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THE PROPER STANDARD FOR RISK OF FUTURE INJURY UNDER THE AMERICANS WITH DISABILITIES ACT: RISK TO SELF OR RISK TO OTHERS

Bryan P. Neal

I. INTRODUCTION

On July 26, 1992, the initial employment provisions of the Americans With Disabilities Act of 1990 (ADA) became effective. The ADA protects individuals with disabilities from discrimination in employment, public services, public accommodations, and telecommunications. The employment provisions of the ADA provide a cause of action to qualified individuals with disabilities who have been discriminated against in employment decisions because of their disability. To be qualified, an individual must be able to perform the essential functions of the position in question.

2. Id. § 12111(5)(A). July 26, 1992 marked the implementation of the first phase of the ADA employment provisions in which employers with 25 or more employees are covered. Id. On July 26, 1994, the law will become effective for employers with 15 or more employees. Id.
3. Under the ADA, a “disability” means, “with respect to an individual—(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” Id. § 12102(2).
4. The term “qualified individual with a disability” means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For purposes of this title, consideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job. Id. § 12111(8).
5. The ADA provides: “No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” Id. See generally Kim F. Ebert and Joseph M. Perkins, Jr., New Era of Employment Litigation: Overview of the Americans with Disabilities Act, 34 Res Gestae 318, 318 (1991).
Employers facing ADA claims have several potential defenses. At the outset, an employer may claim that an employee (or applicant) is not qualified, that is, he or she cannot perform the essential functions of the position. Related to this position is the undue hardship defense. The ADA requires employers to provide reasonable accommodation to disabled persons, unless doing so would be an undue hardship. An employer may claim that the disabled person can only perform the essential functions of the job if provided an accommodation, but that requiring the employer to provide the particular accommodation needed would pose an undue hardship. An employer may also assert a business necessity defense. Under this defense, the employer must show that standards or selection criteria that tend to screen out disabled persons are “job-related and consistent with business necessity.”

An additional defense available to employers is based on safety concerns. In some situations, a disabled individual who is fully capable of performing the essential functions of a job will pose a risk to others or to the individual if allowed to interact in the workplace. Under previous legislation this situation has given rise to what has been termed the “safety defense.”

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8. According to the ADA, a “reasonable accommodation” may include:
   (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
   (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.
9. Id. § 12112(b)(5)(A). An “undue hardship” is defined as:
   (A) . . . [A]n action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).
   (B) . . . In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—
      (i) the nature and cost of the accommodation needed under this chapter;
      (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
      (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
      (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.
This Comment examines the safety defense in the context of determining which of two standards should be applied when the defense is invoked. Should the standard be only one of “risk to others” where an employer will have as a defense the fact that the applicant/employee poses a risk of injury to other individuals? Or, should the standard further include a “risk-to-self” aspect where an employer will have as a defense the fact that the applicant/employee poses a risk of injury to himself or herself? The response to these questions will determine whether an employer will be able to terminate an employee or refuse to hire an applicant because that person may injure himself or herself at some point in the future.

The Equal Employment Opportunity Commission (EEOC) has adopted the “risk-to-self” standard in implementing regulations for the ADA.13 This Comment argues that the risk-to-self standard is the incorrect standard for the safety defense. This position is supported primarily by an analysis of the ADA and its legislative history as well as the Rehabilitation Act of 1973.14 Additional support is provided by an examination of safety-related cases decided under Title VII of the Civil Rights Act of 1964,15 and the Age Discrimination in Employment Act of 1967.16 This Comment concludes that the EEOC position should change or, in the alternative, that courts should refuse to follow the regulations, choosing instead to adhere to the principles behind the plain language of the ADA.

II. EEOC REGULATIONS

The EEOC is authorized to issue regulations for implementing and enforcing the ADA.17 The EEOC’s rules were promulgated in June of 1991.18 According to the EEOC, a valid defense may be that a qualification standard that reduces, eliminates, or has a tendency to reduce or eliminate job opportunities of persons with disabilities is “job-related and consistent with business necessity” and cannot be met notwithstanding the employer’s reasonable accommodation.19 A “qualification standard” may include a requirement that an individual shall not pose a direct threat to the health or

13. 29 C.F.R. § 1630 (1992). As discussed below, the EEOC takes the position that the proper standard is one of risk-to-others and risk-to-self. See infra part II. The EEOC claims that its position is supported by “the legislative history of the ADA and the case law interpreting section 504 of the Rehabilitation Act [of 1973].” Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,726, 35,730 (1991) [hereinafter EEOC Final Rule] (includes comments and interpretive material of EEOC).
safety of the individual or others in the workplace." Therefore, in order for an employer to successfully maintain this defense, it must demonstrate that the applicant or employee in question fails to meet a "qualification standard." This qualification standard must be imposed by the employer to exclude from employment any applicant or employee who would pose a "direct threat" to the safety of the individual or to others in the workplace. Furthermore, the qualification standard must be "job-related and consistent with business necessity" and unable to be met by an employee even after reasonable accommodation is provided.

Allowing an employer to discriminate against persons who would pose a direct threat of harm to fellow employees is not controversial and no courts have found it inappropriate. Rather, the trouble with the regulations lies in their inclusion of the risk-to-self standard. As will be discussed in more detail, neither the language of the ADA nor its legislative history justifies allowing employers to use risk to self as a defense. Furthermore, there are

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20. Id. § 1630.15(b)(2) (emphasis added). A "direct threat" is defined 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.

The determination that an individual poses a 'direct threat' shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

1. The duration of the risk;
2. The nature and severity of the potential harm;
3. The likelihood that the potential harm will occur; and
4. The imminence of the potential harm.

21. It is interesting to note that in the proposed regulations, the discussion of a qualification standard precluding a direct threat was contained in the general discussion of qualification standards rather than under the employer's defenses. Proposed Regulations, supra note 18, at 8590. This was construed by some disability groups to mean that the plaintiff would be required to demonstrate that he or she did not pose a direct threat as part of the plaintiff's case in chief. EEOC Final Rule, supra note 13, at 35,731. To avoid this confusion, EEOC moved the reference to the defense portion consistent with its location in the ADA. Id.

22. While there are disagreements among courts over the particular degree of risk that must be shown, there is apparently no opposition to the risk-to-others standard. On the contrary, the development of law concerning communicable diseases demonstrates complete acceptance of a risk-to-others standard. For example, the ADA provides:

In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food . . . and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.


Also, the communicable disease cases clearly demonstrate that courts, including the Supreme Court, wholeheartedly accept a risk-to-others standard. See School Bd. v. Arline, 480 U.S. 273 (1987) (examining employment protection of tuberculosis infected teacher under the Rehabilitation Act of 1973 in the context of the teacher's risk to others with whom she was likely to come in contact). See infra part IV.B.3.b. Finally, there are compelling policy reasons to embrace a risk-to-others standard. Perhaps the most compelling is society's interest in protecting innocent and disinterested parties. This interest seems to clearly justify allowing an employer to refuse to hire anyone—not just a disabled person—who poses a substantial risk of harm to a customer or co-worker.
many convincing policy arguments against a risk-to-self standard and the
few policy arguments in favor of the standard can be thoroughly refuted.

