discussion of essential job functions of flight attendants at one major airline at the time, see *Conway, supra* note 245, at 979 nn.188-89.

282. Two ADA cases brought by diabetic flight attendants against carriers were resolved on other grounds in favor of the carrier. *See* Prather v. Delta Air Lines, Inc., No. 1:93-CV-2321-CAM (N.D. Ga. 1995) (unpublished), *aff'd mem.*, 85 F.3d 644 (11th Cir.

(Amtrak)[283] considered the safety issues posed by a diabetic railroad passenger attendant. The court described the general responsibilities of a train attendant to include "loading supplies, ensuring the proper operation of lights, heating and air conditioning units, ensuring that the restrooms remain cleaned and stocked, changing the bed linens, assisting while passengers embarked and disembarked from the train, and securing the train car doors after the passengers had loaded," all during twenty-hour shifts on long-distance runs.[284] At a point in time when Amariglio was returning to work after a disciplinary suspension, his physician notified Amtrak that Amariglio had diabetes and "'should not take any long trips,'" while an independent medical examiner retained by Amtrak noted that Amariglio's diabetes was not adequately controlled and opined that he should not work as a train attendant even though "'more regular hours of employment with an ability to adhere to a regular and prescribed diet would allow gainful employment if such a position was available.'"[285] Although Amtrak did not disqualify diabetics per se from employment as train attendants, Amtrak's medical director disqualified Amariglio after concluding, based on the doctors' opinions, that his diabetes was not controlled.[286] Amariglio sued under the ADA, but the court granted summary judgment in Amtrak's favor. The court cited the direct threat standard, but did not use the *Arline* factors in evaluating the claims.[287] Instead, the court proceeded upon the general statement that "[p]ersons with diabetes have been lawfully excluded from occupations in the transportation industries because of the potential impact upon safety."[288] Amtrak, the court found, had not gone that far, but had merely "bar[red] a person with diabetes only when that person's diabetes is not under control, because a train attendant with uncontrolled diabetes cannot perform the essential functions of the position without creating

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1996); Atkinson v. Delta Airlines, Inc., No 95-00472-CV-GET (N.D. Ga. 1997) (unpublished), *aff'd mem*, 137 F.3d 1355 (11th Cir. 1998).

283. 941 F. Supp. 173 (D.D.C. 1996).

284. *Id.* at 174.

285. *Id.* at 175.

286. *See id.*

287. *See id.* at 178.

288. *Id.*

a [sic] substantial harm to the passengers."[289] The court's analysis in support of that conclusion, however, was not very detailed:

> The essential functions of AMTRAK train attendants are passenger safety-related and include opening car doors to permit loading and unloading of passengers, assisting passengers as they embark and disembark trains, and securing the car doors after the passengers have loaded. The hours are long and stressful, and travel for extended periods is required. Because a person whose diabetes is uncontrolled is subject to disorientation, blurred vision and severe illness that may result in a lapse into coma . . . such a person, like Plaintiff Amariglio, is simply not "otherwise qualified" to perform the essential functions of an AMTRAK train attendant.[290]

What is most notable about this analysis is what it does not address: (1) how "uncontrolled" Amariglio's diabetes was (there apparently was no record evidence of his having suffered the symptoms about which the court speculates); (2) the real nature of the risk posed by Amariglio's potential diabetic complications with respect to true "safety" duties (as opposed to "comfort" or other ministerial duties like changing bed linens); (3) the likelihood that Amariglio would have any such symptoms in a given trip; and (4) the options for reasonably accommodating a diabetic train attendant to help him or her cope with long-distance travel.[291]

The court did not take the analysis to this degree, however, because of Amariglio's own actions. Amariglio would not provide medical information from his own doctor to Amtrak when Amtrak requested it; he would not even produce his medical records in the lawsuit.[292] This was essentially a refusal by Amariglio to participate in an internal medical review process provided by Amtrak wherein a medically disqualified employee may return to work if (1) his treating physician documents that the employee's medical condition has

289. *Id.* at 179.

290. *Id.* at 178 (citations omitted).

291. For example, Amariglio might have been permitted to split his shifts with other attendants on the train so that he could rest more frequently on a long-distance run. In addition, Amariglio might have had short snack breaks incorporated into his daily schedule on the train to ensure that he maintained the proper balance between insulin and food.

292. *See id.* at 176 n.1, 179.

improved and (2) a medical specialist of Amtrak's choice examines the employee and concurs.[293] Amariglio also demanded not a return to his old job with accommodation, but that Amtrak, in effect, create an "easier job" for him—for example, one with less travel and "regular and normal hours"—that simply did not exist.[294]

D. Food Handlers

There have been few reported cases to date in which employees in food handling positions have sued their employers under the ADA based on their being transferred or dismissed from food handling positions.[295] This lack of reported litigation is probably due in part to the way in which the ADA specifically addresses contagious diseases in food handling and to its promulgation of an identifying list of specific conditions. The presence of a listed disease in an individual does not establish per se that the individual presents a direct threat to health and safety or is otherwise not

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293. *See id.* at 175.

294. *Id.* at 176, 179. Amariglio had opportunities to *apply* for transfers to clerical positions involving "regular hours," but did not use them.

295. It is difficult to estimate the number of cases that have been *filed* as opposed to *decided*. Many have been resolved because an employer's overreaction in this area often approaches a per se ADA violation. *See, e.g.*, Doe v. Thremart, No. 1-93-3299-M6BD (D.S.C. filed Dec. 21, 1993, dismissed after settlement Apr. 6, 1995) (McDonald's franchisee allegedly terminated restaurant store manager after owners learned of HIV-positive status); *see also* Chapoton v. Majestic Caterers, Inc., No. 87-000688, 1989 Va. Cir. LEXIS 156 (Va. Cir. Ct. Feb. 16, 1989) (holding that a restaurant violated the Virginians with Disabilities Act by discharging an asymptomatic, HIV-positive waiter because, alluding to *Arline*, the court's "study of this disease (AIDS) has demonstrated . . . that a waiter is not a hazard to persons . . . at a restaurant where he or she works and waits tables," and "[u]ntil a cure is found for this disease, the courts must protect those [who are] disabled by the disease"). Similarly, the employer at a Veterans Administration hospital overreacted and removed, on a VA physician's recommendation, a food-service employee who tested HIV-positive in a screening test without waiting for confirmation through a second, more sensitive test that established that he did not have the HIV-virus. *See* Sierra-Perez v. United States, 779 F. Supp. 637, 638-40 (D. P.R. 1991). Plaintiff's counsel in that case made the strategic errors of (1) not raising the ADA claim; (2) filing no EEOC charge; and (3) focusing on a "negligence of the employer" theory, all of which resulted in summary judgment for the employer. *Id.* at 642-46. The fact, however, that the ADA took on this issue directly shows considerable progress from the days in which certain infectious diseases were regarded as per se disqualifying. *See, e.g.*, Shapiro v. Central Poultry Corp., 131 N.Y.S.2d 716, 717 (App. Div. 1954) (affirming worker's compensation disability award to employee "found to be a [healthy] typhoid carrier" who was "ordered by the board of health to cease his employment [as a schochet employed to slaughter chickens,] was forbidden to be on the employer's premises, and was prohibited from engaging in any occupation which involved food handling, or in any occupation connected therewith").

qualified.[296] The ADA's approach requires two specific additional inquiries.

First, there must be a significant risk of transmission of the disease.[297] It does not appear, however, that the statute allows such a risk to be assumed simply because the disease is one which the CDC has listed as an infectious or communicable disease "transmitted through handling the food supply."[298] On the contrary, consistent with the ADA's general approach to risk evaluation, it would appear that the risk must be evaluated in the specific context of the job and the pathology of the disease.

Second, even if there is a scientifically established, significant risk of transmission under relevant circumstances in the workplace, the issue remains whether that risk of transmission "ca[n] be eliminated through reasonable accommodation."[299] Mechanical and hygienic measures in food-handling jobs are probably more relevant and effective as accommodation options than in most other discrete areas of employment. For example, there is no scientific evidence that suggests that HIV-positive employees cannot work as food-handling employees. The facts about the fairly narrow circumstances in which HIV-transmission may occur and the fragility of HIV[300] itself establish that HIV-positive employees do not present a direct threat in the typical food handling environment.[301]

Not every concern about a food-handler's HIV status and the possibility that it may pose a direct threat is necessarily mere stereotyping. For example, in *EEOC v. Prevo's Family Market*,[302] the Sixth Circuit reversed a summary judgment that had been

296. *See* 42 U.S.C. § 12113(d)(2), (3) (1994).

297. *See id.*

298. 42 U.S.C. § 12113(d)(1)(B) (1994).

299. 42 U.S.C. § 12111(3) (1994).

300. *See, e.g.*, American Dental Ass'n v. Martin, 984 F.2d 823, 824 (7th Cir. 1993). Hepatitis B, by contrast, is a resilient virus that can survive on air-exposed surfaces for up to 7 days and, for example, *kills* 100 times more health-care workers each year than HIV infects. *See id.*

301. Injuries that may result in the exposure of blood matter from an HIV-infected employee may be prevented by mechanical means. For example, beverage service by flight attendants may create the opportunity to suffer cuts from sharp or irregular can tabs and surfaces. However, any serious risk could be eliminated by providing the flight attendant with protective gloves or with a tool common among beverage servers that permits them to open the can without touching the tab.

302. 135 F.3d 1089 (6th Cir. 1998).

granted against Prevo's, a family owned grocery store, in favor of the EEOC on behalf of an HIV-positive produce clerk.[303] The produce clerk was reassigned by Prevo's after he informed Prevo's of his HIV status.[304] It was undisputed that "produce clerks often cut themselves in the course of their regular duties."[305] Prevo's requested that the employee obtain certification of his condition from his physician.[306] When months went by and the employee provided no information, but instead took paid medical leave and sought out a lawyer, Prevo's arranged, at its own expense, for the employee to be examined by an infectious disease specialist to determine the following: (1) a complete diagnosis and prognosis concerning whether the employee tested positive for HIV, hepatitis, or any related condition; (2) whether future treatment would require the employee to miss work; (3) whether Prevo's should assign the employee to other work; (4) whether HIV could be transmitted on tools and produce handled by a produce clerk; and (5) the degree of risk the employee posed to customers and co-workers in a produce position.[307] The employee refused to be examined and instead provided a note from his own doctor stating that he had tested negative for tuberculosis and hepatitis, but saying nothing as to whether the employee was HIV positive.[308] Prevo's "rejected the letter . . . because it did not provide the requested information about [the employee's] diagnosis, prognosis, or suitability for employment."[309] The employer tried to negotiate a new examination date for the employee, but when he refused to cooperate it terminated his employment.[310]

The EEOC sued Prevo's. It contended that because the known odds of HIV transmission were "so low,"[311] (1) the medical examination Prevo's sought was not permitted by the ADA and (2) Prevo's relied on illegal stereotyping of HIV-

303. *See id.* at 1090.
304. *See id.* at 1091.
305. *Id.* at 1091-92.
306. *See id.* at 1091-92.
307. *See id.* at 1091-92.
308. *See id.* at 1092. At this time, Prevo's offered the employee home employment developing marketing information by computer, which he declined. *See id.*
309. *Id.* at 1092.
310. *See id.*
311. *Id.* at 1095.

positive patients when it dismissed him.[312] The district court was also presented with competing medical expert testimony from both sides; however, Prevo's expert conceded that the risk of transmission "could be further reduced by proper hygiene procedures" such as wearing protective steel lined gloves.[313] On this basis, the district court concluded that Prevo's medical inquiries "were not strictly necessary" and therefore, it concluded, those inquiries, and the employee's discharge for failing to cooperate with those inquiries, violated the ADA.[314] After ordering judgment as a matter of law for the EEOC, the district court tried the issue of damages to a jury, and the employee was awarded reinstatement, back pay, and compensatory and punitive damages.[315]

The Sixth Circuit reversed the district court.[316] The panel majority emphasized that "[t]his is not the sort of unfounded and biased discrimination that the ADA was created to prevent," but rather, "Prevo's actions were based on [the employee's] statements and [Prevo's] concerns about the health and safety measures needed to prevent further infection."[317] The court noted that "[p]art of the concern of the Congress in

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312. *See id.* at 1092.

313. *Id.* at 1093. The employee's expert testified that the risk of transmission of HIV to a co-worker or customer was 1 in 10 million, or 1 in 3,000 if "direct blood-to-wound contact occurred." *Id.*

314. *Id.*

315. *See id* at 1093. The district court refused to stay the award of reinstatement pending an appeal, but the Sixth Circuit subsequently granted the stay. *See id.*

316. *See id.* at 1094.

317. *Id.* The court analyzed those concerns as follows:

> Prevo's legitimate business purpose and business necessity was to protect the health of [the employee], its other employees[,] and the general public from HIV infection. Because of the frequency of bleeding in the produce area, Prevo's needed to verify [the employee's] medical condition, determine whether he had other conditions associated with HIV, and determine whether he was aware of and able to follow safety procedures to reduce or eliminate any risk of infection. HIV is a blood borne pathogen and can be transmitted in an environment such as that of a produce department of a grocery store, where one is susceptible to cuts and scrapes on a regular basis. [The employee] himself was prone to cuts and scrapes through the use of knives in preparing produce and scraping himself against stapled produce boxes. He acknowledged that "[m]any times the cleaning and sanitation of the knives [was] not done from one item to the next as it should have been done." . . . [The employee] also admitted there were probably times he did not clean knives after using them. There was also testimony that it was not uncommon for Prevo's workers to have several lacerations at the same time. [The owner,] who had once worked in the produce department, gave testimony that employees shared knives and, at times, knives on which one had bled.

