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# Employment Discrimination - Americans with Disabilities Act - Ninth Circuit Holds That the Direct Threat Defense Is Not Available When an Employee Poses a Threat to His Own Health or Safety - *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063 (9th Cir. 2000)

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EMPLOYMENT DISCRIMINATION—  
AMERICANS WITH DISABILITIES ACT—  
NINTH CIRCUIT HOLDS THAT THE  
DIRECT THREAT DEFENSE IS NOT  
AVAILABLE WHEN AN EMPLOYEE POSES  
A THREAT TO HIS OWN HEALTH OR  
SAFETY—*ECHAZABAL V. CHEVRON  
USA, INC.*, 226 F.3d 1063  
(9th Cir. 2000)

*Douglas C. Heuvel*

**T**HE Americans With Disabilities Act of 1990 (ADA) is a “national mandate” to eliminate discrimination against individuals with disabilities in “critical areas” of life such as employment.<sup>1</sup> While the ADA generally prohibits employers from making employment decisions based on an individual’s disability, employers are not prohibited from making an adverse employment decision when a disabled individual poses “a direct threat to the health or safety of other individuals in the workplace.”<sup>2</sup> In *Echazabal v. Chevron USA, Inc.*, the Ninth Circuit considered whether the “direct threat” defense is available to employers when employees, or prospective employees, “pose a direct threat to their own health or safety, but not to the health or safety of other persons in the workplace.”<sup>3</sup> The court correctly concluded that the ADA’s direct threat defense is not available to employers in that situation.<sup>4</sup> The court recognized that the language of the statute is unambiguous and “the direct threat defense plainly does not include threats to the disabled individual himself.”<sup>5</sup> In addition to giving a proper reading of the statutory language, *Echazabal* is in harmony with congressional intent. Overprotective and paternalistic attitudes toward disabled people are forms of discrimination in their own right. Had the court allowed employers to

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1. 42 U.S.C. § 12101 (1994).
  2. *Id.* at § 12113(b).
  3. 226 F.3d 1063, 1064 (9th Cir. 2000).
  4. *See id.*
  5. *Id.* at 1067.

protect employees from themselves, it would have been endorsing a form of discrimination that Congress intended to prohibit when it codified the ADA.<sup>6</sup>

In 1992, Mario Echazabal applied to work directly for Chevron in its El Segundo, California oil refinery. Echazabal had worked in the refinery since 1972 as an employee of multiple maintenance contractors.<sup>7</sup> Chevron extended Echazabal an offer for employment that was contingent on his passing a pre-employment physical examination given by a Chevron physician.<sup>8</sup> The results of a test conducted during the examination showed that Echazabal's liver was releasing enzymes at a higher rate than normal.<sup>9</sup> Fearing that Echazabal's liver would be damaged by exposure to chemicals used in the refinery, Chevron rescinded its offer of employment.<sup>10</sup>

Echazabal continued to work in the Chevron refinery as an employee for Irwin Industries, a maintenance contractor, until 1995 when he reapplied to work directly for Chevron.<sup>11</sup> Chevron once again made Echazabal an offer for employment that was contingent on his passing the physical. Again, the offer was rescinded for fear that Echazabal would suffer liver damage if he worked in the refinery.<sup>12</sup> After Chevron rescinded the offer for employment the second time, it requested that Irwin no longer use Echazabal in a position at the refinery where he would be exposed to chemicals and solvents.<sup>13</sup> Irwin complied with the request, and Echazabal lost his position at the Chevron Refinery.

Echazabal filed complaints with the Equal Employment Opportunity Commission (EEOC) and in state court, alleging that Chevron and Irwin had violated the ADA by discriminating against him on the basis of his disability.<sup>14</sup> The case was removed to federal court, and the United States District Court for the Central District of California entered summary judgment in favor of Chevron.<sup>15</sup>

The district court certified for appeal its grant of summary judgement,

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6. See 42 U.S.C. § 12101(a)(5) (1994) which lists "overprotective rules and policies" as forms of discrimination faced by individuals with disabilities.