After the EEOC’s proposed rule was published, disability groups com-
plained that a direct threat should not include any reference to the dis-
abled individual’s health or safety because such a standard would result in de-
cisions “based on negative stereotypes and paternalistic views about what is
best for individuals with disabilities.” 23 While the EEOC acknowledged and
attempted to manage the problem of negative stereotype based decisions, 24 it
completely failed to address the problem of the paternalistic nature of the
regulations. On the contrary, the EEOC has adopted a regulation that ex-
cedes its authority and should, therefore, be rejected by the courts.

While considerable weight is given to an agency’s interpretation of a stat-
ute, 25 “[t]he judiciary is the final authority on issues of statutory construc-
tion and must reject administrative constructions which are contrary to clear
congressional intent.” 26 In Espinoza v. Farah Manufacturing Co. 27 Justice
Marshall, speaking for the Court, stated that “[c]ourts need not defer to an

23. EEOC Final Rule, supra note 13, at 35,730. In the alternative, disability groups asked
EEOC to at least clarify that the “assessment of risk must be based on the individual’s present
condition and not on speculation about the individual’s future condition.” Id.

24. See id. In response to the fears about decisions being made based on negative stereo-
types, the EEOC made changes in five areas. First, the EEOC added language to the definition
of direct threat to indicate that while there is a threshold level of risk beyond which one may
not advance, the risk does not have to be eliminated, just reduced to a level below that thresh-
old. Id. at 35,736, 35,739.

Second, the EEOC amended its interpretive comments “to highlight the individualized na-
ture of the direct threat assessment.” Id. at 35,730. In doing so, the EEOC clarified that medical
evidence is not the only relevant evidence to the determination of the existence of a
direct threat. On the contrary, relevant evidence will include “input from the individual with a
disability, the experience of the individual with a disability in previous similar positions” and
various opinions of disability experts. Id. at 35,745.

Third, the EEOC clarified that the decision as to the existence of a direct threat is to be
based on the “individual’s present ability to safely perform the essential functions of the job.”
Id. at 35,730, 35,736 (emphasis added). Thus, an employer appears to be precluded from
considering the future ability that the employee, while fully able to perform the job at the time of
hiring, may be unable to do so even in the near future.

Fourth, the EEOC also amended the definition of direct threat, adding “[t]he imminence of
the potential harm” to the factors to be considered. Id. at 35,730, 35,736. It is not clear,
however, how much actual difference there is between the third factor—the likelihood of the
potential harm occurring—and the imminence of the potential harm.

Fifth, the EEOC also emphasized in its interpretive comments that the direct threat defini-
tion applies to all persons, not just disabled individuals. Id. at 35,730, 35,745. With regard to
this aspect, the reasoning is unclear because it is difficult to conceive of a risk to self existing
absent a disability. See supra note 3 for the broad definitions of disability under the ADA. In
other words, this aspect is probably mere rhetoric because a situation in which a non-disabled
individual poses such a risk to himself or herself is highly unlikely to ever arise. Of course,
there may be certain jobs where such a risk is inherent no matter what the physical capabilities
of the employees. In this situation, the mandate of equal application would prevent the em-
ployer from imposing anything other than a risk-to-self qualification standard since the em-
ployer would be required to apply it to all applicants. Consequently the employer would never
find a qualified person for the position.

(1984); see also Russell L. Weaver, Challenging Regulatory Interpretations, 23 Ariz. St. L.J.
109 (1991) (discussing various mechanisms used to challenge agency regulations).


administrative construction of a statute where there are 'compelling indications that it is wrong.'

The Court subsequently refused to follow EEOC regulations in *General Electric, Inc. v. Gilbert.* Thus, while it is general practice for courts to follow agency regulations, they are required to adhere to congressional intent on the issue to be decided.

The current test for determining the validity of an agency's interpretation of a statute is stated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, and was recently reaffirmed in *Rust v. Sullivan.* Under the *Chevron* test, the court asks two questions. First, the court determines whether Congress has spoken on the "precise question at issue." If Congress has addressed the specific issue at hand, then the inquiry is completed and both the court and the agency are required to adhere to that intent. If the statute is silent or ambiguous as to the determination of the issue, however, the court moves to the second question, which is whether the agency's interpretation is based on a permissible, or reasonable, interpretation.

An examination of the plain language and legislative history of the ADA shows that Congress has spoken on the precise issue at hand in this case: whether the safety threat discussed in the statute includes a risk-to-self standard. Even if a court were to find that the ADA was ambiguous on this point, the analysis will show that the EEOC interpretation is not a permissible or reasonable one and must fail under the second question. Therefore, under *Chevron* and *Rust*, courts will be required to reject the EEOC's interpretation of this aspect of the ADA.

III. LANGUAGE AND LEGISLATIVE HISTORY OF ADA

In examining the validity of the standard, the obvious starting point is the language and legislative history of the ADA itself. An examination of the relevant sections and legislative history of the ADA leads to the conclusion that the ADA was not intended to allow employers to use risk to self as a defense. On the contrary, the language and legislative history of the ADA demonstrate that the statute does indeed operate "on the premise that an individual with a disability, when fully apprised of a potential risk [where] the risk is only of future harm to herself, is capable of deciding for herself..."
whether or not to submit to the risk.”

Section 103 of the ADA, concerning defenses to a charge of discrimination, makes it clear that an employer may impose qualification standards related to safety. Under this provision, “[t]he 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.” Recall, however, that the EEOC's statement of the defense includes approval for “a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others.”

The ADA's definition of direct threat in section 101 is "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." Likewise, this should be compared to the EEOC's statement of the definition as the risk applying to "the [disabled] individual or others." Comparing the language of the statute to that used by the EEOC strongly supports the notion that the safety defense was intended to apply only in the context of a risk to others. Congress must have been aware of the obvious differences between standards of risk-to-self and risk-to-others and yet, Congress explicitly referred only to other individuals.

Had Congress intended the safety defense to include a risk-to-self standard, it would have added the few words necessary to make that intention clear.