Id. at 1094.

creating the ADA and the ability of employers to require employees to undergo medical examinations was the unwanted exposure of the employee's disability and the stigma it may carry."[318] The court went on to note that "the employer need not accept the employee's word that the employee has an illness that may require special accommodation" and thus has the right to "confirm whether a need for the accommodation exists."[319]

The Sixth Circuit also rejected the EEOC's contention "that a medical opinion as to [the employee's] direct threat was necessary *prior to* the medical examination, and that medical testimony showed the risk of transmission to be so low that a medical examination to determine the existence of a direct threat was unnecessary."[320] The court noted that the direct threat test here boiled down to determining "whether [the employee] could safely perform the function of his [produce] job involving cuts and scrapes without exposing others to HIV infection" and noted that the EEOC's own expert had testified "that a medical examination would be an opportunity to evaluat[e] [the employee's] intellect and personal hygiene; an opportunity to assess [the employee's] understanding of how the condition can be transmitted and to determine whether [the employee] is acquainted with universal precautions for preventing transmission."[321] More importantly, the court noted that the issue of whether the employee had HIV at all *was never* resolved because he never submitted any medical information on that point; indeed, the Sixth Circuit characterized the district court's finding that the employee was HIV-positive as "suspect in view of the lengths to which [the employee] has gone to avoid a medical evaluation of his HIV status."[322] The Sixth Circuit cut to the heart of the matter in rejecting the EEOC's contention that the information relevant to the direct threat analysis could "be obtained without a medical examination, either by consulting health care officials or by simply asking [the employee] himself":

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318. *Id.* 1094 n.8.
319. *Id.* at 1094-95.
320. *Id.* at 1095 (emphasis added).
321. *Id.* at 1095.
322. *Id.* at 1096 n. 12.

> Prevo's is simply a grocery store chain There is no evidence that Prevo's has within its organization . . . access to "the most current medical knowledge" as required by the statute. Therefore, Prevo's *needed* to contact a third party to obtain a medical examination of [the employee] to confirm his HIV status and to determine what steps were necessary concerning [the employee's] employment. The EEOC contends Prevo's could have obtained this information from a health care source without an examination of [the employee] or by simply asking [the employee]. [However,] there was evidence at trial that the type of assessment authorized in the statute and regulation of an employee in an environment in which there was bleeding could not have been made without a medical examination. Nor do we believe [the employee] himself could answer the four *Arline* factors suggested by the statute. . . . As Prevo's contends, the EEOC's argument would impose upon Prevo's a duty to become an expert in the field of HIV transmission and control. We do not believe the statute and regulations impose such a burden.[323]

The Sixth Circuit accordingly remanded the case to the district court with directions to enter summary judgment in favor of Prevo's.[324]

E. Industrial Workers

Outside of the occupations in which a fundamental safety concern is intuitive and apparent, the direct threat standard has been applied with much less consistency. Two recent cases illustrate this dichotomy well: *Turco v. Hoescht-Cellanese*[325] and *EEOC v. Complete Auto Transit, Inc.*[326]

John Turco, a chemical process operator at Hoescht-Celanese's Clear Lake, Texas facility, had a history of adult-onset diabetes and insulin treatment well known to the employer. Turco had made a number of serious safety lapses involving the handling of chemicals that appeared to be related

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323. *Id.* at 1096-97 (emphasis added).

324. *See id.* at 1098. A different point of view was taken by a dissenting judge, who sought to impose the decision-making responsibility under *Arline* directly upon the employer. *See id.* at 1102 (Moore, J., dissenting) (asserting that employer had no right to require HIV-positive employee to undergo medical examination to permit a direct-threat analysis "because ample objective evidence exists showing that he does not pose a direct threat").

325. 101 F.3d 1090 (5th Cir. 1996).

326. No. 95-CV-73427-DT (E.D. Mich., filed Aug. 25, 1995) (jury verdict reported in 9 DIS. COMP. BULL. 1 (1997)).

to errors in judgment rather than any side effect of his condition or treatment. As a result, Hoescht-Celanese terminated Turco, who sued the company contending that his termination violated the ADA.[327]

The employer defended the case primarily on the grounds that Turco's errors in judgment violated company procedures, which provided the legitimate, non-disability related reason for its action.[328] However, relying on facts that were not even specifically pleaded by the employer, the district court granted summary judgment in favor of Hoescht-Celanese, finding that Turco was not a qualified individual with a disability "because he could not perform the essential functions of his job without putting himself or others in dangers [sic] way and no reasonable accommodation would be able to eliminate this risk."[329]

The Fifth Circuit affirmed the grant of summary judgment because it, too, agreed that Turco was not "qualified." The court reached this conclusion by evaluating evidence—principally the plaintiff's deposition—in a manner typically reserved for a jury drawing inferences from trial testimony.[330] The court also rejected the plaintiff's claim that the employer did not accommodate him.[331] The court then offered another rationale

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327. *See Turco*, 101 F.3d at 1091-92.

328. *See id.* at 1093.

329. *Id.* at 1092.

330. In an interesting passage, the court observed that it found

> that Turco was not qualified to perform the essential functions of a chemical process operator. This is evidenced by his own testimony. He testified in his deposition that walking and climbing "are all things that a chemical process operator has to do" and that "good concentration" is "most definitely" important to a process operator. Yet, he recalls specific instances when his diabetes affected his ability to do his job. For example, he remembers working on the "control room board" while one of the operators was putting a piece of apparatus in service and not being able to concentrate on what to do next. He also recalls walking to an incinerator at one point and his legs hurting so bad that he could hardly walk, he couldn't climb, and he lost his concentration. There were times that his sugar level was so low that he could not remember his name. On the one hand he sets out the essential job requirements of a chemical process operator and on the other he basically admits that he cannot fulfill those basic requirements.

Id. at 1093-94.

331. The court explained that

> Turco next contends that his ailments and concentration problems would all be alleviated if Hoechst had accommodated him and switched him to a day-time shift. We find this argument implausible for . . . regardless of whether Turco was working a straight day-shift or a rotating shift, he would still, by his own admission, be unable to perform the essential functions of an operator

for affirming the district court's decision. It suggested that Turco posed a "direct threat" that rendered him unqualified:

> The ADA allows qualification standards that "include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace," and defines a "direct threat" as a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation. 42 U.S.C. § 12113(b). Turco's position at Hoechst required him to work with complicated machinery and dangerous chemicals. Any diabetic episode or loss of concentration occurring while operating any of this machinery or chemicals had the potential to harm not only himself, but also others. This would be a walking time bomb and woe unto the employer who places an employee in that position.[332]

The court went on to hold that "he was not qualified due to the safety concerns presented by the severity and volatility of his diabetes. No reasonable accommodation could be made that would qualify Turco to perform his job in spite of his diabetes."[333]

Although *Turco* might certainly be explicable under a *McDonnell Douglas*-type analysis—Turco was fired for safety lapses that even he did not claim were related to his disability—the Fifth Circuit seemed to go out of its way to engage in a "direct threat" analysis that, based on the explanation for the rationale offered by the court, is both woefully inadequate and, indeed, contrary to the only medical evidence cited in the opinion.[334] Rather than discuss whether the record permitted a "direct threat" analysis or remand the case to the district court for factual findings to permit such an analysis, the Fifth Circuit simply ignored the *Arline* factors and condensed its rationale

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> because both the physical and mental demands would be the same. He would still need to walk, climb and concentrate, but he would still not be able to perform these essential functions.

Id. at 1094. This analysis, however, is contradicted by the undisputed testimony, cited earlier in the court's opinion, that "Turco submitted a letter written by his treating physician . . . recommending that he be transferred to a daylight position, concluding that the more predictable eating, sleeping, and exercise patterns accompanying an exclusively daytime schedule would facilitate the regulation of his blood sugar levels." *Id.* at 1091.

332. *Id.* at 1094.

333. *Id.*

334. Implicitly, the court might have been "punishing" Turco for the apparent failure to follow up on the company's request that his doctor's "accommodation" recommendation be evaluated by an endocrinologist of its choosing. *See id.* at 1092.

into the aphorism, "woe unto the employer who places an employee in that position."[335] This same aphoristic line of reasoning appears in cases discussed above such as *Daugherty*, *Collier*, and *Chandler*. In each of those cases, the Fifth Circuit did not find that full-blown direct threat analyses were required to uphold exclusions of insulin-dependent persons from commercial driving positions, despite the opportunity under applicable regulations to obtain waivers for insulin-dependent drivers.[336] Instead, as in *Turco*, the Fifth Circuit has repeatedly cited concern for potential liability for the failure of an employee in a safety-sensitive job to perform essential job functions.

The court in *Complete Auto Transit*, however, took an entirely different view of such evidence and submitted the plaintiff's claim to a jury, which returned a $5.5 million verdict in favor of an epileptic automobile transport driver who had been discharged from his employment because his condition had allegedly posed an unacceptable safety risk.[337] The employee had been disqualified under federal regulations from driving an interstate trucking route for the employer. However, no regulations prohibited him from driving vehicles across a rail yard and onto waiting train cars. The employee's physicians opined that he could safely perform this job, but the employer declined to permit him to take such a position because of fears, it asserted, for his own and his co-workers' safety. The jury rejected its arguments under the "direct threat" analysis, concluded that there were over a dozen workplace modifications that could have been made to allow the employee to perform the transport work safely, and determined that the employer relied on subjective fears rather than medical evidence.[338]

A similarly exacting analysis of an employer's attempt to

335. *Id.* at 1094.

336. The U.S. Supreme Court recently granted certiorari to determine whether the ADA requires an employer to pursue a waiver of federal medical qualifications as a "reasonable accommodation." *See* Albertsons Inc. v. Kirkingburg, 143 F.3d 1228 (9th Cir. 1998), *cert. granted*, 67 U.S.L.W. 3433 (Jan. 8, 1999).

337. Although no decision on the merits is reported, the court did reduce the jury's verdict as to the ADA claim to $191,931 backpay and compensatory and punitive damages capped at $300,000. *See* EEOC v. Complete Auto Transit, Inc., No. 95-CV-73427-DT, 1997 U.S. Dist. LEXIS 3121 (E.D. Mich. Jan. 9, 1997).

338. *See* 9 DIS. COMP. BULL. 1, 6 (1997).

invoke a "direct threat" exclusion resulted in the grant of summary judgment against the employer in *EEOC v. Chrysler Corp.*[339] In *Chrysler,* the company physician at the employer's stamping plant followed a general policy of certifying for employment only those individuals whose blood sugar level tested less than 140 mg/dl.[340] An applicant for employment who had a job offer contingent upon the company medical examination underwent a drug screen urinalysis that revealed he had a high blood sugar level.[341] Never having been treated for diabetes, the applicant sought out treatment and was diagnosed as having Type II diabetes mellitus.[342] After his treating physician opined that the applicant "had been watching his diet well and his random blood sugar level was 136 mg/dl," the company's plant physician tested him again and found levels in excess of 200 mg/dl.[343] The plant physician refused to authorize the applicant's hire "because she believed his blood sugar level was too high."[344]

Among the reasons for its actions, Chrysler asserted that the applicant was not hired because he posed a direct threat.[345] The court, however, found that the defendant had failed to establish even a single factor required for such a conclusion:

> Defendant contends that it performed an individualized assessment of [the applicant] based on the three blood sugar tests it administered to him over a two to three week period. Defendant also relied on . . . correspondence [from the applicant's physician] which indicated a likelihood that [the applicant's] condition would have to be controlled by medication in the future. From these sources, Defendant

339. 917 F. Supp. 1164 (E.D. Mich. 1996), *rev'd on other grounds,* No. 97-1793, 1998 U.S. App. LEXIS 30607 (6th Cir. Nov. 25, 1998).

340. *See id.* at 1166, 1173. The Company physician opined that "a normal fasting blood sugar level is between 65 and 110 mg/dl." *Id.* at 1166. The plaintiff in this case initially tested at 219 mg/dl. *See id.*

341. *See id.* at 1165-66.

342. *See id.* Type II diabetes mellitus is "characterized by hyperglycemia, or elevated blood sugar." *Id.* at 1166.

343. *Id.* at 1166.

344. *Id.* The plant physician also issued physical restrictions to be placed on the applicant's consideration for any other positions, including limitations on climbing, restriction to floor-level work, and prohibition on operating moving machinery or working near open pits, chemical hazards, or fire hazards. *See id.* Subsequently, plaintiff's physician prescribed daily glucotrol and certified six weeks later that the applicant's diabetes was well controlled and the he should be subject to no work restrictions. *See id.* Nevertheless, the company withdrew its offer of employment. *See id.*

345. *See id.* at 1171.

> concludes that "it is clear that [the applicant] posed a direct threat to himself and others.". . . Defendant also contends that the increased risk of sudden blurred or lost vision, a possible complication of diabetes, constituted a danger to [the applicant] and his coworkers. Defendant explains, "[f]or example, [the applicant] could easily fall from an elevated place or heavy equipment descending to the ground or on top of another co-worker. There are any number of unforeseen dangerous occurrences stemming directly from [the applicant's] potential impaired vision.
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> Despite [d]efendant's ominous predictions, it has no evidence to support its assertion . . . . Nor has [d]efendant established, as it contends, that it performed an individualized assessment . . . . The administration of three blood sugar tests hardly constitutes an individual assessment.[346]

Indeed, the court noted that the company's physician failed to ask the applicant a number of highly pertinent questions that would be part of any individualized assessment, such as (1) questioning the applicant about his past or current health; (2) determining whether he suffered from any diabetes-related complications; (3) asking if he had ever suffered from dizziness, fainting, or convulsions during the twenty-five years he had been working as an electrician; [347] (4) consulting with the applicant's treating physician to explore the basis for his conclusions about the applicant's ability to work; or (5) researching "any medical literature or studies which suggest that individuals with diabetes are more prone to on-the-job injuries or are greater safety risks."[348] The court concluded its analysis by noting that "a speculative or remote risk is insufficient to establish a 'direct threat' defense."[349] It rejected Chrysler's attempt to do so because "it is clear to the court that in revoking [the applicant's] offer of employment, [d]efendant relied on mere speculation that [he] posed a danger to himself and others."[350] The court permanently enjoined Chrysler "from

346. *Id.*

347. In the kind of testimony by a physician that will inevitably hurt the employer's case, the plant physician testified "that it was 'not necessary' to ask [the applicant] if he had ever experienced any diabetic-related complications in his prior jobs because 'they always lie.'" *Id.* at 1171.

348. *Id.* at 1172.