7. *Echazabal*, 226 F.3d at 1065.

8. Before asking Echazabal to take the physical examination, Chevron had determined that Echazabal was otherwise qualified for the job for which he was applying. *Id.*

9. *Id.* Echazabal later consulted with a number of physicians and was diagnosed with asymptomatic chronic active hepatitis. However, none of the physicians that Echazabal saw concluded that he should discontinue working at the oil refinery. *Id.*

10. *Id.* Echazabal had applied to work in the coker unit at the refinery where he would have been exposed to hydrocarbon liquids and vapors, petroleum, solvents and oils. *Id.* at 1065, 1070.

11. *Id.* at 1065.

12. *Id.*

13. *Echazabal*, 226 F.3d at 1065.

14. Additionally, Echazabal claimed that Chevron had violated the Rehabilitation Act, California's Fair Employment and Housing Act, and intentionally interfered with his employment contract with Irwin. The district court granted Chevron's motion for summary judgement on these three issues, but the Ninth Circuit reversed the summary judgement on all three claims. *Id.* at 1065 n.1.

15. The district court denied Irwin's motion for summary judgement. *Id.* at 1065.

and Echazabal's appeal was heard by the Ninth Circuit.<sup>16</sup> After considering the "direct threat" defense Chevron offered as its reason for not hiring Echazabal, the court reversed the district court's grant of summary judgment on Echazabal's ADA claim.<sup>17</sup>

Writing for the court of appeals, Judge Reinhardt stated that in order to resolve the dispute concerning the scope of the "direct threat" defense, the language of the direct threat provision itself must first be considered.<sup>18</sup> The court initially needed to determine whether on its face the provision would permit Chevron to use the direct threat defense as a justification for not hiring Echazabal.<sup>19</sup>

According to the court, the "the plain language of the direct threat provision is dispositive" and "does not afford a defense on the basis that the performance of a job would pose a direct threat to an employee's (or prospective employee's) own health or safety."<sup>20</sup> The court, in order to rule out the possibility that a drafting error had been committed in limiting the direct threat defense to situations when the disabled employee is a threat to others, looked to support its interpretation of the defense provision by referencing the definitional section of the statute. The ADA defines "direct threat" as "*a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.*"<sup>21</sup> The court concluded that because the direct threat defense only refers to threats to others throughout the statute, the provision could not be read to include threats to the disabled individual himself.<sup>22</sup>

Judge Trott dissented.<sup>23</sup> He argued that Chevron was entitled to use the "direct threat" defense, and that the majority's holding was not in harmony with other circuits that have addressed the issue or with the EEOC regulations interpreting the ADA.<sup>24</sup> In *Moses v. American Nonwovens, Inc.*, the Eleventh Circuit stated that "[a]n employer may fire a disabled employee if the disability renders the employee a 'direct

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16. *Id.* at 1065 n.1.

17. *Id.* at 1065-70, 1072.

18. *Id.* at 1066.

19. The pertinent portion of the defenses section of the ADA reads:

(a) In general. It may be a defense to a charge of discrimination under this Act that an alleged application of qualification standards . . . that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this title.

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

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

20. *Echazabal*, 226 F.3d at 1070.

21. 42 U.S.C. § 12111(3) (1994) (emphasis added).

22. *Echazabal*, 226 F.3d at 1067.

23. *Id.* at 1073.