The legislative history of the ADA also supports the argument that the risk-to-self standard is improper. The report from the House Committee on Education and Labor states that it is acceptable for an employer to “deny

36. 42 U.S.C.A. § 12113(b) (emphasis added). Section 103 also provides that for a qualification standard to be a valid defense, it must be "job-related and consistent with business necessity," and cannot be met notwithstanding reasonable accommodation by the employer. Id. § 12113(a). This aspect of the regulations is consistent with the statute.
37. 29 C.F.R. § 1630.15(b)(2) (emphasis added).
38. 42 U.S.C.A. § 12111(3) (emphasis added).
39. 29 C.F.R. § 1630.2(r).
40. 42 U.S.C.A. § 12113(b).
employment to an applicant or to fire an employee with a disability on the basis that the individual poses a direct threat to the health or safety of others or poses a direct threat to property.\footnote{Id. at 1. Because the focus of this Comment is on the ADA's application in the employment context, the Report of the Committee on Education and Labor is discussed as the primary source of legislative history from the House.}

Moreover, the underlying theme throughout both the House Labor Report and the Senate Labor Report, as well as the statute, is that a standard that excludes or tends to exclude disabled persons is only legitimate if it is job-related and consistent with business necessity.\footnote{42. HOUSE LABOR REPORT, supra note 41, at 56; see SENATE LABOR REPORT, supra note 41, at 27. Note that this reference to a direct threat to property did not appear in the final language of the ADA. 42 U.S.C.A. § 12113 (b). However, its presence provides the opportunity for a court to interpret the term “others” to include the property of others. This reference to damage to property tends to discredit the following example of an application of the risk-to-self standard offered by the EEOC:}

\begin{quote}
[A]n employer would not be required to hire an individual, disabled by narcolepsy, who frequently and unexpectedly loses consciousness for a carpentry job the essential functions of which require the use of power saws and other dangerous equipment, where no accommodation exists that will reduce or eliminate the risk.
\end{quote}

\footnote{EEOC Final Rule, supra note 13, at 35,745. In such a situation, it is a safe assumption that the possibility is just as high that damage will be done to other persons, including the property of other persons, in the workplace as to the disabled individual. Therefore, such a situation could be precluded based on the risk of harm to others, thus rendering the risk-to-self standard unnecessary in that context.}

This factor makes it clear that a risk-of-self defense could not have been intended, because such a standard could not meet the business necessity test and, at the same time, abide by other statutory limits on the employer.

The risk-to-self standard is consistent with business necessity only when it is invoked for financial reasons. This could arise in one of two situations. First, the failure to use a risk-to-self standard could result in increased insurance cost to the employer. Second, the failure to use a risk-to-self standard could lead to increased employment costs in hiring and training replacement employees to perform the job on which the disabled person was injured.

Although it is conceivable that one or both of these situations may arise, the ADA and the regulations appear to foreclose any possibility of either situation causing legitimate employer concerns in the context of an employer deciding whether or not to hire a disabled person. With regard to increased insurance costs, the EEOC stated that the determination of whether one is qualified is to be made without concern for a potential of increased health

\footnote{43. See HOUSE LABOR REPORT, supra note 41, at 71; see SENATE LABOR REPORT, supra note 41, at 37. Note also that the “exception to the general rule [against medical examinations] meets the employer's need to discover possible disabilities that do, in fact, limit the person’s ability to do the job, i.e., those that are job-related and consistent with business necessity.” HOUSE LABOR REPORT, supra note 41, at 73 (emphasis added); see SENATE LABOR REPORT, supra note 41, at 39.}
insurance costs. Furthermore, the House Labor Report emphasized that "an employer could not deny a qualified applicant a job . . . because of the increased costs of the insurance."

Consideration of the costs that may result from a currently qualified employee's inability to perform at some point in the future also appears to be prohibited under the ADA. The EEOC stated that the determination of whether one is qualified "should not be based on speculation that the employee may become unable in the future." Again, the House Labor Report supports this statement. "The term 'qualified' refers to whether the individual is qualified at the time of the job action in question; the possibility of future incapacity does not by itself render the person not qualified."

Therefore, the ADA forecloses consideration of the only two factors that could make a risk-to-self standard job-related and consistent with business necessity. Consequently, the risk-to-self standard would be incorrect even if the EEOC definitions of direct threat and qualification standard were correct.

Moreover, absent these two justifications, the only remaining theoretical ground for an employer to espouse a risk-to-self standard is a general concern and benevolence for the applicant, a person who, prior to submitting an application for employment, will often be completely unknown to the employer. Of course, this same situation could arise where an existing employee is injured and returns to work disabled. In that case, the employee will be known to the employer. It is questionable whether most businesses have any interest or concern in applicants or employees beyond the financial aspects already discussed. While there may be particular persons acting in supervisory roles for the business who do have a genuine concern, the business as an entity presumably exists for profit and does not need to be concerned that an employee is injured, except insofar as potential financial liability could result. Giving employers the benefit of the doubt, assume that the business is truly interested in the welfare and health of employees, an assumption that may well be true for many employers. This genuine concern does not alter the impropriety of the risk-to-self standard because the decision of whether to accept risks involved with a job is one that is properly made by the disabled individual.

By permitting an employer to use a risk-to-self standard to exclude dis-

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44. EEOC Final Rule, supra note 13, at 35,743. As to specific costs of workers' compensation and direct employer liability, see infra part VII.
45. House Labor Report, supra note 41, at 136; see also Senate Labor Report, supra note 41, at 85. It may be argued that this refers only to the general increase in insurance rates that is likely to result when disabled persons are employed and not to a specific increase in insurance rates, especially workers' compensation rates, that may result after a claim is filed. However, there does not appear to be any basis for making such a distinction.
46. EEOC Final Rule, supra note 13, at 35,743.
47. House Labor Report, supra note 41, at 55; see also Senate Labor Report, supra note 41, at 26.
48. Cost is, however, a proper consideration in the determination of whether a reasonable accommodation imposes an undue hardship on an employer. Crespi, supra note 9, at 823.
49. See Burnwell v. Eastern Airlines, 633 F.2d 361 (4th Cir. 1980), cert. denied, 450 U.S. 965 (1981). "If . . . personal compassion can be attributed to corporate policy it is commend-
abled individuals, the EEOC allows an employer to circumvent the statute. In claiming a benevolent concern for applicants, an employer is allowed to achieve goals indirectly that the statute prohibits: consideration of increases in insurance rates and future inability to perform the job. An employer is permitted to substitute the business’ risk aversion for that of a disabled employee who is probably less risk averse because he or she is accustomed to the increased risk concomitant with a particular disability. In doing so, the employer is most likely concerned about the effect that a person’s potential injuries could have on the business vis-a-vis insurance or tort liability rather than about the injuries per se. Thus, the EEOC permits employers to evade the dictates of the ADA.

The House Labor Report also states that “[a] physical or mental employment criterion can be used to disqualify a person with a disability only if [it] has a direct impact on the ability of the person to do their actual job duties without imminent substantial threat of harm.”50 This statement follows the statement that “[p]aternalism is perhaps the most pervasive form of discrimination for people with disabilities and has been a major barrier to such individuals.”51 Because these two statements appear together, it could be argued that the word “harm” includes harm to the disabled individual.