349. *Id.*

350. *Id.* The court also invoked "the advantage of hindsight": Chrysler hired the

enforcing any policy which automatically excludes from employment an individual with a [particular] blood sugar level . . . or any similar blanket exclusionary policy."[351]

However, in a manner symptomatic of the lack of consensus among the courts in assessing ADA claims under the "direct threat" standard, the Sixth Circuit subsequently reversed the district court's judgment.[352] Pretermitting the "direct threat" analysis of the district court, the Sixth Circuit ruled that the EEOC failed to establish a prima facie case that the applicant was disabled under the ADA and "[t]herefore there is insufficient evidence to support the district court's conclusion that Chrysler discriminated against the [applicant] in violation of the Act."[353]

IV. A More Rational Approach to the "Direct Threat" Analysis: Commit Medical Issues to Medical Professionals

A. The Case of Mary Mallon

Although almost a century has passed since Mary Mallon was transformed into a negative historical icon, her story continues to spark macabre and cruel commentary.[354] It was to fight such persistent stereotyping and manipulation of public fear that the ADA decreed that science—not superstition, overreaction, and mob-borne panic—should determine the

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applicant a year after initially rejecting him, and he worked successfully as an electrician at another facility where the work involved even more elevated places as well as working in tunnels and pits. *See id.*

351. *Id.* at 1173.

352. *See* EEOC v. Chrysler Corp., No. 97-1793, 1998 U.S. App. LEXIS 30607 (6th Cir. Nov. 25, 1998) (per curiam).

353. *Id.* at *5. The Court of Appeals explained its reasoning as follows:

> On appeal, Chrysler contended that [the applicant] did not establish a prima facie case of discrimination under the Act, specifically that [the applicant] did not demonstrate that Chrysler regarded him as "disabled," or "substantially limited in one or more major life activities." Given that [the applicant] worked for various electrical contractors from March, 1994 until he was ultimately hired by Chrysler in November, we find that the record does not include sufficient evidence for the district court to hold as a matter of law that Chrysler regarded [the applicant] as "disabled."

Id. at *4-*5.

354. *See, e.g.*, Jeanne & William Steig, *Sketchbook: Typhoid Mary*, The New Yorker, Sept. 14, 1998, at 63 ("'Does it not, dear friend, seem callous/Thus to wretch away my ladle/Of the fifty-one infected/Only three were struck down fatal!'").

balance between individual freedom and public protection.[355] Accordingly, Congress codified the *Arline* test in the "direct threat" standard of the ADA to require objective assessments of risk, harm, and probability according to the best medical or scientific data available.

Had Mallon been a worker today confronted with a serious, contagious health-related condition, she would have enjoyed at least two advantages that she did not have in the first decade of this century. First, even if she hailed from a disadvantaged background, she would have enjoyed a society so accustomed to lessons derived from microbiology and epidemiology, which were merely in their infancy in 1900, that it would have been far easier for Mallon to understand the nature of her disease and the efficacy of precautions that would protect others from it. In 1900, who in the American general public would reasonably have believed the assertion that they were "sick" when they felt robust and healthy?[356] In addition, Mallon

355. Although generally less well-known than the case of Mallon, there were other cases at the turn of the century in which judicial sanction was obtained for public prejudice against medical disabilities. For example, a Maryland appellate court sustained the action brought by neighbors of a woman with leprosy seeking to evict her. *See* City of Baltimore v. Fairfield Imp. Co., 39 A. 1081 (Md. App. 1898). The court noted that "[t]here are modern theories and opinions of medical experts that the contagion is remote, and by no means dangerous," but rejected what it called "a mere academic inquiry as to whether the disease is in fact highly or remotely contagious," because fear inspired by leprosy "cannot, in this day, be shaken or dispelled by mere scientific asseveration or conjecture." *Id.* at 1084. Similarly, the Washington Supreme Court recognized that tuberculosis posed no medically verifiable threat to the neighbors of a landlord who wished to board ten tuberculosis patients in his house, but nonetheless ruled in favor of the neighbors seeking to enjoin the landlord because the court "question[ed] our right to say that the fear is unfounded or unreasonable, when it is shared by the whole public." Everett v. Paschall, 111 P. 879, 880-81 (Wash. 1910). In that court's view, "[t]he question is, not whether the fear is founded in science, but whether it exists; not whether it is imaginary, but whether it is real, in that it affects the movements and conduct of men. Such fears are actual, and must be recognized by the court as other emotions of the human mind." *Id.* A Kansas court that enjoined construction of a cancer hospital because of undocumented concerns of communicability of cancer raised the standard, but only slightly, to the level of "whether [the occupants of the adjacent dwellings] . . . would have reasonable ground to fear such a result." Stotler v. Rochelle, 109 P. 788, 790 (Kan. 1910). *See generally* PETER W. HUBER, GALILEO'S REVENGE 130-37 (1993).

356. Mary Mallon exemplified this sense of bewilderment of an "invisible" malady, as Professor Leavitt explained:

> An Irish Immigrant cook, with limited career opportunities, but with quite a good reputation among New York's finest families, Mary Mallon deeply resented her incarceration from the beginning. From the day in 1907 when her employment came to an abrupt end, when the health officials knocked her down at her door and literally dragged her, kicking and screaming, into a city ambulance, and ultimately deposited her in a small cottage on an island on

would have the benefit of living in an age in which general sanitation standards have improved, antibiotic treatment[357] and vaccines for illnesses such as typhoid fever are common,[358] and employment and educational opportunities for many women have increased exponentially. A Mary Mallon of the 1990s would probably not be caught between the extremes of abandoning her ability to earn a decent living in one of the few trades open to women at the turn of the century or of losing her liberty entirely to face a lifetime of involuntary isolation. Today, improved hygiene at work, protective clothing, or, if Mallon chose, opportunities for retraining in a new line of work would be among an expanded set of options potentially open to her.[359]

Second, and more germane to the subject of this Article, a modern Mallon could seek protection under the ADA. Especially in light of *Bragdon*, an asymptomatic carrier of typhoid fever such as Mallon could reasonably argue that she *was perceived as* or had a *record of being* substantially limited in

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the grounds of an isolation hospital, Mallon claimed never to have understood the basis on which she, a healthy woman in mid-career, could be isolated and locked up for life. As she put it to a reporter, "I have never had typhoid in my life, and have always been healthy. Why should I be banished like a leper and compelled to live in solitary confinement with only a dog for a companion?

LEAVITT, *supra* note 1, at 11.

357. Information provided by the author's electronic correspondence with Eric D. Mintz, M.D., M.P.H., Chief of the Diarrheal Diseases, CDC, suggests that it is now possible in over 90 percent of cases to eradicate *salmonella typhi* from healthy carriers with antibiotic treatment. *See also* SHERWOOD L. GORBACH ET AL., INFECTIOUS DISEASES 708-710 (2d ed. 1998) (hereinafter "INFECTIOUS DISEASES"); A.B. CHRISTIE, INFECTIOUS DISEASES: EPIDEMIOLOGY AND CLINICAL PRACTICE 130-31, 141-49 (4th ed. 1987) (hereinafter, "CHRISTIE"); MARTIN J. BLASER ET AL., INFECTIONS OF THE GASTROINTESTINAL TRACT 327-28, 330 (1995) (hereinafter "GASTROINTESTINAL TRACT").

358. *See* John Steele Gordon, *The Passion of Typhoid Mary*, 45 AM. HERITAGE 118 (1994); *Bad News For Typhoid Mary*, U.S. NEWS & WORLD REPORT, Feb. 25, 1991, at 71 (discussing the injected—and new oral—forms of typhoid fever vaccine for international travelers). A vaccine was first introduced in 1911. *See* LEAVITT, *supra* note 1, at 18. Its efficacy, however, has been questioned by some state health authorities. *See, e.g.*, UTAH ADMIN. CODE § R386-702-5(3) (1997) (calling the vaccine "of doubtful value" and requiring exclusion of "household and close contacts" of a typhoid carrier from "occupations likely to facilitate transmission of the disease . . . during [the] period of contact," until negative excretion samples are obtained and verified). *See also* CHRISTIE, *supra* note 357, at 149-50, 152-154; INFECTIOUS DISEASES, *supra* note 357, at 1800-1801; GASTROINTESTINAL TRACT, *supra* note 357, at 330-31.

359. This would have been especially significant in the case of Mallon. As Professor Leavitt observed: "There is no suggestion that health department officials tried to persuade Mallon that they would release her after either retraining or finding her new employment—an omission Mary Mallon herself noted." LEAVITT, *supra* note 1, at 47 n.20.

one or more major life activities,[360] if not in fact substantially limited in one or more major life activities. There is also little question that Mallon was "otherwise qualified" for her work but was excluded directly because of her disability for reasons claimed to be rooted in public safety.

Thus, we come full circle to the "direct threat" standard. In order to sustain Mallon's exclusion, her condition would have to constitute a "direct threat" as defined in the ADA and its implementing regulations.[361] Indeed, the food-handling occupations are unique among any field of employment because the ADA specifically addresses food-handling occupations.[362] The ADA provides a three-part approach for dealing with the risks posed by infectious diseases in food-handling occupations:

> (1) the Secretary of Health and Human Services is required to issue a list of infectious and communicable diseases which are transmitted through handling the food supply, including the "methods by which such diseases are transmitted;"[363]
>
> (2) if an employee has one of the diseases listed by the Secretary, he or she is not automatically excluded from a food-handling job. He or she is excludable only if a significant risk of transmission "cannot be eliminated by reasonable accommodation;"[364]
>
> (3) the ADA does not supersede any state or local regulation "designed to protect the public health from individuals who pose a significant risk to the health or safety of others, *which cannot be eliminated by reasonable accommodation.*"[365]

In Mallon's case, the ADA—and even the federal government through the EEOC—would have been an ally rather than an opponent. The Secretary's list includes *salmonella typhi* as one of the "[p]athogens [o]ften [t]ransmitted by [f]ood

360. *See, e.g.*, 42 U.S.C. § 12112(c)(2)(B), (C) (1994). This is particularly true if employers viewed her, as Soper did, as forever barred from any position involving food handling. Given Mallon's limited training and background, factors that the EEOC's regulations tell us must be considered, it could be argued that Soper's view substantially limited Mallon in the major life activity of working. *See* 29 C.F.R. § 1630.2(j)(3)(i), (ii)(A)-(C) (1998).

361. *See* 42 U.S.C. § 12113 (d) (2),(3) (1994).

362. *See id.* The origin of the food-handling provisions are discussed *supra* notes 48-55 and accompanying text.

363. 42 U.S.C. § 12113(d)(1)(A)-(D) (1994).

364. 42 U.S.C. § 12113(d)(2) (1994).

365. 42 U.S.C. § 12113(d)(3) (1994) (emphasis added).

[c]ontaminated by [i]nfected [p]ersons [w]ho [h]andle [f]ood."[366] That fact in and of itself, however, does not condemn the infected food-handling worker to removal or dismissal. Indeed, the Secretary's list states that

> [t]he contamination of raw ingredients from infected food-producing animals and contamination during processing are more important causes of foodborne disease than is contamination of foods by persons with infectious or contagious diseases. However, some pathogens are frequently transmitted by food contaminated by infected persons.... The failure of food employees to wash hands (in situations such as after using the toilet, handling raw chicken, cleaning spills, or carrying garbage, for example), wear clean gloves, or use clean utensils is responsible for the foodborne transmission of these pathogens.[367]

Thus, although the cause of Mallon's illness—the presence of *salmonella typhi* in her gallbladder or urinary track that made her a healthy carrier of typhoid fever[368]—is identified by the Secretary as among those "[p]athogens that can cause diseases after an infected person handles food,"[369] it does not result in an automatic exclusion.[370] Employers and health authorities must, under the ADA, consider whether there is any "reasonable accommodation" that will eliminate a significant risk of transmission of the pathogen by an employee performing food-handling tasks.[371] Although there may well be other accommodations depending on the circumstances of particular cases, the Secretary's list gives several basic examples: (1) better personal hygiene (for example, washing the hands after using

366. The original list was published in 56 Fed. Reg. 40,897, 40,898 (1991). The most recent update appears at 63 Fed. Reg. 49,359 (1998).

367. 56 Fed. Reg. at 40,898; *accord* 63 Fed. Reg. at 49,359.

368. Dr. Mintz explained in his electronic correspondence with the author that although there is a brief phase in which an acute typhoid fever infection renders a patient bacteremic (i.e., salmonella typhi would be present in the blood), the vast majority of healthy carriers harbor the bacteria in the gallbladder or, in a minority of healthy carriers, in the urinary system. *See supra* note 357. *See also* INFECTIOUS DISEASES, *supra* note 357 at 706-07, 709-10; CHRISTIE, *supra* note 357, at 106-07, 132-36, 143-48; GASTROINTESTINAL TRACT, *supra* note 357, at 326-27.

369. 56 Fed. Reg. at 40,898; 63 Fed. Reg. at 49,359.

370. *See* 42 U.S.C. § 12113(d)(2) (1994).

371. *See id.* (no adverse action sustainable against the employee unless risk "cannot be eliminated through reasonable accommodation"); 42 U.S.C. § 12113(d)(3) (1994) (regulation of food handling must be designed to protect the public health from "a *significant risk* to the health or safety of others, which cannot be eliminated by reasonable accommodation") (emphasis added).

the restroom with an agent that will destroy the pathogen); (2) better care of work implements (such as cleaning and sterilization of utensils); and (3) use of assistive devices (such as gloves worn by the infected employee to prevent transmission of the pathogen).[372] Of course, in a given case, the employer of a modern-day Mallon might seek to assert an "undue hardship" defense to such possible accommodations. For example, the employer might contend that it would bear the responsibility for ensuring that Mallon maintain one hundred percent compliance with these measures which it could not practically do because that would require another employee to monitor her almost constantly.[373] Or the employer might assert that because of the high potential for transmission of *salmonella typhi* via excretions, it would have to provide Mallon with entirely separate restroom facilities to protect co-workers and patrons. However, the financial resources

372. *See* 56 Fed. Reg. at 40898; 63 Fed. Reg. at 49,359. As the electronic correspondence between Dr. Mintz and the author indicates, if the listed measures were strictly adhered to for the entire duration of the time in which a healthy carrier was infected and employed as a foodhandler, the risk of *salmonella typhi* transmission would be minimized. However, Dr. Mintz notes that only successful antibiotic treatment can eliminate the risk of transmission. *See supra* note 357. *See also* CHRISTIE, *supra* note 357, at 50-52, 151-52; INFECTIOUS DISEASES, *supra* note 357, at 709-10. Curiously, although Dr. Christie observes that "the danger of infection from the carrier's hands can be very greatly reduced, or virtually eliminated, by thorough washing of the hands after toilet, and before preparing any food" and discusses the chemical agents that eliminate *S. typhi*, his treatise (without supporting reference) repeats the "Soperist" view that "[a] carrier must obviously take no part in employment concerned with the preparation of food and, when discovered in such employment, must be persuaded to leave it till declared free of infection." CHRISTIE, *supra* note 357, at 50-52, 151. The authors of GASTROINTESTINAL TRACT, *supra* note 357, take a somewhat less dogmatic and more enlightened view:

> Those carriers who are food handlers and who do not wash their hands carefully can easily contaminate food; under proper environmental conditions, multiplication occurs and consumers are at risk . . . . Small outbreaks of typhoid fever continue to occur in the USA, usually caused by a carrier who is involved in food preparation. Some of these carriers are recent immigrants from areas where enteric fever remains endemic. Since humans are the major reservoir for *S. typhi*, toilet paper and careful handwashing serv[e] to interdict this method of dispersal.