24. *Id.* at 1073-75. In addition to arguing that the "direct threat" defense was properly used by Chevron, Judge Trott would have affirmed the district court's holding because, in his opinion, Echazabal was not "otherwise qualified" for the position at the refinery.

threat' to his own health or safety."<sup>25</sup> The Eleventh Circuit court did not discuss how it came to this conclusion, but apparently it found that the EEOC regulations were controlling, or at least very persuasive.<sup>26</sup>

The EEOC regulations are clearly at odds with Ninth Circuit's decision in *Echazabal*.<sup>27</sup> The EEOC defines direct threat as "a significant risk of substantial *harm to the health or safety of the individual or others* that cannot be eliminated or reduced by reasonable accommodation."<sup>28</sup> The EEOC's discussion of the direct threat defense eliminates any possibility that its inclusion of "individual" in its definition was an oversight or unintended. The EEOC states:

An employer is also permitted to require that an individual not pose a direct threat of harm to his or her own safety or health. If performing the particular functions of a job would result in a high probability of substantial harm to the individual, the employer could reject or discharge the individual unless a reasonable accommodation that would not cause an undue hardship would avert the harm.<sup>29</sup>

*Echazabal* correctly relied on the plain language of the statute and rejected the EEOC's contrary interpretation of "direct threat." Not only was the court's decision correct, it was required by the United States Supreme Court which has held that "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."<sup>30</sup> The court's decision gives proper meaning to the statutory phrase "an individual shall not pose a direct threat to the health or safety of others."<sup>31</sup> Had the EEOC's interpretation been accepted, that phrase and others like it in the statute would have been rendered entirely meaningless.<sup>32</sup>

Although the Ninth Circuit concluded that the plain language of the statute was sufficient proof of Congress's intent,<sup>33</sup> the court wisely reinforced its holding by showing that the legislative history of the ADA sup-

25. 97 F.3d 446, 447 (11th Cir. 1996). In deciding *Echazabal*, the Ninth Circuit noted that its decision was not consistent with the holding of the Eleventh Circuit in *Moses* and recognized that other "cases do state, in passing dicta, that the direct threat defense includes threats to oneself." *Echazabal*, 226 F.3d at 1066 (citing *LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832 (11th Cir. 1998); *EEOC v. Amego, Inc.*, 110 F.3d 135 (1st Cir. 1997); *Daugherty v. City of El Paso*, 56 F.3d 695 (5th Cir. 1995)).

26. See *Moses*, 97 F.3d at 447. To support its conclusion that the direct threat defense is available when a disabled employee is a threat to himself, the court cited to 42 U.S.C. §§ 12113(a), (b) (1994) (which on its face would not seem to support its conclusion), and to 29 C.F.R. § 1630.2(r) (1999) (which is in harmony with the court's holding).

27. The Ninth Circuit invited the EEOC to file a brief commenting on its regulatory interpretation of the direct threat defense, but the EEOC declined. *Echazabal*, 226 F.3d at 1069 n.7.

28. 29 C.F.R. § 1630.2(r) (1999) (emphasis added). Chevron argued that the Ninth Circuit should defer to the EEOC's definition of direct threat, but the court found the argument unpersuasive. See *Echazabal*, 226 F.3d at 1069.

29. 29 C.F.R. § 1630, app. § 1630.2(r) (1999).

30. *Echazabal*, 226 F.3d at 1069 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984)).

31. 42 U.S.C. § 12113(b) (1994).

32. See *Kohnke v. Delta Airlines, Inc.*, 932 F. Supp. 1110, 1111-12 (N.D. Ill. 1996).

33. *Echazabal*, 226 F.3d at 1067.

ports the position that the direct threat defense is not available when an employee is only a threat to himself.<sup>34</sup> A statement made by Senator Kennedy, a co-sponsor of the ADA, makes clear that Congress discussed and ultimately dismissed the idea that the direct threat defense should be available when a disabled employee is a threat to his own safety. Senator Kennedy stated: "It is important, however, that the ADA specifically refers to health and safety threats to others. Under the ADA, employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health."<sup>35</sup> By using legislative history to bolster its already solid conclusion, the court has set an exceedingly persuasive precedent that will be difficult for courts to distinguish when addressing this issue in the future.