If these two sentences are read in isolation from the full text, this argument appears to have merit. But, when they are read in context, and in conjunction with the statute, it becomes clear that the word “harm” is intended to refer to harm to others. The more logical reading is that harm is a reference to aspects other than personal harm, specifically, the explicitly mentioned harm to others or harm to property. If the Committee had intended the word “harm” to refer to harm to oneself, it could have easily stated “harm to the individual” instead of merely “harm.” Moreover, any inferences that could be drawn from these statements read in isolation are refuted by the explicit reference in the ADA to risk to others, as well as other statements in the legislative history that foreclose use of a risk-to-self standard.52

Further support for the congressional position against a risk-to-self standard is found in the floor debates. A statement by Senator Kennedy, a co-sponsor of the Senate bill, makes clear that the direct threat standard is not meant to provide employers with a risk-to-self defense. Kennedy stated:

The ADA provides that a valid qualification standard is that a person not pose a direct threat to the health or safety of other individuals in the workplace—that is, to other coworkers or customers. A specific decision was made to state clearly in the statute that, as a defense, an em-

50. HOUSE LABOR REPORT, supra note 41, at 74.
51. Id.
52. It does appear that the Committee would allow the exclusion of individuals based on risks to their own safety when the employer is otherwise required to follow health standards set out by other statutes enacted for the protection of employees. See HOUSE LABOR REPORT, supra note 41, at 74 (reference to the OSHA lead standard). However, this does not weaken the argument against a risk-to-self standard since it is not explicitly provided for in the ADA.
ployer could prove that an applicant or employee posed a significant risk to the health or safety of others, which could not be eliminated by reasonable accommodation. . . . 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. For example, an employer could not use as an excuse for not hiring a person with HIV disease the claim that the employer was simply “protecting the individual” from opportunistic diseases to which the individual might be exposed. That is a concern that should rightfully be dealt with by the individual, in consultation with his or her private physician. 53

There is no statement to the contrary in the record either prior or subsequent to Kennedy’s statement. This further supports the position that Congress intended to provide employers with a direct threat defense based on risk to others but not on risk to self.

In conclusion, the language and legislative history together do not support, and in fact prohibit, use of a risk-to-self standard. The statute explicitly mentions a risk to others but does not mention a risk to self. The legislative history, while not as clear, also fails to mention a risk-to-self defense. The risk-to-self standard conflicts with the structure and spirit of the ADA. The plain language of the statute, the legislative history, and common sense permit only one reasonable construction: risk to self is not a valid defense.

IV. REHABILITATION ACT OF 1973

A. RELEVANCE OF REHABILITATION ACT TO THIS ANALYSIS

The Rehabilitation Act of 197354 provides protection to “handicapped”55 individuals in various situations. Section 501(b) requires federal agencies to promulgate and maintain affirmative action plans for the hiring of handicapped persons. 56 Section 503(a) requires most federal contractors to take


In addition to the federal protection of the disabled, various states have enacted laws prohibiting discrimination on the basis of a persons status as disabled. Carey, supra note 11, at 395; BRUCE D. SALES ET AL., DISABLED PERSONS AND THE LAW, 1 LAW, SOCIETY, AND POLICY, 158-62 (Joel Feinberg et al. eds., 1982).

55. The Rehabilitation Act uses terminology regarding “handicapped” individuals throughout. The term “disability” in the ADA is intended to be comparable to the term “handicap” in the the Rehabilitation Act. HOUSE LABOR REPORT, supra note 41, at 50. The use of disability rather than handicap “represents an effort . . . to make use of up-to-date, currently accepted terminology.” SENATE LABOR REPORT, supra note 41, at 21.

56. 29 U.S.C.A. § 791(b) (West Supp. 1992). Section 501(b) provides in part: “Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate commission) in the executive branch shall . . . submit . . . an affirmative action program plan for the hiring, placement, and advancement of individuals with handicaps in such department, agency, or instrumentality.” Id.
affirmative action to hire handicapped persons.\textsuperscript{57} Section 504(a) prohibits discrimination against handicapped persons in employment decisions by programs or activities receiving federal financial assistance or conducted by an executive agency or the postal service.\textsuperscript{58} Despite minor differences in language, the ADA covers the same individuals that are covered under the Rehabilitation Act, but expands the scope of employers covered.\textsuperscript{59} The Rehabilitation Act protects "handicapped" persons, while the ADA protects "disabled" persons. The definitions of these persons are almost identical.\textsuperscript{60} The major difference between the Rehabilitation Act and the ADA, with regard to employment, is the scope of employers covered by each statute. Indeed, "[t]he overall effect of the ADA's employment-related provisions is to extend and amplify the nondiscrimination protections which were previously only available [to some] under the Rehabilitation Act of 1973."\textsuperscript{61}

\textsuperscript{57} Id. § 793(a). Section 503(a) provides:
Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified individuals with handicaps as defined in section 706(7) of this title. The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction for the United States).

\textsuperscript{58} Id. § 794(a). Section 504(a) provides:
No otherwise qualified individuals with handicaps in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

\textsuperscript{59} The nondiscrimination provision of ADA is most similar to section 504(a). Section 102(a) of the ADA provides:
No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

\textsuperscript{60} A "disabled" person under the ADA is one who has (i) "a physical or mental impairment that substantially limits one or more of the major life activities of such individual;" (ii) "a record of such an impairment;" or (iii) one who is "regarded as having such an impairment." 42 U.S.C.A. § 12102(2) (West Supp. 1992). Under the Rehabilitation Act, a handicapped person is one who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(8)(B) (1988).

\textsuperscript{61} RESEARCH INSTITUTE OF AMERICA, supra note 59, ¶ 101 at 3. See HOUSE LABOR REPORT, supra note 41, at 23 (noting that "[t]he ADA incorporates many of the standards of
In addition to claiming support in the legislative history of the ADA, the EEOC claims that a risk-to-self standard is supported by "the case law interpreting section 504 of the Rehabilitation Act [of 1973]." Therefore, the next logical area of law to examine is the Rehabilitation Act of 1973. This examination will show that the law concerning the proper standard is conflicting.

### B. Rehabilitation Act Case Law

1. **Introduction**

   As previously noted, section 504 is the provision of the Rehabilitation Act most similar to the employment aspects of the ADA. Therefore, section 504 will be the primary topic of consideration within the discussion of the Rehabilitation Act. The safety defense arises under the "otherwise qualified" prong of the Rehabilitation Act. This aspect of the safety defense appears not to have changed under the ADA. Since the defense is a claim that a disabled person fails to meet a qualification standard established by an employer, the defense is an assertion that one is not qualified to perform the job. Because the defense is likely to be one portion of the qualification determination, it may be helpful to consider the basic meaning of "otherwise qualified" under the Rehabilitation Act.