Id. at 327 (footnote omitted). The ADA, as described above, does not require elimination of the risk altogether, only its reduction to an acceptable level. The question for the medical experts thus would be whether the basic hygiene methods reduce the risk to an acceptable level.

373. Dr. Mintz, in his electronic correspondence with the author, observed that it was his "impression that enforcement of" measures involving handwashing, gloves, and utensil cleaning with the necessary strictness "would be difficult." *See supra* note 357. See also INFECTIOUS DISEASES, *supra* note 357, at 699; CHRISTIE, *supra* note 357, at 151-52.

available to an employer would be determinative of the success of such arguments. A corporate-owned McDonald's or Burger King restaurant would have a more difficult time in establishing an "undue hardship" defense to such possible accommodations than a modest, family-owned restaurant.

In fact, any or all of these measures might reduce the risk of transmission of typhoid fever by a modern Mallon well below the level of "significance." Moreover, such measures might be much more readily embraced by Mallon and her prospective employers in the 1990s than they would likely have been in the early 1900s.[374] Thus, Mallon would have been more likely to have remained employed in her chosen work and certainly would not have been confined against her will. Furthermore, even if for some reason (for example, lack of cooperation with hygienic and sanitation measures) the risk posed by Mallon could not be eliminated below the level of significance, the EEOC's implementing regulations suggest that employers who cannot accommodate disabled employees in their current jobs transfer such employees to other vacant jobs for which they are qualified.[375] In Mallon's case, if she worked in a restaurant, for example, her employer might have to consider transferring her to an available non-food handling position such as hostess, cashier, or administrative employee. Thus, the combination of science, social progress[376], and the fusion of both in the ADA would present Mallon with a chance to live life as any other citizen despite her rare and insidious medical condition.

Nevertheless, an enduring and questionable obstacle to Mallon's employment in the 1990s would be the plethora of state laws on the books since the age of "Typhoid Mary" that prescribe blanket exclusions for *salmonella typhi* carriers from

374. As Professor Leavitt notes: "Officials did not allow Mary Mallon a chance to prove whether or not, upon learning of the situation, she would or could change her behavior and cease infecting others. The health department and the court acted to keep her in quarantine when all she had done was to insist she was healthy and to resist what seemed to her to be an unreasonable arrest." LEAVITT, *supra* note 1, at 90-91.

375. *See* 29 C.F.R. § 1630.2(o)(2)(ii) and app. § 1630.2(o)(2)(ii); TAM § 3.10(5).

376. Indeed, it appears that Mallon's gender and perceived social class may have motivated the severity of her treatment almost as much as the dreaded nature of her disease. *See* LEAVITT, *supra* note 1, 57-58, 97, 104 n. 19, 118-25. *See also* CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION, 9, 175 (1979) ("Working class and poor women" had "an even more precarious hold on jobs than their male counterparts" and worked only "at the mercy of the employer.").

occupations "having anything to do with" food or drink for public consumption, pharmaceuticals, boarding houses, child care, elder care, or patient care[377] as the price for their liberty. Whether these proscriptions have been reevaluated under the most current medical knowledge to admit of some exceptions for reasonable accommodations, or whether they simply "err" on the Draconian side by assuming that the exclusion must be absolute because no risk whatsoever to the "public health" is tolerable, is unclear. What is clear, however, is that the ADA defers to these laws *only* to the extent that they "protect the public health from . . . a *significant* risk to the health and safety of others, which cannot be eliminated *by reasonable accommodation*."[378] A modern "Typhoid Mary" might well force state health authorities to re-examine long-held notions embedded in these laws and ameliorate the severity of their strictures.

The "direct threat" standard appears relatively easy to apply in the case of a food-handling worker with a condition such as Mallon's asymptomatic *salmonella typhi*. Indeed, it might even be viewed as a paradigm case. What is most significant about it, however, is that Congress took the unique approach as to this single issue under the ADA of leaving the determination of the risk and the appropriate measures for accommodation specifically for resolution by medical experts—the Secretary of Health and Human Services acting through the National Center for Infectious Diseases at the CDC—who are charged to effect "wid[e] disseminat[ion]" of that resolution.[379] Yet, Congress gave no such specific instruction as to resolving

377. *See* 35 PA. CONS. STAT. § 655.7 (1995); CONN. GEN. STAT. ANN. § 21a-157 (1994); CONN. AGENCIES REGS. § 19-13-B76 (1994); FLA. ADMIN. CODE ANN. r. 62R-8.005 (1999); IDAHO ADMIN. CODE §§ 16.02.10.020, 16.02.19.400 (1995); ILL. ADMIN CODE tit. 77, § 690.730 (1994); IND. ADMIN. CODE tit. 410, r. 1-2.1-6 (1988); KAN. ADMIN. REGS. 28-1-8, 28-23-12 (1966); CODE MASS. REGS. tit. 105, § 300.200 (West 1999); MD. REGS. CODE §§ 10.15.02.03(I)(1)-(3), 10.66.01.06(E)(8) (West 1999); N.Y. COMP. CODES R. & REGS. tit. 10, § 2.42 (West 1998) ("Control of typhoid carriers"); UTAH ADMIN CODE, §§ R386-702-06, R386-702-67 (1997); WASH. ADMIN. CODE § 246-100-171(2)(f) (1988); WIS. ADMIN. CODE § HFS 190.09(1)(a) (1986). The New York regulation extends so far as to provide that "[N]o typhoid carrier shall be permitted to reside on premises on which one or more cows are kept." N.Y. COMP. CODES R. & REGS. tit. 10, § 2.42(f). These regulations typically maintain the exclusion of a typhoid carrier unless and until he or she has "produc[ed] three consecutive negative stool specimens each taken no less than 48 hours apart." CODE MASS. REGS. tit. 105, § 300.200. Professor Leavitt traces the origin of such statutes. *See* LEAVITT, *supra* note 1, at 50-63.

378. 42 U.S.C. § 12113(d)(3) (1994) (emphasis added).

379. 42 U.S.C. § 12113(d)(1) (1994); 56 Fed. Reg. at 40898; *accord* 63 Fed. Reg. at 49359.

similarly important safety issues in other occupations involving other disabilities. Implicitly, the ADA assumes that those issues will be committed to courts and juries, like other more routine issues in discrimination cases. But is this the best policy? Will that implicit approach effectuate the purposes of the ADA in the public interest? Are lawsuits in the court system the preferred means to resolve safety issues that affect not only the livelihoods of those who are disabled but also the lives of the public as a whole? As the cases that have been examined above demonstrate, the answer is a fairly clear "No," as the discussion below explains.

B. What the Cases Teach about the "Direct Threat" Standard

The cases reviewed in this Article provide an array of decisions under the "direct threat" standard. In the main, however, they most strikingly demonstrate that no court since the Supreme Court's remand to the district court in *Arline* has taken any real pains in analyzing the four-pronged *Arline* test. In most cases, the courts seem to have reached a determination beforehand, based on a tacit emphasis on one particular aspect of the test that, from a "common-sense" perspective, appears to be determinative. At their most reasoned, these courts have at least recognized that deference to reasonable medical opinions from competent medical professionals—even if there are conflicting opinions—is a useful approach. Cases such as *Knapp v. Northwestern University*,[380] *Anderson v. University of Wisconsin*,[381]

380. 942 F. Supp. 1191 (N.D. Ill. 1996), *rev'd*, 101 F.3d 473 (7th Cir. 1996), *cert. denied*, 520 U.S. 1274 (1997) (affirming district court's grant of an injunction prohibiting Northwestern from excluding a student suffering from instances of sudden cardiac arrest, which required the student to wear an implanted cardiac defibrillator to restart his heart if future incidents occurred, from playing on its intercollegiate basketball team). The Seventh Circuit cited substantial, although not entirely undisputed, medical evidence supporting the school's decision. *See Knapp*, 101 F.3d at 476-78 n.2, 485. Applying *Arline*, the court took a decidedly "hands off" approach to deciding medical issues where, as there, each side had presented conflicting opinions from qualified medical experts:

> We do not believe that, in cases where medical experts disagree in their assessment of the extent of a real risk of serious harm or death, Congress intended that the courts—neutral arbiters but generally less skilled in medicine than the experts involved—should make the final medical decision. Instead, in the midst of conflicting expert testimony regarding the degree of serious risk of harm or death, the court's place is to ensure that the exclusion or disqualification of an individual was individualized, reasonably made, and based upon competent medical evidence. So long as these factors exist, it will be the rare case regarding participation in athletics where a court may

Amego, Prevo's, Fedro, Lassiter, and *Bradley* each show judicial reluctance to reweigh, reevaluate, or probe behind facially reasonable medical opinions relied on by employers and other institutions, even if there are other medical professionals who may disagree with those opinions. In a more activist posture, courts have engaged in independent assessments of the substance of sometimes conflicting medical evidence and appear to have substituted their own views of medicine and science. Such cases include *Mendez v. Geran,*[382] *Bragdon, Exxon,* and the district court's decision and the Sixth Circuit's dissenting opinion in *Prevo's.*[383]

The "direct threat" cases are susceptible to classification by the particular factor or group of factors from the *Arline* test that predominate in the analysis. For example, a large body of cases can be categorized as "catastrophic consequences" cases. These cases focus primarily on the nature and severity of potential harm posed by the individual at issue, who in many cases is an

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substitute its judgment for that of the school's team physicians.

Id. at 485 (holding that although different schools and other physicians might reach a different determination on the facts, "if substantial evidence supports the decisionmakers . . . that decision must be respected").

381. 665 F. Supp. 1372 (W.D. Wis. 1987), *aff'd,* 841 F.2d 737 (7th Cir. 1988) (affirming summary judgment in favor of law school authorities on Rehabilitation Act claim of alcoholic student whom they dismissed after three failed attempts to remain in school). Although *Anderson* was not a "direct threat" case, it provides a good example of how judicial deference to a single professional judgment or school of thought, whether medical or academic, can subvert the purposes of laws such as the ADA just as much as judicial intervention. The *Anderson* Court relied on the premise that federal disability law "requires only a stereotype-free assessment of the person's abilities and prospects rather than a correct decision." *Id.* at 741 (citation omtted). However, that premise is inconsistent with the scientific determination required by the "direct threat" test.

382. 956 F. Supp. 1520 (N.D. Cal. 1997). The district court in *Mendez* criticized the *Knapp* analysis in denying summary judgment to an individual excluded by the Peace Corps. The *Mendez* court stated that (1) "if a decision-maker unnecessarily excludes an individual on the basis of a disability, that decision should be overturned, regardless of the sufficiency of the evidence upon which it was based" and (2) the "trier of fact . . . ought be permitted . . . to determine if risk of injury caused by a disability is such that the individual has been needlessly excluded." *Id.* at 1527. *Mendez* is fundamentally different from *Knapp,* however; what *Mendez* really demonstrates is that the deference applied in *Knapp* is not tantamount to giving an employer a free hand to discriminate. In *Mendez,* there was little or no competent medical evidence to support the Peace Corps' risk assessment. Indeed, the plaintiff in Mendez was denied a Peace Corps' assignment in Panama solely because she had a history of depression and was taking a prescription anti-depressant. *See id.* at 1528. The court specifically found "that not only did the Peace Corps utterly fail to investigate possible accommodations, but the record demonstrates that plaintiff may have been easily accommodated," as had other volunteers overseas who were supplied with anti-depressants. *Id.* at 1528 n.10.

383. *See* No. 1:95 CV 446, 1996 WL 604984 (W.D. Mich. Aug. 27, 1996), *rev. in part, vacated in part,* 135 F.3d 1089 (6th Cir. 1998); 135 F.3d at 1098, 1102 (Moore, J., dissenting).

HIV-positive employee or applicant. The courts in such cases have focused primarily on the catastrophic consequences of transmission to others. The courts have placed little emphasis on the fact that no transmission of HIV may ever have been medically documented in circumstances relevant to the employment in question or on the fact that the risk of such transmission is extremely difficult to quantify. Such cases not only involve HIV-positive persons who seek to participate in invasive surgery,[384] but also HIV-positive persons who practice dentistry[385] or work with cutting tools in a grocery store,[386] as well as persons with another infectious disease such as Hepatitis B who seek to work in public safety occupations.[387] Interestingly, when the obverse case has presented itself—the danger of an infectious disease being transmitted from a patient to the health care professional providing the treatment—the courts *have* focused on the lack of evidence documenting transmission in the relevant circumstances, rather than on the "catastrophic consequences" of transmission from patient to practitioner.[388]

Another discrete line of cases involves dangerous "situations" and "instrumentalities" in public safety occupations—such as firefighting[389] or police work[390]—where the courts have focused

384. *See, e.g., Bradley*, 3 F.3d at 924 (acknowledging that "the risk is small" and subject to dispute, although nonetheless "present"); *University of Maryland*, 50 F.3d at 1266 (rejecting CDC assessment of the risk of HIV transmission to patient); *Scoles*, 887 F. Supp. at 770 (acknowledging lack of evidence of AIDS transmission in relevant circumstances).

385. *See Mauro v. Borgess Med. Ctr.*, 886 F. Supp. 1349, 1353-54 (W.D. Mich. 1995) *aff'd*, 137 F.3d 398 (6th Cir. 1998), *petition for cert. filed*, 66 U.S.L.W. 3773 (U.S. May 21, 1998) (No. 97-1870).