Throughout *Echazabal*, the court remains focused on letting the unambiguous language of the ADA guide its responses to the arguments made by Chevron. Chevron suggested that the court should ignore legislative intent because forcing employers to hire or maintain employees who pose a risk to their own safety would expose employers to costly tort liability.<sup>36</sup> Even though this question was not properly before the court and did not need to be addressed,<sup>37</sup> the court used statutory language to refute Chevron's suggestion and expand the scope of its holding. The court held that "[t]he extra cost of employing disabled individuals does not in itself provide an affirmative defense to a discriminatory refusal to hire those individuals,"<sup>38</sup> and that the ADA requires "employers to accommodate disabled individuals, even when those accommodations impose additional costs."<sup>39</sup>

While the Ninth Circuit's holding on the scope of the direct threat defense is solidly supported by the language of the statute and the legislative history of the ADA, it may be possible for employers "to side step this issue by making personal safety an essential function of the job."<sup>40</sup> The ADA protects from discrimination only a person who is a "qualified individual" with a disability,<sup>41</sup> which is someone who "can perform the essential functions of the employment position that such individual holds or desires."<sup>42</sup> Chevron argued on appeal that an essential function of the

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34. *Id.* at 1067-69.

35. *Id.* at 1067-68 (citing 136 Cong. Rec. S9684-03, at S9697 (1990)).

36. *Id.* at 1069-70.

37. *Id.* at 1070. The court stated that "[b]ecause Chevron has not argued that it faces any costs from tort liability, this question is not properly before us." *Id.*

38. *Id.*

39. *Echazabal*, 226 F.3d at 1070 (citing 42 U.S.C. § 12112(b)(5)(A) (1994)). The court recognized that the statute does not require an employer to absorb additional costs imposed by employing a disabled worker if the employer could show that the cost of accommodating that employee would impose an undue hardship on the operation of the business. *Id.*

40. *Employment Discrimination—Disability: Rejection of 'Direct Threat' Defense Changes ADA Playing Field, Attorneys Assert*, 68 U.S.L.W. 2781 (June 27, 2000) [hereinafter *Employment Discrimination*].

41. 42 U.S.C. § 12112(a) (1994).

42. 42 U.S.C. § 12111(8) (1994). In determining what an essential function of a job is, the statute gives consideration to the "employer's judgement." *Id.*

job Echazabal had applied for was to be able to perform the work "without posing a threat to one's own health or safety."<sup>43</sup> The court rejected Chevron's assertion that this was an essential job function, as Chevron failed to contend that the risk Echazabal was facing would affect his ability to perform actual job duties.<sup>44</sup> The court stated that even had Chevron argued that the risk would have rendered Echazabal unable to perform, they would not have accepted such an argument "in this case."<sup>45</sup> However, the court stopped short of saying that such an argument would never be persuasive.

By giving the appropriate meaning to the language of the ADA, and by respecting the intentions of Congress, the Ninth Circuit has put employers on notice that paternalistic attitudes towards disabled workers and job applicants will not be tolerated.<sup>46</sup> Employers, who in the past have dismissed or refused to hire disabled workers who pose a threat to their own health or safety, will be forced to rethink their employment policies. Rather than thinking for the employee, employers will have either to defer to the disabled employee's own judgement or work with the employee to develop an employment relationship that is mutually beneficial.<sup>47</sup>

In *Echazabal*, the Ninth Circuit took great strides towards eradicating a specific form of discrimination that the ADA was designed to eliminate. Other courts would be well advised to follow the Ninth Circuit's lead, and when they do, the purpose of the ADA, "the elimination of discrimination against individuals with disabilities,"<sup>48</sup> will be closer to being achieved.

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43. *Echazabal*, 226 F.3d at 1070.

44. *Id.* at 1070, 1072.

45. *Id.* at 1072.

46. *See id.* at 1072.

47. As one attorney noted, "nothing is stopping an employer from making the worker aware of the risks presented by a certain position . . . the employer may want to make the individual aware of alternative jobs that pose less of a safety and health risk." *Employment Discrimination*, *supra* note 38, at 2781.

48. 42 U.S.C. § 12101(b)(1) (1994).