2. **Otherwise Qualified**

   The Supreme Court defined "otherwise qualified" in *Southeastern Community College v. Davis*, the first case in which the Court interpreted section 504. The case involved a hearing impaired plaintiff's attempt to be admitted to a registered nurse program at Southeastern Community College. She had been rejected by Southeastern for the stated reason that she was not otherwise qualified.

   - *Southeastern Community College v. Davis* involved a hearing impaired plaintiff's attempt to be admitted to a registered nurse program at Southeastern Community College. She had been rejected by Southeastern for the stated reason that she was not otherwise qualified.


   - *Richards*, supra note 54, at 24-25 (discussing the safety issue under heading regarding otherwise qualified).


   - Although, as previously discussed, lack of risk to self or others is not an aspect of being qualified that the plaintiff will have to prove as part of his or her case. See *supra* note 21 (concerning the placement of the "qualification standard" discussion under defenses by the statute and later the EEOC).


   - Id. at 405.
The Court affirmed the district court's ruling that Davis was not qualified, stating that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." The Court indicated that there are two aspects to the notion of being otherwise qualified. First, a person must be able to meet a program's "technical standards," meaning those "essential to participation." Second, and actually a part of the first, the plaintiff must meet any "legitimate physical qualifications" that are "essential to participation." Davis was disqualified on this second prong since she could not perform the duties of the program and still insure patient safety.

The problem with the Court's definition of "otherwise qualified" is twofold. First, the term is inherently ambiguous. The term could mean, as the Court asserted, that a person must be qualified notwithstanding his or her handicap. Alternatively, the term could mean that a person is qualified except for those limits imposed by the disability itself, as the court of appeals maintained. There is no real reason for deciding that one interpretation is more "correct" than the other.

Second, if the Court's definition ("able to meet all of a program's requirements in spite of [the] handicap") were read literally, it would mean that one must meet a program's requirements, regardless of the usefulness or the arbitrary nature of such requirements. The remaining text of the opinion demonstrates, however, that the requirement is actually that one must be "able to meet all the reasonable (and thus nondiscriminatory) physical and mental requirements of a program in spite of [the] handicap." These issues

68. Id. at 401-02.
69. Id. at 406.
70. Id. at 407.
71. 442 U.S. at 407.
72. Id. at 409. Much of the debate in Davis concerned what, if any, accommodation the Rehabilitation Act required the college to provide Davis. If the Act required an accommodation, then she may have been qualified once that accommodation was factored in. If the Act did not require an accommodation, then whether she would have been qualified with an accommodation was irrelevant. The court held that the only accommodation that would render Davis qualified would require a "fundamental alteration in the nature of [the] program" and thus was not required. Id. at 410.
74. See 442 U.S. at 406.
75. Id.
76. See Richards, supra note 54, at 22.
77. Id. As Richards points out, this reading was confirmed by the Supreme Court in Alexander v. Choate, 469 U.S. 287 (1985), where the Court stated: "Davis thus struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones."

Id. at 300.

A subsequent Fifth Circuit case summarizes the effect of Alexander well. After Alexander it is clear that the phrase 'otherwise qualified' has a paradoxical quality; on the one hand, it refers to a person who has the abilities or characteristics sought by the grantee; but on the other, it cannot refer only to those al-
RISK OF FUTURE INJURY

have apparently been settled under the ADA. Section 101(8) defines a “qualified individual with a disability” as one who “with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” Thus, the Davis holding survives, though whether one meets the program’s requirements will be considered in light of any reasonable accommodation that can be provided to the plaintiff.

3. Standard Under the Rehabilitation Act Case Law

Determining the proper standard under the Rehabilitation Act is quite difficult. In short, different courts adopt different standards. Therefore, while these cases are certainly not irrelevant, there is no one discernible rule that can be derived so that one arguing for or against any particular standard can claim the selection of that standard to be settled under the Act. To demonstrate this point, a discussion of various cases selecting one standard or another is provided below.

a. Risk-to-Self Cases

Very few courts adopt the risk-to-self standard alone. The Second Circuit adopted a risk-to-self standard in Kampmeier v. Nyquist. Kampmeier involved a preliminary injunction requested by two junior high school students, each with vision in only one eye, preventing their schools from denying them the opportunity to participate in contact sports. The court ready capable of meeting all the requirements—or else no reasonable requirement could ever violate § 504, no matter how easy it would be to accommodate handicapped individuals who cannot fulfill it. This means that we can no longer take literally the [definition in Davis]. The question after Alexander is the rather mushy one of whether some ‘reasonable accommodation’ is available to satisfy the legitimate interests of both the grantee and the handicapped person.

Brennan v. Stewart, 834 F.2d 1248, 1261-62 (5th Cir. 1988).

78. 42 U.S.C.A. § 12111(8).
79. It should be stated at the outset that the degree of risk required under a given risk standard is not at issue here; rather what is at issue is the propriety of a given standard—the risk-to-self standard. With regard to the degree of risk which must be shown, many courts define the issue narrowly in the case of the risk-to-self standard. TUCKER & GOLDSTEIN, supra note 12, at 5:18; see also Bentivegna v. United States Dep’t of Labor, 694 F.2d 619, 621 (9th Cir. 1982) (requiring “rigorous scrutiny”). The EEOC Regulations are in accord with this approach. “The risk can only be considered when it poses a significant risk, i.e., high probability of substantial harm; a speculative or remote risk is insufficient.” EEOC Final Rule, supra note 13, at 35,745. Those same courts allow more room for the employer’s interests when applying the risk-to-others standard. TUCKER & GOLDSTEIN, supra note 12, at 5:19; see also Strathie v. Department of Transp., 716 F.2d 227, 233 (3d Cir. 1983) (applying an “appreciable risk” standard). Regardless of the standard applied, courts require true evidence of the risk. Employers cannot rely on stereotypical generalizations about a particular handicap. Carter v. Casa Cent., 849 F.2d 1048, 1054-55 (7th Cir. 1988) (noting that Section 504 was designed to counteract reliance on generalizations and stereotypes); see also Smith v. Administrator of Veterans Affairs, 32 FAIR EML. PRAC. CAS. (BNA) 986, 990 (C.D. Cal. 1983) (“The fear of hiring the handicapped merely transfers real or imagined costs on the handicapped which is contrary to the Act.”).
upheld the trial court's denial of the preliminary injunction. The court found a "substantial justification" in the schools' policies since there was evidence of a "high risk of eye injury" involved in the sports that was not refuted by any evidence presented by the plaintiffs.

The language in this decision appears to provide strong support for a risk-to-self standard. This case, however, involved children, over whom state schools have traditionally exercised a paternal power. Indeed, on this basis, the court distinguished its decision from a case offered by the plaintiffs in which the court granted a preliminary injunction allowing a university student with one eye to play basketball on the grounds that "the student was old enough to weigh the risks and make the decision for himself."