386. *See Prevo's*, 135 F.3d at 1093, 1096.

387. *See Fedro*, 21 F.3d at 1393-94. *See also Fedro*, 21 F.3d at 1397 n.1 (Rovner, J., dissenting).

388. *Compare Bragdon*, 118 S. Ct. at 2211-12, *with Mauro*, 886 F. Supp. at 1353-54. The judicial inability to grapple effectively with direct-threat concepts such as "the amount or nature of the evidence" required to establish the significance of a risk is exemplified by the sharply divided court in *Onishea v. Hopper*, 171 F.3d 1289 (11th Cir. 1999) (en banc). *Compare id.* at 1298-99 (focus on what "reliable medical opinion" suggests can happen), *with id.* at 1305 (Barkett, J., dissenting) (asserting that majority misapplied *Arline* and *Bragdon* by "uphold[ing] [a] blanket exclusion on the grounds that any cognizable risk of [HIV] transmission, no matter how infinitesimal and even if based on a wholly unlikely and speculative chain of events, suffices to disqualify" individuals as direct threats).

389. *See Huber*, 849 F. Supp. at 412-13. *But see Hamlin*, 165 F.3d at 431-32 (affirming jury verdict for assistant fire chief because risk posed by heart condition in occasional fire-fighting duties was "speculative or remote").

390. *See Siefken*, 65 F.3d at 667 n.4; *Burroughs*, 163 F.3d at 508.

primarily on the unquantifiable risk that an officer might not be able to perform his or her duties when his co-workers most need him or her or might become incapacitated or impaired while in control of a dangerous instrumentality such as a firearm or a police car. Most of the cases which uphold exclusions of disabled individuals do not probe very deeply into the "duration of risk," "likelihood of potential harm," or "imminence of harm" factors of the "direct threat" test. However, a few cases in this area have found no "direct threat" when a sufficient connection has not been established between the impairment at issue and the instrumentality in question.[391]

Virtual blanket exclusions have dominated the realm of transportation cases, and most courts have upheld exclusions of individuals whose medical conditions—particularly diabetes and epilepsy—have posed risks of unconsciousness or incapacitation, especially when those seeking the employment have experienced them in the past.[392] For these courts, the beginning and end of their analysis has not been *Arline*. Their analysis has been condensed into an insurance analysis—should an employer be required to act as the insurer of safety when the stakes are human lives and the instrumentalities involved are the least forgiving of error? Indeed, these courts seem to have replaced *Arline* with the policymaking liability analysis formula suggested by Circuit Judge Learned Hand in *United States v. Carroll Towing Co.*[393] Under the "Hand formula," the liability of an alleged tortfeasor is determined by whether the burden ("B") of taking adequate precautions is exceeded by the product of the probability ("P") of injury occurring and the gravity of that injury ("L") if it occurs—$B < PL$. This formula has been described as the classic "American formula of balancing magnitude of risk and gravity of harm against utility

391. For example, compare *Stillwell*, 872 F. Supp. at 685-88 (insufficient connection to support blanket exclusion of officers with anatomical loss) with *Layser*, 935 F. Supp. at 569 (sufficient connection between armed guard's violent dream and his access to firearms).

392. *See, e.g., Chandler*, 2 F.3d at 1395; *Chiari*, 920 F.2d at 316; *Daugherty*, 56 F.3d at 697-98; *Serrapica*, 708 F. Supp. at 74-75; *Chevron*, 979 F. Supp. at 1090-91. *But see* Kapche v. City of San Antonio, No. 98-50345, 1999 U.S. App. LEXIS 9700, *17, *18-*22 (5th Cir. May 20, 1999) (suggesting that "in recent years this once solid foundation may have eroded a bit" and that per se disqualification of insulin-dependent diabetics from unemployment requiring them to drive may no longer be "scientifically valid").

393. 159 F.2d 169 (2d Cir. 1947).

of conduct"[394] and criticized for "its emphasis on economic efficiency and its implicit denial of 'soft' or 'human' variables and individual rights."[395] Whatever its merits in allocating common law fault, however, a "Hand-like" approach to "direct threat" cases substitutes an economic analysis for the *Arline* analysis of scientific evidence intended to protect individual rights from unfounded stereotyping about disabilities. Moreover, even in the transportation area, the courts' approach can be volatile. When given the opportunity to apply this "insurer" analysis to Exxon's rule excluding past alcoholics from safety-sensitive positions in the wake of concrete events—such as the *Exxon Valdez* oil spill—the court expressly rejected the same "employer-as-insurer" argument that other courts had recognized in cases lacking such substantial history. In any event, the general tendency courts have displayed to cast *Arline* aside in transportation cases is at odds with the evolving willingness of safety regulators—such as the FAA in the case of diabetic private pilots—to reconsider long-held exclusions upon the urging of medical experts at the forefront of research in their fields.

Finally, ad hoc "safety-threat" claims arising in unregulated industrial settings reveal the employer's tendency to invoke vague safety concerns as an expedient and the unpredictability of judicial application of "direct-threat" standard in assessing those asserted concerns. Cases such as *Turco, Complete Auto Transit,* and *Chrysler* have produced conflicting results on weakly-documented "direct threat" claims by employers. These cases illustrate a lack of consistency, transparency, and analytic vigor when the "direct threat" test is left to judicial application. Each case also illustrates the expense and dissipation of

394. W. PAGE KEETON, ET AL., PROSSER AND KEETON ON TORTS § 43, at 296 (5th ed. 1984). Or, as another commentary observed, "Hand's formula"

> is at the center of a continuing debate about how the law should determine the proper level of safety in social life. The formula prescribes a utilitarian method involving calculation of costs and benefits and choice of the least costly alternative. Safety, it appears, is a matter of economy.

PAGE KEETON, ET AL., TORT AND ACCIDENT LAW 10 (West 1983).

395. PROSSER AND KEETON, *supra* note 394, § 31, at 173 n.46. Judge Hand later confessed difficulties in applying his formula that mirror some of the difficulties in applying the "direct threat" factors. *See* Moisan v. Loftus, 178 F.2d 148 (2d Cir. 1949) (noting that because the factors are rarely "susceptible of quantitative estimate," the formula tends "only to center attention upon which one of the factors may be determinative in any given situation").

precious time and litigation resources in protracted proceedings over the validity of various medical opinions.

C. A Modest Proposal for Reforming the "Direct Threat" Standard

Contrary to popular thinking, the most significant public policy choice that Congress effected by enacting the ADA was not to extend civil rights protection to the disabled who are employed or seeking employment in the private sector. The most significant policy choice was one that is hardly discussed in the legislative history or by most courts. That choice was selection of the process to evaluate and resolve issues that arise in adjudicating the rights established by the ADA along with the interests, both public and private, that are affected by those rights. Congress did not make it clear whether federal courts and juries are to perform the adjudication function as to *all* issues involving rights under the ADA, or just those which, like liability for discrimination under Title VII of the Civil Rights Act of 1964, involve traditional jury functions.[396]

To explore fully the competency of our court system to adjudicate various kinds of ADA claims would be a subject requiring another article. However, the ADA cases examined in this Article point up the weakness in merely assuming that because it did not say otherwise, Congress intended "direct threat" cases to be treated as just another garden-variety discrimination case. Congress left largely unaddressed whether such a policy choice is justified in the cases involving "direct threats" to safety or health. Although Congress specifically provided for some of the "direct threat" determinations to be made by the Secretary of Health and Human Services regarding infectious diseases in food-handling occupations,[397] Congress did not have much in the way of deliberations over the issue of whether the judiciary should be the institution which makes the determinations affecting other safety-sensitive industries under the "direct threat" standard. Proceeding directly from the mere existence of the *Arline* decision, Congress did not tackle the underlying issue of whether courts

396. *See* 42 U.S.C. § 12117(a) (1994) (adopting the procedures, including federal court actions and jury trials, provided under Title VII in 42 U.S.C. § 2000e-5(f)(3) (1994) and 42 U.S.C. §§ 1981a(a)(2)(c) (1994)). Interestingly, section 1981a(a)(2) exempts from the jury trial provisions claims based on disparate *impact* upon disabled individuals.

397. 42 U.S.C. § 12113(d) (1994), discussed *supra* at notes 48-55, 362-367.

should be in the "*Arline* business." Nowhere, it appears, did Congress evaluate the competency of courts to resolve competing claims of science and safety through a process of partisan argument and anonymous jury verdicts. But if anything is deducible from the body of "direct threat" cases examined in this article, it is that the competency of the judiciary to deal with the substantive issues is called into question.

In the "direct threat" cases examined in this article, the courts have meted out a brand of justice that has rarely undertaken the kind of analysis required by the "direct threat" test. Some employees and applicants have been victimized by lawyering that appears not to have been up to the task of marshalling the medical and scientific evidence needed to survive an employer's summary judgment motion under Rule 56 of the Federal Rules of Civil Procedure. On the other hand, some employers or service-providers have been victimized by courts who are willing to ignore the employer's scientific evidence and instead to substitute their own judgment for that not only of the employer's medical consultants but also for that of a jury. In fact, most of the "direct threat" cases decided to date have been resolved as a matter of law, primarily on motions for summary judgment. Yet the complex factual determinations required by the "direct threat" test would seem practically never appropriate for resolution by way of summary judgment.

That having been said, the crucial issue is not whether "direct threat" cases should or should not be resolved through summary judgment motions. The procedural device applied to reach *judicial* resolution of a "direct threat" issue seems less important than whether "direct threat" issues should be within the province of the judiciary in the first place. Although there appear to be few "direct threat" cases that have been presented to juries[398] rather than resolved on motions, there is no reason to believe that a jury verdict would provide any better

398. For one of the few reported "direct threat" cases submitted to a jury, see *Complete Auto Transit, Inc.*, 1997 U.S. Dist. LEXIS at 3121 (noting $5.5 million jury verdict for epileptic employee excluded from rail-loader position) and see report of jury verdict in 9 DIS. COMP. BULL. 1 (1997). *See also* Hamlin v. Charter Township of Flint, 165 F.3d 426, 430-32 (6th Cir. 1999) (jury rejected "direct threat" defense to termination of assistant fire chief whose cardiac condition prevented him from engaging in firefighting; jury concluded "firefighting" was not an essential job function and returned $500,000 verdict).

resolution of the medical issues and frequently conflicting medical opinions that characterize a "direct threat" case. Indeed, the jury would seem to be a fairly poor means of resolving "direct threat" issues. The anonymous and outcome-oriented decisionmaking that characterizes juries simply will not suffice in the application of the "direct threat" standard.[399] The "direct threat" standard involves the weighing of scientific data, evolving scientific theories, possibly competing methodologies, and often conflicting expert opinions regarding the "direct threat" factors of "risk," "harm," "severity," "likelihood," and "imminence." For this analysis to be meaningful, it cannot simply be expressed in a jury verdict that ultimately finds a defendant liable or not liable for alleged discrimination on the basis of a claimed disability. Even special interrogatories to a jury cannot do justice to a legal analysis that recognizes the relevant factors but does not—and cannot—supply the relevant medical or scientific background and context that is crucial to assigning relative importance and perspective to those factors in a specific case.[400] The best that any jury can do is to pick between two simplified, polarized views of a body of scientific or medical evidence that may in reality command a spectrum of subtle interpretation and implication. Such a condensation of complex issues can hardly

399. G. CALABRESI & P. BOBBITT, TRAGIC CHOICES, 57 (1978). Jerome Frank thoughtfully explored the "myth[s]" of what he deemed "jury-worshipers" and concluded that "[t]he jury . . . are hopelessly incompetent as fact-finders" and "no one can be fatuous enough to believe that the entire community can be so educated that a crowd of twelve [persons] chosen at random can do, even moderately well, what painstaking judges now find difficult to do." JEROME FRANK, LAW AND THE MODERN MIND, 180-81 (1930). *See also* JERRY MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 176 (1985).

400. FRANK, *supra* note 399, at 181. There is little empirical data about the helpfulness of jury interrogatories or special verdict forms although the use of such mechanisms appears to be infrequent. *See, e.g.*, Mark S. Broclin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fast Verdict*, 59 U. CIN. L. REV. 15, 55-56 (1990). However, the use of special verdicts in federal litigation is not as rare as it once was. *See id.* at 62. Proponents of special verdict procedures have suggested that their use aids juries in correctly applying the law to the facts and helps to remove the potential for juries to render verdicts on the basis of emotion. *See id.* at 58 (*citing* Morrow v. County Comm'rs of Saline, 21 Kan. 484, 503-04 (1879)). However, commentators have also recognized the disadvantages of the use of special verdict procedures. "No doubt there is also some interference with the jury's ability to resolve cases, because requiring agreement on specific items and in effect forbidding compromise resolutions can be expected to make consensus among the jurors more difficult to achieve." *Id.* at 73. The bottom line for the context of the "direct threat" standard, however, is that a special verdict form will do little more than pose the specific questions that a medical professional should be answering.

be expected in the long run to serve the rights of either the disabled or the public interest in safety. The ultimate determination is not merely a question of whether the plaintiff was discriminated against because of a statutorily protected classification as in, for example, Title VII and ADEA cases. The ultimate determination in a "direct threat" case may have life and death consequences for the plaintiff, his or her co-workers, and members of the public at large.[401]

The jury also falls short of the demands made by the "direct threat" test in the area of long-term regulation of safety-sensitive industries. Although the ADA emphasizes determinations focused on "individuals," the "direct threat" analysis addresses important and recurring situations in safety-sensitive industries. The consequences of the "direct threat" analysis for both the disabled individual, his or her employer, and the general public demand that any "direct threat" decision be fully explained and supported by relevant medical and scientific evidence. The guidance from such a determination is not just important to the individuals and entities concerned in a particular case. That case may provide guidance that proves to be essential in defining many parameters of safety-sensitive employment in the future (for example, what constitutes a "significant risk" in a particular safety-sensitive occupation, what kinds of harm must be eliminated to reduce the risk to an "acceptable" level, under what circumstances is potential harm

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401. As Professor Leavitt observed regarding the habeas corpus proceeding brought by Mary Mallon's lawyers in 1909:

> In any case, attempts to understand the full context of legal and medical thinking about Mary Mallon are stymied by the fact that public health experts did not get a chance to participate directly in the court debate.