One of the most discussed risk-to-self cases is Bentivegna v. United States Department of Labor, in which the City of Los Angeles denied Bentivegna employment on the basis of his diabetic condition. The City argued that a blood sugar test demonstrated lack of control and that, consequently, performing the job posed a risk of future injury to Bentivegna. The court relied on regulations promulgated under the Rehabilitation Act that allowed an exclusionary criteria only if it was "consistent with business necessity and safe performance." The court read the statement regarding safe performance as concerning safety to the employee but refused to exclude Bentivegna, stating that for the risk to exclude him, "it must be directly connected with, and must substantially promote, 'business necessity and safe performance.'" The court acknowledged that because many handicapped persons will be subject to a higher risk of injuries resulting from employment, qualifications based on risk to self must be examined with strict scrutiny; otherwise, the purpose of the Rehabilitation Act would be circumvented. Thus, while the court accepted a risk-to-self standard as being permissible, it imposed a strict standard on the showing that must be made for an employer to succeed under the safety defense.

b. Risk-to-Others Cases

Many courts have adopted a risk-to-others standard. Recall that in South-
eastern Community College v. Davis, the reason that Davis was disqualified was that she could not perform her duties in a way that would insure patient safety. A risk-to-others standard was also applied in Strathie v. Department of Transportation, in which a hearing-impaired school bus driver brought suit claiming that the state's licensing requirements violated the Rehabilitation Act. The court examined the case in the context of risk to others. The court found that for each risk allegedly posed by Strathie driving a school bus, a reasonable accommodation was available that eliminated the risk. Therefore, after reasonable accommodation was provided, any risk to others was eliminated. While the court could have also examined the case under a risk-to-self standard because there was also a risk to the driver, it chose not to do so.

Numerous cases adopting the risk-to-others standard involve the potential transmission of communicable diseases. The leading case in this area is School Board of Nassau County v. Arline. Arline involved a school teacher who was discharged because she experienced recurring tuberculosis infections. After concluding that one suffering from a contagious disease is indeed handicapped, the Supreme Court moved to the question of whether Arline was otherwise qualified.

The Court acknowledged that the school had a legitimate interest in not exposing other persons to health and safety hazards. The Court stated that in assessing the significance of the risk the following factors should be considered:

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

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92. Id. at 409.
93. 716 F.2d 227 (3d Cir. 1983).
94. Id. at 229. The regulation in question required that a licensee have "[n]o hearing loss greater than 25 decibels at frequencies of 500, 1,000 and 2,000 in the better ear, without a hearing aid." Id. at 228. Strathie required a hearing aid to meet these requirements.
95. Id. at 232-34.
97. Id. at 281. The Court stated:
Allowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of § 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others. By amending the definition of 'handicapped individual' to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment. The fact that some persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act all persons with actual or perceived contagious diseases.
98. Id. at 284-85.
After applying these factors, the Court concluded that there was insufficient evidence to determine if Arline was otherwise qualified.\textsuperscript{100}

Significantly, this analysis has also been applied to cases involving the transmission of AIDS.\textsuperscript{101} In \textit{Chalk v. United States District Court, Central District of California},\textsuperscript{102} a teacher was reassigned to an administrative position after being diagnosed with AIDS. The court applied the four factors applied in \textit{Arline} and determined that Chalk did not pose a significant risk and therefore reversed the district court's denial of a preliminary injunction. \textit{Arline} and \textit{Chalk} are fully representative of the many cases applying a risk-to-others standard in the context of the transmission of a communicable disease.\textsuperscript{103}

c. Risk-to-Self-and-Others Cases

Many courts adopt a risk-to-self and risk-to-others standard. The Ninth Circuit applied a standard of risk-to-others-or-self in \textit{Mantolete v. Bolger}, a section 501 case.\textsuperscript{104} Mantolete, an epileptic, was denied the position of machine distribution clerk with the United States Postal Service on safety grounds. Specifically, the Post Office asserted that as a result of her epileptic condition, and the nature of the sorter machine with which she would be in constant contact, she posed a risk of injury to herself.\textsuperscript{105} The court accepted the proposition that "in some cases a job requirement that screens out qualified handicapped individuals on the basis of possible future injury, could be both consistent with business necessity and the safe performance of the job,"\textsuperscript{106} which is to read "safe performance" as applying to the handicapped person and, presumably, to others.\textsuperscript{107} The court relied on the EEOC's regu-

\textsuperscript{99} Id. at 288 (quoting the Brief for the American Medical Association as Amicus Curiae, at 19).
\textsuperscript{100} Id. at 288.
\textsuperscript{102} 840 F.2d 701 (9th Cir. 1987).
\textsuperscript{104} 767 F.2d 1416 (9th Cir. 1985).
\textsuperscript{105} Id. at 1419-20.
\textsuperscript{106} Id. at 1422.
\textsuperscript{107} Justice Rafeedie, in a concurring opinion, criticized the court for not elaborating on its acceptance of the risk-to-self standard, though noting that this position was consistent with the court's earlier opinion in \textit{Bentivegna}. Id. at 1425 (Rafeedie, J., concurring).
lations under section 501.108 The court remanded for the district court to consider whether there was evidence of a "reasonable probability of substantial harm."109

Another example of a court's application of the risk-to-self or others standard is provided by Sharon v. Larson.110 In that case, the plaintiff challenged Pennsylvania's prohibition against using bioptic lenses to satisfy the visual requirements for receiving a drivers license.111 The court stated the test as one of risk to self or others112 and found the plaintiff disqualified because of her risk to herself.113 In doing so, the court relied on Strathie. However, as discussed above, the court in Strathie used a risk-to-others test.114 Since driving an automobile without adequate visual capabilities creates a certain risk to others, the court unnecessarily expanded Strathie to apply to risk to self.

The Fifth Circuit recently applied a risk-to-self-or-others test in Chiari v. City of League City.115 The city terminated Chiari, a sixty-six-year-old engineer, who suffered from Parkinson's disease, from his position as a construction inspector based on a perceived safety risk resulting from the ailment.116 The city justified its action based on the "concern that his loss of balance [resulting from Parkinson's disease] would endanger him and others working with him."117 Chiari argued that there was no danger to others and that risk to self was not a proper consideration.118

The Fifth Circuit rejected Chiari's argument. Unlike many courts, however, the Fifth Circuit attempted to provide support for its position in accepting the risk-to-self prong of the standard. The court relied on the EEOC's regulations enforcing section 501, which espouse a risk-to-self-or-others standard, and the Mantolete decision to establish that section 501 includes a risk-to-self standard.119 Since section 501 included a risk-to-self component, the court held that section 504 must also include such a component.120 "Therefore, under § 504, an individual is not qualified for a job if there is a genuine substantial risk that he or she could be injured or could injure others, and the employer cannot modify the job to eliminate that risk."121

While the court attempted to justify its position, the matters on which it

108. Id. at 1421 (citing 29 C.F.R. § 1613.703).
109. Id. at 1424.
111. Id. at 1397. Bioptic lenses create a large blind spot when driving an automobile. Id. at 1399.
112. Id. at 1402.
113. Id. at 1403.
114. See supra text accompanying notes 93-95.
115. 920 F.2d 311 (5th Cir. 1991).
116. Id. at 313.
117. Id. at 315-16.
118. Id. at 316.
119. Id. at 317 (discussing 29 C.F.R. § 1613.702(f) (1990)); see Mantolete v. Bolger, 767 F.2d 1416, 1422 (9th Cir. 1985).
120. 920 F.2d at 317.
121. Id.
relied did not provide adequate support. The Mantolete decision relied on the same EEOC regulations, and thus, those regulations are the sole support provided for a risk-to-self standard. Reliance on these regulations is probably inadequate in the context of the Rehabilitation Act but is certainly inadequate in the case of the ADA regulations, since it is nearly identical language used by the same agency that is being contested. This case applies the rationale that the EEOC's selection of the risk-to-self standard makes that standard correct. While this case uses stronger language and is more direct in attacking the issue, it is no more persuasive that the risk-to-self standard should apply than the cases that fail to directly address the issue.\footnote{See also Doe v. New York Univ., 666 F.2d 761 (2d Cir. 1981) (medical school's refusal to readmit former student with a history of mental illness was justified based on risk-to-self-and-others standard); Wallace v. Veterans' Admin., 683 F. Supp. 758 (D. Kan. 1988) (registered nurse who was a former drug addict was precluded from administering narcotics and therefore not a risk to others); Davis v. Meese, 692 F. Supp. 505 (E.D. Pa. 1988), aff'd without op., 865 F.2d 592 (3d Cir. 1989) (FBI's exclusion of insulin-dependent diabetics was justified based on a risk-to-self and risk-to-others standard); Anderson v. USAir, Inc., 619 F. Supp. 1191 (D.D.C. 1985) (airline's policy of refusing to allow blind persons to sit in an emergency exit row seat was not in violation of the Rehabilitation Act based on risk-to-self and risk-to-others standard).}

Of course, it could be argued that since the court's basis was not merely the language of the EEOC regulation involved, but also the acceptance and application of the language by other courts, the case does provide support for applying the risk-to-self standard in the context of the ADA. This argument raises questions regarding the extent to which cases interpreting the Rehabilitation Act should be relied on by courts interpreting the ADA. There are real differences between the ADA and the Rehabilitation Act that preclude an intellectually honest reliance on the cases as conclusive support.\footnote{See Cooper, supra note 35, at 1424.} This issue, however, need not be resolved to determine that a risk-to-self standard is inappropriate, because even if substantial weight is given to these decisions, it is clear from this discussion that the cases are contradictory and exhibit no pattern of distinction with regard to why a given standard is better or worse than another. There are cases here that support the position of the EEOC. There are also cases that support the position of this Comment. Neither position is fully supported by the case law and both positions can cite cases with an opposing viewpoint.

In passing the ADA, Congress must have been aware of these conflicting decisions. It must have known that some courts applied the risk-to-self defense and others did not. Yet, Congress only included the risk-to-others defense. Since Congress must have been aware of a conflict between the two
standards and only placed one of those standards in the ADA, Congress could not have intended the other standard to be applicable. Indeed, Congress could not have done much more to demonstrate its intent that the risk-to-self defense not be allowed.

In conclusion, either because of the differences between the ADA and the Rehabilitation Act or because the case law is far from conclusive on the matter, the EEOC cannot rely on these cases to support its adoption of the risk-to-self standard. The other primary support for the EEOC’s position is the statute itself. This reliance has also been demonstrated to be inappropriate because the plain language and legislative history of ADA demonstrate that the congressional intent was to deny employers the risk-to-self defense. In addition, an examination of other legislation and cases concerning safety matters will demonstrate the existence of a basic policy in favor of allowing individuals to choose their own risks. A risk-to-self defense defeats this policy.

V. THE POLICY FAVORING INDIVIDUAL SELECTION OF RISK

A. SELECTION OF RISK AND OTHER FEDERAL CIVIL RIGHTS STATUTES

The basic principle that a person should be allowed to choose the risk associated with employment is supported by cases decided under Title VII of the Civil Rights Act of 1964 (Title VII)\textsuperscript{124} and the Age Discrimination in Employment Act of 1967 (ADEA).\textsuperscript{125} These cases generally adopt a risk-to-others standard in the context of whether particular qualification standards meet the test of either a bona fide occupational qualification\textsuperscript{126} (BFOQ) or a business necessity.\textsuperscript{127} Clearly, the fact that one standard is adopted under one statute is not determinative of the proper standard under another statute. In this case, however, the similarities between the statutes warrant an inquiry into how similar issues have been decided. Of course, this is also true with regard to the Rehabilitation Act. Cases under Title VII and ADEA have, however, unlike the Rehabilitation Act, developed clear principles for dealing with the safety issue.

The similarities between the three statutes are fairly obvious. Title VII, ADEA, and ADA are all designed to eradicate discrimination based on physical (as well as mental in the case of ADA) characteristics. In all three, the safety issue arises when the argument is made that because of a person’s characteristics (sex, age, or disability) he or she cannot safely perform the job in question. The issue here is whether “safely” should refer to risks to others, to the protected individual, or both. The case law establishes that in

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the case of Title VII and ADEA the proper standard is risk-to-others. In cases where a person poses a risk to himself or herself because of a physical characteristic, the individual is the one who decides whether to bear the risk, not the employer.

The Supreme Court addressed this issue in the context of ADEA in *Western Air Lines, Inc. v. Criswell*. In that case, the plaintiffs challenged a rule requiring flight engineers to retire at age sixty as violating ADEA. Western Air Lines defended the rule as a BFOQ adopted for safety reasons. After stating the test for BFOQ in this situation, the Court upheld the jury’s verdict that the rule was not justified as a BFOQ for safety purposes. Of importance here is that the Court and jury looked at safety factors concerned with the safety of persons other than the individual employees. As the Court speaks in general terms of safety, passenger safety and public safety, it could be argued that the plaintiff-employees are passengers and part of the public, and, therefore, risk to self is considered. However, a full reading of the opinion, as well as other courts’ interpretations of *Criswell*, makes clear that the safety concern was for persons other than the plaintiff-employees.