LEAVITT, *supra* note 1, at 87. Indeed, the problems posed by decisionmaking that leaves the final choice from a range of medical opinions in the hands of a court is reflected in an argument by the city readily accepted by the court: "The examination of the stools of the patient shows clearly of her infected condition and the danger to the public by allowing this person to go at large until such time as she is free from the infection of the bacilli of typhoid." *Id.* at 88. As Professor Leavitt observes:

> If the logic of this statement had been followed generally, health officials would have had to isolate all healthy carriers they found. In 1909 they had identified only five healthy carriers in New York City, but the health officials knew that there were hundreds, if not thousands, of others yet to be found. A general application of the principle even to all identifiable carriers did not get discussed in 1909, nor did the court ask health officials to justify locking up one person in the face of thousands, most unidentified, going free. If they had, perhaps the outcome of Mary Mallon's hearings would have been different.

Id. at 88-89.

"severe" and "imminent," what functions of the job are both essential and safety-sensitive, and what kinds of measures either do or do not sufficiently reduce a "significant risk" to "acceptable" levels?). A jury verdict is woefully inadequate to provide that crucial element in potentially precedent-setting applications of the "direct threat" test. At best, a jury would be called upon to choose between two sets of competing medical or scientific expert opinions. The jury is not allowed to compromise between, harmonize, or blend such competing opinions. Nor is a jury competent to do so.

How then should the "direct threat" test be applied? Despite its development in the context of a Rehabilitation Act lawsuit in *Arline*, the "direct threat" test is really a set of standards that can most effectively be evaluated and applied by medical and scientific experts in the fields relevant to the alleged threat and to the safety-sensitive industry in question. Indeed, the framework that became the "direct threat" test was proposed in the brief of the AMA, which appeared as an amicus in *Arline*.[402] When Congress enacted the ADA and transformed the *Arline* factors into "a defense to a charge of [disability] discrimination,"[403] it borrowed that analysis out of its original context and intended use. The EEOC's implementing regulations and Technical Assistance Manual took that a step further by requiring that the employer prove to a jury that a "direct threat" determination "relies on the most current medical knowledge and/or the best available objective evidence."[404] In so doing, the EEOC squarely placed courts and juries in the role of second-guessing and reassessing the medical advice obtained by employers in order to determine whether the medical advice is "the *most* current medical knowledge" or "the *best* available objective evidence." Such qualitative determinations are by their nature both subjective and re-evaluative. They require a factfinder to choose between competing medical points of view by deciding which physicians, which researchers, and which theories are "best" or "most current." As defined under the ADA, the test demands that if one medical opinion holds an individual to be "safe" and

402. *See Arline*, 480 U.S. at 287.
403. 42 U.S.C. § 12113(a)-(b) (1994).
404. TAM § I-4.5; C.F.R. § 1630.2(r) (1998).

another medical opinion holds that individual to be "unsafe," "less safe" than an "acceptable risk," or even "less safe" than the other medical opinion, one opinion must be "right" and the other "wrong." One must "win" and the other must "lose." Yet, this is exactly what the AMA emphasized in its *Airline* amicus brief that the factors it had proposed were *not* supposed to do:

> [An employer must] mak[e] a reasonable employment decision based on medical judgments *within a reasonable professional range.* Federal courts *should not choose between conflicting medical judgments* offered by plaintiff and defendant, if defendant . . . can demonstrate that the medical evidence upon which he relied was *within the range of reasonableness,* given then current medical knowledge. *Deference should be given to employment decisions rationally related to reasonable medical judgments relied upon by [the employer].*[405]

However, Congress did not discuss *who* should apply the *Arline* standard—as opposed to what factors comprise it—and the EEOC apparently ignored the AMA's strong admonitions when issuing its regulations transforming the *Arline* test from a highly deferential standard of review for facially valid medical opinions rendered by qualified physicians to an onerous affirmative defense that the EEOC advises requires "an employer [to] meet very specific and stringent requirements under the ADA" *to prove* that a "'direct threat'" *in fact* "exists."[406] Yet the AMA's proposed standard foresaw a very limited role for judicial review of "direct threat" determinations. At most, the AMA's amicus brief in *Arline* appears to view judicial involvement as something akin to a "rational basis test" such as that articulated in the constitutional law arena by cases such as *West Coast Hotel Co. v. Parrish*[407] and *United States v. Carolene Products Co.*[408] The EEOC's view of the ADA "direct threat" standard, however, heightens the level of review to a kind of

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405. Brief of the American Medical Association as Amicus Curiae In Support of Petitioners at 15, School Board of Naussau County v. Arline, No. 85-1277 (July 11, 1986) (emphasis added).

406. TAM § I-4.5.

407. 300 U.S. 379 (1937). Under the "rational basis" test, legislation that burdens a right deemed not to be fundamental is immune from attack on constitutional grounds if it bears a rational relationship to a permissible governmental end. *See* Jeffrey A. Van Detta, *Compelling Governmental Interest Jurisprudence of the Burger Court: A New Perspective On* Roe v. Wade, 50 Albany L. Rev. 675, 675 n.1 (1986).

408. 304 U.S. 144 (1938).

"strict scrutiny" apparently requiring, to borrow the words of the now-famous "footnote four" of *Carolene Products*, "a correspondingly more searching . . . inquiry."[409] This approach goes too far beyond both *Arline* and the statute. That is not to say that there is necessarily error in the EEOC's *substantive* interpretation of what the statute requires before an individual may be excluded from a job or occupation because he or she poses a safety-threat; to the contrary, the EEOC's elaboration of the requirements of the "direct threat" standard falls well within the zone of reasonableness[410] that emanates from the vague language and awkward location of the "direct threat" standard in the statute itself.[411] However, the statute nowhere commits such a heightened inquiry under *Arline* factors to federal courts or juries. As U.S. District Court Judge Julie E.

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409. Id. at 153 n.4. "Strict scrutiny" review is applied to legislation that burdens a right deemed to be fundamental and requires that the legislation be narrowly tailored to further a clearly identified compelling governmental interest in circumstances where less intrusive alternative means of furthering the governmental interest are unavailable. *See* Van Detta, *supra* note 407, at 675 n.1.

410. *See, e.g.*, Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843, 866 (1984) (establishing that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency answer is based on a permissible construction of the statute"); 42 U.S.C. §§ 12116, 12117(a) (1994) (directing EEOC to promulgate regulations "to carry out this subchapter" and to exercise the "powers, remedies, and procedures" through those regulations that are provided by statute); Rebecca Hanner White, *The EEOC, The Courts, And Employment Discrimination Policy: Recognizing The Agency's Leading Role In Statutory Interpretation*, 1995 UTAH L. REV. 51 (1995) (exploring the EEOC's substantive rule-making powers under various statutory schemes).

411. The awkwardness of the organization of the ADA's provisions arises from the fact that (1) it is part of an employee's case to prove that he or she meets the employer's lawful qualification standards; (2) the "direct threat" test is such a qualification standard; (3) yet the statutory provision regarding "direct threats" appears as a "defense to a charge of discrimination," suggesting that it is an affirmative defense to be pled and proved as required by FED. R. CIV. P. 12(b) by the employer. The courts, however, have not agreed who should bear the burden in the "direct threat" cases. Some courts, relying on the peculiar structure of the statute, have ruled that it is an affirmative defense, while others have ruled that the ability to perform a job without posing a "direct threat" is part of the plaintiff's burden to establish his or her qualifications to perform the essential functions of a job. *Compare Rizzo*, 84 F.3d at 764 ("As with all affirmative defenses, the employer bears the burden of proving that the employee is a direct threat."), *and Chrysler*, 917 F. Supp. at 1171 ("[I]t is Defendant's burden to prove that [plaintiff] was in fact a 'direct threat.'"), *with Amego*, 110 F.3d at 144 (holding that in cases where the essential job functions implicate the safety of others, plaintiff "must demonstrate that she can perform those functions in a way that does not endanger others," while recognizing that other cases may place the burden on defendants), *and* Moses v. American Nonwovens, Inc., 97 F.3d 446, 447 (11th Cir. 1996) ("The employee retains at all times the burden of persuading the jury either that he was not a direct threat or that reasonable accommodations were available."). *See* BARBARA LINDEMANN & PETER GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 132-33 & n.243 (W. Carl Jordan ed., 3d ed., Supp. 1998). *See also* note 124, *supra*.

Carnes has said in wrestling with the application of the "direct threat" test in the "public accommodations" context under Title III of the ADA,[412] "[t]he Court, however, cannot choose between two ostensibly acceptable methods given that 'considerable judicial deference should be paid to the [medical expert herself], absent proof that standards and application of them serve no purpose other than to deny [a benefit] to handicapped persons.'"[413]

If the EEOC's gloss on the ADA's much plainer codification of *Arline* is a fair effort at realizing congressional intent to eradicate "stereotypic assumptions not truly indicative of . . . individual ability,"[414] then surely the "more searching" inquiry required by the EEOC's interpretation of the "direct threat" test should not be a vehicle for allowing either employers, disabled individuals, or persons alleging disability to use the federal courts on a case-by-case basis to referee controversies over medical and scientific opinion, theory, and research.

What then can harmonize the apparent tension between the

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412. The relevant portion of the ADA provides:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of accommodation.

42 U.S.C. § 12182(a) (1994).

413. Jairath v. Dyer, 972 F. Supp. 1461, 1470 (N.D. Ga. 1997) (quoting Doe v. New York University, 666 F.2d 761, 776 (2nd Cir. 1981)). Jairath, an HIV-positive individual, sued Dyer, a plastic surgeon, because Dr. Dyer declined to perform a "Gore-Tex" implant procedure on Jairath, who was HIV-positive. Dr. Dyer's articulated reason was that such surgery would pose a "direct threat" to Jairath because of the high-risk of infection associated with the procedure even with patients who do not have immune systems "compromised" by HIV-caused conditions. *See id* at 1468-69. Dr. Dyer relied on a medical journal article that found an infection rate of 2 to 2½ times higher for patients with "compromised" immune systems who had "Gore-Tex augmentation in cosmetic surgery." *Id.* at 1468-69. Jairath's medical experts opined that there was no justification for a blanket exclusion of HIV-positive patients and that "there must be an individualized assessment" of a patient's immune system "before such a decision is made." *Id.* at 1469. In Judge Carnes' view, the case did not boil down to whether Dr. Dyer's view or Jairath's experts' views were more correct or better science:

> The expert testimony provided by plaintiff simply demonstrates that there are different opinions regarding whether Gore-Tex augmentation surgery can safely be performed on HIV-positive individuals. This dispute does not create a question of fact as to whether defendant unlawfully discriminated against plaintiff, however. Instead, the differing expert opinions *illustrate that there is a range of legally acceptable bases* upon which a doctor can predicate his decision whether to perform Gore-Tex augmentation surgery on an HIV-positive patient.

Id. at 1469 (emphasis added).

414. 42 U.S.C. § 12101(a)(7) (1994).

origins of the *Arline* standard, the goals of the ADA, and the EEOC's interpretation of the "direct threat" standard as "very specific and stringent"? The answer lies in (1) the medical community which, despite occasional overzealousness in its righteousness earlier this century, lifted society out of its stereotypes and confronted it with knowledge; and (2) a system of alternative dispute resolution ("ADR") that has already been in existence for years in certain safety-sensitive industries as a kind of industrial due process and that has been further sanctioned by the emphasis on ADR in *Gilmer v. Interstate/Johnson Lane Corp.*[415], Section 108 of the Civil Rights Act of 1991[416], and the ADA itself.[417] Indeed, the answer is as

415. 500 U.S. 20 (1991) (upholding enforceability of stockbroker's contract clause with brokerage association that required arbitration of employment discrimination claims). However, it should be understood that it is *not* the position of this article that ADA claims, in general, should be subject to arbitration or that employees whose employment relationships are defined by collective bargaining agreements should be required to submit ADA claims to arbitration pursuant to typical arbitration clauses that provide arbitration procedures for grievances. Indeed, the latter position was recently rejected by the U.S. Supreme Court in *Wright v. Universal Maritime Service Corp.*, 119 S. Ct. 391 (1998). In so doing, however, the Court did not rule out the enforceability of a "'clear and unmistakable'" waiver of an employee's right to a judicial forum "in areas outside of collective bargaining," such as ADA claims. *Id.* at 396, 397 n.2. In any event, as discussed below, this article advocates resolution of medical issues by medical experts rather than lay judges or juries. The bases for this argument are the nature of the "direct threat" test itself, the need for precision and clarity in applying the factors to set potential precedents and consistent guidance in safety-sensitive industries, and the ambiguity of the statute as to the process for making such determinations. Thus, issues of whether a "judicial forum" has been waived or whether ADA-claims fall outside of the "collective bargaining" expertise of labor arbitrators are irrelevant.

416. Pub. L. No. 102-166, § 118, 105 Stat. 1081 (1991) ("Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact finding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title," including the ADA). The legislative history of the "alternative dispute resolution" sections contained in both Title VII (through the Civil Rights Act of 1991) and the ADA suggests that Congress intended to encourage arbitration of claims under these Acts. *See* Douglas E. Abrams, *Arbitrability in Recent Federal Civil Rights Legislation: The Need for Amendment*, 26 CONN. L. REV. 521, 551 (1994). However, this same legislative history indicates that Congress intended to encourage alternative means of dispute resolution not so much for their efficacy in resolving the substantial legal issues presented by such claims but rather because of the value ADR brings (over litigation) in terms of judicial economy. *See id.*. 551-55. Further, Congress clearly did not see ADR as a replacement for litigation. For example, in the conference report for the Civil Rights Act of 1990, which was defeated but served as a predecessor to the Civil Rights Act of 1991, "[t]he Conferees emphasized, that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by Title VII." 136 Cong. Rec. H9552 (daily ed. Oct. 12, 1990) (Conference Report on S.2104, Civil Rights Act of 1990).

Moreover, as President Bush remarked when signing the Civil Rights Act of 1991, the

> Act encourages voluntary agreements between employers and employees to rely on alternative mechanisms such as mediation and arbitration. This

old as the rise of safety-sensitive industries themselves. Before the ADA and other employment discrimination laws were enacted at the federal level, union-represented employees won protections from arbitrary or unsupported dismissal from their employment based on alleged health or safety concerns of their employers. In the railroad industry, for example, issues of whether an employee was medically qualified to continue working in a safety-sensitive position, such as an engineer, were resolved by bipartisan panels of physicians selected by the employer and the employee or his union.[418]

This is epitomized by the Supreme Court's enforcement of an arbitration award, reinstating an employee based on a medical panel's opinion, against a rail carrier that refused to comply with the award.[419] The case, *Gunther v. San Diego & Arizona Eastern Railway Co.*, arose when a rail carrier removed the plaintiff from service after its physician concluded "that in [that physician's] opinion he was no longer physically qualified to work as a locomotive engineer because his 'heart was in such condition that he would be likely to suffer an acute coronary episode.'"[420] The employee was unwilling to acquiesce in the career-ending opinion of his employer's physician. In accordance with "commo[n] us[age]" of the railroad industry, the employee "went to a recognized specialist who, after examination, concluded that [the employee] was qualified physically to continue work as an engineer."[421] With this medical opinion in hand, the employee did not simply demand

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> provision is among the most valuable in the Act because of the important contribution that voluntary private arrangements can make in the effort *to conserve the scarce resources of the Federal judiciary* . . . .

Abrams, *supra*, at 554 (emphasis added) (citation omitted). Thus, the legislative history of the ADR sections of civil rights legislation is not very illuminating as to whether Congress considered the value such mechanisms might add to resolving the difficult questions of cutting-edge medical science and competing schools of legitimate scientific thought that arise in "direct threat" cases.

417. Under the heading, "Alternative means of dispute resolution," the ADA provides:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.

42 U.S.C. § 12212 (1994).

418. *See* Gunther v. San Diego & Arizona E. Ry. Co, 382 U.S. 257, 262 (1965).

419. *See id.*

420. *Id.* at 258.

421. *Id.*

to be returned to work or threaten a lawsuit. Instead, the employee "requested the railroad to join him in the selection of a three-doctor board to re-examine his physical qualifications for return to service."[422]

When rail carrier refused the employee's request, the employee filed a grievance with the National Railroad Adjustment Board ("NRAB"), which, "referring to past practice in similar cases, proceeded . . . to appoint a committee of three qualified physicians to re-examine" the employee.[423] The committee consisted of "one [physician] chosen by carrier and one by the employe[e] and the third by the two so selected, for the purpose of determining the facts as to the claimant's disability and the propriety of his removal from service."[424] The panel was appointed, "examined [the employee,] and decided by a majority vote that he was physically qualified to perform as an engineer, contrary to the prior findings of the railroad's doctors."[425] The NRAB arbitrators ordered the rail carrier to reinstate the employee, the carrier refused to comply, the employee sued the carrier under the Railway Labor Act to obtain enforcement of the Adjustment Board's award, and on appeal the Supreme Court ordered enforcement of the award. The Court placed particular emphasis on the fact that "[t]he medical board was composed of three doctors, one of whom was appointed by the company, one by [the employee], and the third by these two doctors."[426] Noting that a tripartite medical panel "not only seems an eminently fair method of selecting doctors to perform this medical task," the Court observed that "it appears from the record that it is commonly used in the railroad world for the very purpose it was used here."[427] Yet, the Court did not merely endorse the tripartite medical review process because it happened to be commonplace in the self-regulation of a safety-sensitive industry. To the contrary, *Gunther* recognized the inherent merit of the tripartite procedure in not only providing a healthy measure of due process to individual employees but also in placing issues

422. *Id.* at 258.
423. *Id.* at 259.
424. *Id.*
425. *Id.*
426. *Id.* at 262.
427. *Id.*

involving medical qualification standards in the hands of medical professionals competent to apply the standards in evaluating whether the standards are met.[428]

Although *Gunther* involved the railroad industry, medical review boards of similar structure and function have been used in other safety-sensitive industries as well. For example, such medical review processes are found in the airline industry.[429] They also have been recognized in ADA cases[430] as well as in certain state fair employment practices laws.[431] This Article

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428. The Court wrote that

> [o]n a question like the one before us here, involving the health of [the employee], and his physical ability to operate an engine, arbitrators would probably find it difficult to find a better method for arriving at the truth than by the use of doctors selected as these doctors were.

Id.

429. As Arbitrator Richard R. Kasher has observed in the airline industry context,

> [t]he establishment of tripartite medical boards or single neutral doctor review procedures in cases when an employee's physical condition is in controversy is not uncommon; and has been viewed by the Supreme Court of the United States as being an "eminently fair" procedure. *See Gunther v. San Diego and Arizona Eastern Railway Co.*, 382 U.S. 257 (1965). Obviously, the parties here recognized the fairness of such a procedure because they established one [in their collective bargaining agreement] before the Supreme Court spoke in *Gunther*.

In the Matter of an Arbitration Between Delta Air Lines, Inc. and Air Line Pilots Ass'n, Grievance No. 92-14 (April 25, 1993) (unpublished award). The airlines' tripartite medical review process is also discussed generally in *Witter v. Delta Air Lines, Inc.*, 966 F. Supp. 1193, 1196-97 (N.D. Ga. 1997), *aff'd*, 138 F.3d 1366 (11th Cir. 1998).

430. *See, e.g.*, Judice v. Hospital Serv. Dist. No. 1, 919 F. Supp. 978 (E.D. La. 1996), discussed *supra* at notes 128-30 and accompanying text; Campbell v. Federal Express Corp., 918 F. Supp. 912 (D. Md. 1996), discussed *supra* at notes 216-221 and accompanying text.

431. For example, the Georgia Equal Employment for Persons With Disabilities Code, GA. CODE ANN. § 34-6A-1(1998), provides that "[n]o employer shall fail or refuse to hire nor shall any employer discharge or discriminate against any individual with disabilities with respect to wages, rates of pay, hours, or other terms and conditions of employment because of such individual's disability unless such disability restricts that individual's ability to engage in the particular job or occupation for which he or she is eligible. . . ." GA. CODE ANN. § 34-6A-4(a). The statute continues with the following exemption:

> Nothing in this chapter shall be construed to prevent or otherwise make illegal any employment decision affecting any person where such decision is based upon an employer's good faith reliance upon a professional opinion rendered by a licensed physician, rehabilitation specialist, psychologist, physical therapist, dentist, or other similar licensed health care professional concerning that person.

GA. CODE ANN. § 34-6A-3(c). The exemption has been the subject of few cases to date. However, in *Daugherty v. Metropolitan Atlanta Rapid Transit Auth.*, 371 S.E.2d 677 (Ga. Ct. App. 1988), the defendant established both that its employment decision was made in reliance upon professional recommendation of licensed physician and that its preference of that physician's opinion over the contrary opinion of employee's personal physician was based upon safety concerns rather than upon unlawful, discriminatory

does not, however, make a proposal for simple deference to a "facially valid" medical opinion obtained by an employer. Such a one-step process does not comport with the full process due to resolve issues that are often so vexing for courts and juries precisely because they divide competent opinion in the medical community itself. The lesson from the self-governance of safety-sensitive industries is not merely deference on medical issues to medical professionals. The *process* developed in those industries for committing such issues to medical professionals bears essential elements of due process.

Indeed, the procedures outlined in *Gunther* describe a multi-stage process that fosters and maximizes achievement of two important, but otherwise often inconsistent, goals—consideration of a range of medical views and finality in the resolution of medical issues about which medical professionals may disagree. Thus, while the AMA in *Arline* may have sought to promote judicial deference to competent medical opinions obtained by employers regarding safety issues raised by an employee's health, the ADA demands a more exacting scientific answer and, hence, a more sophisticated process of resolution. The process selected to permit scientific resolution of "direct threat" issues, therefore, will have a direct bearing not only on the quality of outcomes in "direct threat" determinations, but also in legitimizing the process to lay employees, lay management, and a lay public.

Professor Mashaw observed over twenty years ago, in discussing the legitimization of administrative decision-making procedures, that "predictability, transparency, and rationality form a family of related process values that can make a worthwhile contribution to any process participant's sense of self-respect."[432] A key to realizing those values is a process, unlike a jury verdict or a "rejected" stamp from a company doctor, that enhances "the participants' ability to engage in rational planning about their situation, [and] to make informed choices among options."[433] The fundamental condition for due process is realized by a multi-stage process conducted by medical professionals with expertise relevant to the nature of the "direct threat" alleged to be posed by the medical condition

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motive. *See also* Spicer v. Martin Brower Co., 338 S.E.2d 773 (Ga. Ct. App. 1985).

432. Mashaw, *supra* note 399, at 175.

433. *Id.* at 175-76.

of an individual employee. Participation of medical professionals ensures predictability because the professionals who participate in the process will share a common body of scientific knowledge and a fundamental similarity in the approaches used to apply that body of knowledge. Further, medical professionals will engage in a process of consultation about the medical information under consideration. They will debate and critique the opinions and findings of the other professionals who participate in the process. Accordingly, the rationale for the ultimate determination at the conclusion of the process will be assured of the transparency of analysis required to justify the determination. Finally, a determination made in concert by three medical professionals will be based on an already articulated rationale. This rationale will provide the rationality needed to permit employees, employers, and safety-sensitive industries to work cooperatively in pursuing their dual goals—maximizing employment opportunities for disabled individuals while maintaining a working environment free from substantial risks to the health or safety of other persons.

The solution to the problem posed by the "direct threat" standard thus lies in the tripartite medical review boards developed in safety-sensitive industries years ago to permit medical professionals to make an informed determination of whether an individual meets the medical qualifications for employment.

The problem that remains unsolved and largely unaddressed is adopting processes developed in safety-sensitive industries as the basis for a more meaningful safety-issue resolution process for the ADA. Because Congress apparently ignored the process issue when developing the ADA, the "direct threat" standard poses a unique opportunity for the EEOC. The agency has already added substance to the statutory concept of "direct threat" through its implementing regulations, its Interpretative Guidance, and its Technical Assistance Manual. Those authorities transcend any case decided since *Arline* in establishing the parameters of the considerations relevant to a "direct threat" finding. However, the EEOC did not go far enough to fill the significant lacuna left by Congress. The drafters of those ADA resources apparently did not take the next step. That step is to harmonize the rights of disabled

individuals to be free from stereotypical prejudice with the strict standard of medical and scientific analyses that the EEOC perceived as necessary to protect disabled individuals from broad-brush stereotyping in occupations and industries where safety issues assume a higher profile. Apparently unable in 1991 to step outside the litigation-as-panacea box in its thinking, the EEOC left the "direct threat" standard to the vagaries of litigation in lawsuits. Such lawsuits, as the cases in this article amply demonstrate, are inherently expensive and time-consuming due to the detailed factual inquiries required and the tendency for such cases to be litigated aggressively at all levels. This solution has certainly not benefited disabled individuals. They more often than not have been on the losing end of "direct threat" cases. However, the EEOC can close the circle on the development of the "direct threat" standard by using its authority to issue procedural regulations for "direct threat" cases.[434]

If the "direct threat" standard is to be implemented in a meaningful and consistent manner that effectuates the rights of the disabled and other constituencies in our society, the EEOC must take a leadership role in developing a procedure for making "direct threat" determinations. The full extent of the substantive and procedural regulations needed to promote resolution of "direct threat" issues cannot be made in the abstract. Nevertheless, the *process* for developing those regulations would contain a number of discrete stages.

Initially, the EEOC must identify the safety-sensitive industries and occupations that require special attention under the "direct threat" standard. The EEOC should issue a public call for the identification of such industries, for example, through an advance notice of proposed rule-making under the

434. The author recognizes that the EEOC would likely need considerably more meaningful increases in funding to develop the regulations proposed below in addition to fulfilling its other statutorily mandated duties. However, the EEOC has made steady progress in recent years by slashing backlogs of pending charges, aggressively using mediation to resolve charges, and streamlining its processes to produce substantive regulations such as those issued in 1998 amplifying the Older Workers Benefit Protection Act amendments to the ADEA. *See, e.g.*, Edmund M. Kneisel & Joseph G. Silver, *The EEOC Uses Negotiated Rulemaking For Proposed Waiver Regulations Under The OWBPA*, 23 EMPLOYEE RELATIONS L. J. 41 (1998). Accordingly, "Congress increased its budget to $279 million for 1999, $37 million more than it received last year and the agency's first increase in years." Steven A. Holmes, *Jobs Discrimination Agency Lightening Its Load*, N.Y. TIMES, Feb. 22, 1999, at A1.

Administration Procedure Act.[435] This was the means that the EEOC used in 1990 "to inform the public that the Commission had begun the process of developing substantive regulations pursuant to Title I of the ADA and inviting comment from interested groups and individuals."[436] In addition, the EEOC should take the initiative to contact directly and work closely with federal[437] and state agencies that regulate medical qualifications for employment in various safety-sensitive industries.[438] Other constituencies with which the EEOC needs to work closely include medical associations, labor organizations, consumer groups, disability advocacy groups, and employer and trade associations. Clear examples of safety-sensitive industries that require special attention include the airline industry, railroads, marine shipping, over-the-road transportation, medical care providers, law enforcement, public safety, and food processing and handling. As a result of this process, the EEOC should publish a list by industry and, where appropriate, by occupation, for which it will develop regulations to establish standards and procedures for making the necessary determinations when an applicant or employee is excluded on the grounds that he or she constitutes a "direct

435. 5 U.S.C. §§ 552, 553, 556-57 (1994) (discussing rule-making by federal agencies).

436. 56 Fed. Reg. 35726 (1991) (citing 55 Fed. Reg. 31192 (1990)). The EEOC also held sixty-two "input meetings" with industry, labor, and the public at EEOC field offices. *Id.*

437. The Occupational Safety and Health Administration ("OSHA"), which enforces the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.*, and promulgates substantive regulations regarding workplace safety, would be an obvious and possibly extremely helpful partner to the EEOC in addressing "direct threat" issues. OSHA can provide a wealth of experience and knowledge about often complex issues implicating safety concerns in a variety of industries. *See* Thomas D. Brierton, *An Examination Of The ADA's Direct Threat Defense*, 1994 LABOR L. J. 618, 626 (1994) (suggesting that "Congress might instruct the federal agency responsible for workplace safety to promulgate regulations that allow employers to exclude any employee that creates a health or safety risk, not just individuals with disabilities").

438. A valuable lesson can be learned from the ineffective manner in which the EEOC coordinated with the National Labor Relations Board in addressing how an employer's duty of reasonable accommodation should be reconciled with restrictions imposed on the employer's actions by the terms of a collective bargaining agreement with its union-represented employees. *See, e.g.*, Eric H.J. Stahlhut, *Playing The Trump Card: May An Employer Refuse To Reasonably Accommodate Under The ADA By Claiming A Collective Bargaining Obligation?*, 9 THE LABOR LAWYER 71 (1993); Suzanne M. Brayere, Susana Gomez, Gwen Thayer Handelmann, *The Reasonable Accommodation Process In Unionized Environments*, 1996 LABOR L. J. 629 (1996). *See also Eckles v. Consolidated R. Corp.*, 94 F.3d 1041 (7th Cir. 1996) (analogous issues under Railway Labor Act), *cert. denied*, 117 S. Ct. 1318 (1997).

threat."[439] The list should encourage self-identification and participation in the EEOC's rule-making process by industries or groups not previously identified.

In the next phase, for each safety-sensitive industry, the EEOC should work with the identified constituencies to establish an industry-specific bipartisan panel. Such panels should advise and assist the EEOC in preparing regulations to establish the process for determining "direct threat" issues in that industry. An industry panel is a crucial participant in establishing meaningful regulations. The combined medical, labor, and industry experience represented on such panels provide a specialized knowledge and authoritative understanding of the issues not possessed by the EEOC.

The regulations to be developed by the EEOC and each bipartisan panel must include certain features regardless of the industry at issue. For example, the relevant standards within the context of each industry for determination of "direct threats" need to be addressed. This should be done by providing particular context for and specific meaning of the *Arline* concepts of risk, significance of risk, nature of harm, and imminence of representative risk-creating events for the principal safety-sensitive occupations within the industry.

The regulations must also address the relevant safety-related qualifications for safety-sensitive employment in each industry. Those qualifications will not necessarily be merely the minimal qualifications required for licensure by a relevant federal or state agency. Safety-related qualifications must accommodate the need to set higher standards to achieve low risks of harm in particularly safety-sensitive occupations.[440] Such standards must, of course, be rationally related to the performance of essential job functions and cannot be used to screen out otherwise qualified individuals with disabilities.[441]

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439. Such a list would be similar to the list issued by the United States Department of Health and Human Services under the ADA regarding "Diseases Transmitted Through The Food Supply." *See* 56 Fed. Reg. 40897 (1991). *See also* discussion *supra* at notes 362-373 and accompanying text.

440. This article does not, however, advocate deferring the "direct threat" analysis to agencies responsible for developing, implementing, and assuring compliance with minimum standards of licensure in particular safety-sensitive industries.

441. Recent legal developments in the Sixth Circuit demonstrate why issues of essential job functions in safety-sensitive industries, like medical qualifications issues, should be left to qualified experts rather than juries. The Sixth Circuit has ruled that if an ADA plaintiff merely *challenges* a job function that he or she admittedly cannot

Perhaps as important as any aspect of the regulations would be a statement of the specific professional qualifications and experience required for a physician to render a relevant professional medical opinion. This is important to protect the integrity of the process both from unqualified opinion-givers as well as "hired guns," who may be predisposed to provide opinions favorable to his or her employer. Along with qualifications, the regulations must establish a methodology for forming panels of qualified medical experts in each area of safety-sensitive employment. Such a methodology might, for example, include a certification process for individual physicians overseen by a federal or state agency with responsibility for the industry. The methodology might also provide a process for bipartisan industry-union groups to designate qualified medical professionals.

The heart of the regulations must be the codification of a tripartite medical review process that ensures objectivity, neutrality, fairness, and due process to employees and applicants—without resort to litigation in the courts. Specifically, the regulations should provide that whenever an employer seeks to exclude an applicant or employee from employment because that individual purportedly poses a "direct threat" in performing essential job functions, or fails to meet safety-based qualification standards, the employer can only do so if (1) it has retained a qualified, independent physician with an established medical expertise (preferably

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perform safely as "non-essential," then the employer must prove to a jury that the safety-based job function *is* essential. *See Hamlin*, 165 F.3d at 430-32 (citing Monette v. Electronic Data Systems Corp., 90 F.3d 1173, 1178 n.5 (6th Cir. 1996)). This approach is not only directly contrary to the deference to the employer's structuring of job functions mandated by the statute and the EEOC's Interpretative Guidance, 42 U.S.C. §§ 12112(a), 12111(8); 29 C.F.R. pt. 1630, app. §§ 1630.2(n), 1630.10, but also invites sophistry and mischief. *See Hamlin*, 942 F. Supp. at 1137-38; *Hamlin*, 165 F.3d 439-40 (Nelson, J., concurring). As District Judge Rosen observed, using litigation to determine essential job functions "[p]retty clearly . . . place[s] courts and jurors in the position of second-guessing an employer's business judgment as to what the essential functions of a job are, without even requiring the [employee] challenging the function to first come forward with evidence that the function is not essential." *Hamlin*, 942 F. Supp. at 1138. The mischief is clear in *Hamlin*, where a jury's rejection of a "direct threat" argument (because it did not agree that it was essential for an assistant fire chief to be capable of helping the firefighters under his command to fight fires) cost a small fire department half a million dollars simply because it "honestly considered it essential for each of its firefighters to be capable of fighting fires." *Hamlin*, 165 F.3d at 441 (Nelson, J, concurring). Disputes over essential functions in safety-sensitive industries and occupations are better handled by rule-making informed by regulators, employers, and labor organizations intimately familiar with the nature of the work at issue.

"Board certified") in the health problems that allegedly pose the "direct threat" and (2) that physician analyzes each of the *Arline* factors and concludes after examining the individual, reviewing his or her medical history, and consulting with his or her treating physician, if any, that the individual poses a "direct threat" that cannot be reduced to an acceptable level through a reasonable accommodation. The regulations should provide that the individual may retain and designate a similarly qualified medical specialist of his or her own choosing to provide an independent analysis using the same procedure. In the event that the individual's medical specialist disagrees with the employer's designated specialist and concludes that the individual does not pose a "direct threat," the regulations should instruct that the two specialists shall agree upon and designate a third medical specialist to review the case and make the final determination whether the individual poses a "direct threat," or whether reasonable accommodation can reduce the risk below the "direct threat" threshold. This process may be expensive, but it should be borne in mind that "direct threat" litigation, properly prosecuted, also requires the use of medical experts and costs far more. However, it is precisely because the medical review process carries a more than *de minimis* expense that the *employer* should bear the cost of the process. This will discourage employers from invoking "safety" concerns lightly, and recognizes the usual disparity of resources between employing entities and their employees. In the event that the employer's workers are represented by a labor organization, the regulations should permit the employer and the union to negotiate a different allocation of expense between them through good-faith collective bargaining.

Court involvement in this process should be minimal. Indeed, there should be a need for judicial intervention at only three junctures. First, if it were to be determined in the medical review process that the employee or applicant would not pose a "direct threat" should the employer provide a reasonable accommodation, the employer would be required to provide the accommodation unless it could prove in a court proceeding that to do so would create an "undue hardship" as defined in the ADA. Second, if an employer or, in rarer occasions, an employee or his labor representative refused to participate in

the medical review process,[442] the regulations would provide for judicial intervention to compel compliance, similar to a suit to compel arbitration.[443] Third, the regulations should provide for limited judicial review of the medical panel results. Because the panel of medical experts will have determined the substantive medical issues, the bases for challenging the panel results should be limited to *only* those required to ensure observance of due process and impartiality by panel members. Accordingly, judicial review of medical panel results should be limited to (1) failure of the panel to comply with the regulations; (2) failure of the panel to confine itself to medical and scientific issues as provided for in the regulations; (3) a panel result that would require an employer to violate a clearly established safety standard or safety-related employment qualification established by a federal or state regulatory agency with jurisdiction over the industry and occupation in question; or (4) fraud or corruption by a member of the panel or a party to the process.[444]

V. CONCLUSION

The legal status of persons with disabilities has advanced dramatically as the century ushered in by the passion of Mary Mallon nears an end. The advance of medical science among medical professionals and the acceptance of that science by the general public has revolutionized society's view of disabilities. Indeed, the ADA is a culmination of ninety years of social change brought about by the advances in medical science as much as legislation. The integration of medical science into the fabric of our society has become pervasive. Decision-making based on medical science no longer carries, as it did for Mary Mallon, a "befuddlement [that] is one hallmark of a decisional process that can be described as Kafkaesque."[445]

The ADA, with the help of the AMA and the Supreme Court

442. Although rare, highly compensated employees in safety-sensitive industries, such as airline pilots, have rejected their employer's multi-stage medical review process to make offensive use of ADA litigation in the face of medical facts that suggest no reasonable medical professional would have returned them to work.

443. *See, e.g.*, 45 U.S.C. § 153 First (o), (p); 29 U.S.C. § 185(a).

444. For example, compare 45 U.S.C. § 153 First (g) with *Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 93 (1978) (review of arbitral awards rendered by system boards of adjustment under the Railway Labor Act).

445. Mashaw, *supra* note 399, at 175.

in *Arline*, defined generally the broad categories of medical-scientific considerations relevant to the question of whether an individual employee—such as a Mary Mallon—has a disability that poses a "direct threat" to health or safety. The ADA, however, does not provide a *process* appropriate to the undertaking demanded by the "direct threat" test. Instead, effectively by default, the statute left the issue of "direct threats" to the vicissitudes of a partisan litigation process. The results of doing so is revealed in the foregoing review of "direct threat" cases, which generally have fallen into two camps. On the one hand, some courts have been deferential to a single medical opinion obtained by an employer seeking to justify a safety-based disqualification or exclusion of an individual from employment. On the other hand, some courts have arrogated unto themselves a re-evaluation of medical issues to decide whether an individual poses a "direct threat." Neither approach is conducive to the values of predictability, transparency, or rationality that regulation of employment in safety-sensitive industries demands. Nor does entrustment of "direct threat" issues to civil juries hold any more promise of improved "direct threat" determinations. In fact, the judicial process is not the appropriate vehicle to answer the kinds of crucial questions posed about the "direct threat" test in Part I above: What kind of occurrence is a risk? What kind of risk is significant? What kinds of accommodations must be considered? How much risk must be eliminated for an accommodation to be reasonable? What kind of information is required to establish the answers to those questions? How should the analysis be affected by the nature of the employment involved and the magnitude of the harm should the risk eventuate?

Ultimately, these are not *legal* questions within the province of courts or juries. The courts do not have the medical or scientific competency to answer such questions in a systematic way. Instead, the "direct threat" standard leaves courts and juries to make medical judgments, which is unsatisfactory because, although they are "neutral arbiters," they are "generally less skilled in medicine than the experts involved."[446] At best, courts and juries must pick and choose among the competing medical opinions offered by parties in litigation.

446. Knapp v. Northwestern University, 101 F.3d 473, 485 (7th Cir. 1996).

This is exactly what the AMA in *Arline* stated was not to be the function of the courts. Moreover, the litigation process requires parties to "hire" medical professionals to support their respective positions. For plaintiffs who do not have the out-of-pocket resources to hire a medical professional with the required competency, or even to hire one at all, the judicial approach to "direct threat" assessments is likely not to work in their favor. Moreover, given the nature of litigation itself, the judicial approach is unlikely to provide effective consistency, continuity, and above all, accuracy in the regulation of employment in safety-sensitive industries.

The nature of the "direct threat" standard thus requires a different decision-making process. As the AMA envisioned when it proposed the *Arline* standard, the process must be focused on the determination of the medical issues at the heart of "direct threat" cases by medical professionals. It was certainly not the intent of the *Arline* supporters to have courts and juries hearing partisan arguments in acrimonious employment discrimination lawsuits where at best, the science used tends to be presented with an advocate's distortion, and, at worst, becomes science-for-hire.

The EEOC thus has a unique opportunity to advance disability rights law by ensuring that all applicants and employees challenged as "direct threats" get a full, fair, and *competent* hearing through "tripartite" medical review processes. Such processes were developed in safety-sensitive industries long before the advent of anti-discrimination laws.

A bold stroke by the EEOC is needed in the use of rule-making power and of partnership with affected constituencies in developing the necessary rules. That "bold stroke" is to designate the tripartite medical review process as the means by which "direct threat" determinations are made in safety-sensitive occupations and industries. Tripartite medical review commits "direct threat" decisions to medical professionals *chosen by the parties*. The EEOC can assure competency by establishing the minimum qualifications for the medical professionals who participate in the review process. The medical professionals who participate in the review process can be required to analyze fully each of the *Arline* factors and to provide detailed explanations for their determinations. Unlike litigation, tripartite medical review does not promote

seemingly endless proceedings.[447] It results in a final and binding determination made by a neutral, qualified medical professional whom each of the parties' chosen medical professionals select together.

No longer would individuals excluded as "direct threats" be left with no recourse other than expensive litigation before a judiciary often predisposed towards deference to any reasonable medical judgment. No longer would safety-sensitive employers responsible for the lives of co-workers and members of the public have to fear the unpredictability of litigation or the judicial re-evaluation of medical evidence. Working with leaders from government, regulators, management, labor, consumer, industry, and disability rights groups, the EEOC can implement industry-specific regulations that provide appropriate procedures for competent medical professionals to make "direct threat" determinations. The EEOC's regulations would remove the barriers created by the absence of a process suitable for analyzing "direct threat" issues. Employees and employers alike would have the benefit of an equally full and fair opportunity to test a safety-based medical disqualification by an employer or the employer's doctor. The ultimate policy of the "direct threat" test—to ensure individualized determinations based on the best available, most current objective medical and scientific evidence—cannot be realized other than through such a process. In the final analysis, those individuals who are wrongly perceived by employers or the public as "Typhoid Marys"—and the employees and the public who are entitled to protection from individuals who indeed are real "Typhoid Marys"—deserve nothing less.

447. *See, e.g.*, Boykins v. Fairfield Bd. of Educ., 492 F.2d 697, 698 (5th Cir. 1974); Trout v. Ball, 705 F. Supp. 705, 706 (D.D.C. 1989).