In *Dothard v. Rawlinson* the Supreme Court addressed the relationship between safety and gender requirements. *Dothard* involved minimum height and weight requirements established by Alabama for its correctional facility officers as well as an explicit prohibition on employing females in certain positions involving significant contact with male prisoners. The gender requirement was defended as a BFOQ adopted for safety purposes. The Court accepted the defense and upheld the gender requirement as a BFOQ. The Court did so, however, because of the potential risks of harm to the inmates and to other security personnel should attacks on the female guards occur. The Court rejected the argument that the risk to the female plaintiffs was sufficient, stating that

[i]n the usual case, the argument that a particular job is too dangerous

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129. *Id.* at 416-17. The test adopted by the Court was that developed by the Fifth Circuit in *Usery v. Tamiami Trail Tours Inc.*, 531 F.2d 224 (5th Cir. 1976) and applied by all other courts of appeals in addressing the BFOQ issue in a safety context. 472 U.S. at 416. The test has two parts. First, the qualification standard must be “reasonably necessary to the essence of” the employer’s business. *Id.* at 413. Second, the employer must establish that either (1) it had a reasonable cause to believe that substantially all of the employees who did not meet the age requirement would be unable to perform the job safely and efficiently, or that (2) “age was a legitimate proxy for the safety-related job qualifications by proving that it is impossible or highly impractical to deal with the older employees on an individualized basis.” *Id.* at 413-15.
130. See Tullis v. Lear Sch., Inc., 874 F.2d 1489, 1490 (11th Cir. 1989); see also *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976) (concerning age cutoff for bus drivers based on safety to passengers and public).
131. See also *EEOC v. Boeing Co.*, 843 F.2d 1213, 1220-21 (9th Cir.), cert. denied, 488 U.S. 889 (1988) (refusing to allow a manufacturer of airplanes to defend on the basis of the FAA’s Age-60 Rule its practice of requiring retirement of its pilots at age 60 since the safety considerations involved in the Age-60 Rule were different because of the substantial number of passengers carried by airlines covered by the Rule).
133. *Id.* at 336-37.
for women may appropriately be met by the rejoinder that it is the purpose of Title VII to make that choice for herself. More is at stake in this case, however, than an individual woman's decision to weigh and accept the risks of employment . . . .

*Dothard* is illustrative of the policy behind civil rights statutes in general, that a protected person should be allowed to choose for himself or herself the risks of employment, absent overriding concern for the safety of third parties.

Additional support is found in cases where courts have approved layoffs of pregnant flight attendants when based on passenger safety. In one of these cases, *Burnwell v. Eastern Airlines*, the court addressed the argument that personal risk is a legitimate business concern. In that case, Eastern Airlines defended its policy of requiring pregnant flight attendants to take maternity leave after reaching the thirteenth week of pregnancy on the ground that the policy was justified based on the business necessity of protecting the pregnant flight attendant, her fetus, and passengers. The court responded:

Eastern's contention that an element of business necessity is its consideration for the safety of the pregnant flight attendant and her unborn child is not persuasive. If this personal compassion can be attributed to corporate policy it is commendable, but *in the area of civil rights, personal risk decisions not affecting business operations are best left to individuals who are the targets of discrimination*. Its contention that the leave policy is legitimately designed to enhance the safety of passengers meets with more success. Focusing all the evidence at trial . . . demonstrates that Eastern's policy as it relates to pregnancy after the thir-

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134. *Id.* at 335 (footnotes omitted). In addition Justice Marshall, while disagreeing with the Court's application but agreeing with the statements of the law regarding the BFOQ defense, noted that the Court properly rejected the arguments based on risk to the female plaintiffs. *Id.* at 342 (Marshall, J., dissenting). "It is simply irrelevant here that a guard's occupation is dangerous and that some women might be unable to protect themselves adequately." *Id.* at 341. "[P]ossible harm to women guards is an unacceptable reason for disqualifying women." *Id.* at 342.

135. See, e.g., *Burwell v. Eastern Airlines*, 633 F.2d 361 (4th Cir. 1980), cert. denied, 450 U.S. 965 (1981) (policy requiring flight attendants to take leave after 13th week of pregnancy was justified as a business necessity to enhance safety of passengers); *Harris v. Pan Am. World Airways Inc.*, 649 F.2d 670 (9th Cir. 1980) (since requiring employees to take leave upon becoming pregnant was reasonably necessary to passenger safety, the essence of the employer's business, the policy was justified as a BFOQ); *Condit v. United Airlines Inc.*, 558 F.2d 1176 (4th Cir. 1977) (since pregnancy could incapacitate a flight attendant to such a degree that the safe operation of the aircraft might be threatened, the policy of requiring leave upon pregnancy was justified as a BFOQ), cert. denied, 435 U.S. 934 (1978); *In re Nat'l Airlines Inc.*, 434 F. Supp. 249 (S.D. Fla. 1977) (restrictions on pregnant flight attendants were justified based on passenger safety). Regardless of one's position on the substance of these decisions, that is, whether pregnancy poses a significant risk to others so as to justify the discrimination approved of, the fact remains that pregnancy has been treated as a disability of sorts and these cases therefore provide an excellent analogy to the issue at hand. Moreover, the use of this analogy is not affected by the EEOC's decision that pregnancy is not a disability. See *EEOC Final Rule*, supra note 13, at 35,727. First, the EEOC's decision does not change the fact that pregnancy has been treated as a disability in the past. Second, it remains to be seen whether pregnancy will be treated as a non-disability under all circumstances in suits under the ADA.

teenth week results from the legitimate business necessity of safely transporting passengers.\textsuperscript{137} This case clearly supports the proposition that protected employees should be allowed to make their own decision whether to accept or reject a position based on the personal risks involved.

The Supreme Court's recent decision in \textit{International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Johnson Controls, Inc.}\textsuperscript{138} sheds further light on the use of a safety defense based on risk to protected employees. That case involved the validity under Title VII of a fetal protection policy implemented by Johnson Controls. The policy barred all women except those who submitted proof of infertility from positions involving lead exposure over a certain level. Johnson Controls defended the policy claiming that it was supported as a valid safety precaution.\textsuperscript{139} The Court, citing both \textit{Criswell} and \textit{Dothard},\textsuperscript{140} rejected the safety argument and held that it is an acceptable reason for discrimination only where "sex or pregnancy actually interferes with the employee's ability to perform the job."\textsuperscript{141} Only where the "essence" of the business involves safety obligations to, and the excluded criteria place at risk, third parties who are "indispensable to the particular business at issue"\textsuperscript{142} will the BFOQ defense based on safety be accepted. This is a far cry from a defense under ADA based on risk to the disabled individual.

These cases illustrate that risk to self is not a valid consideration under either Title VII or ADEA. There is no distinguishing characteristic between Title VII and the ADEA on the one hand and the ADA on the other, that supports, much less demands, a policy in favor of considering risk to self under the ADA. On the contrary, the model of equality adopted by the ADA indicates that, if anything, even more deference should be given to disabled individuals' decisions as to whether they will assume the risks of a particular job. The ADA uses the special treatment model of equality, as opposed to the equal treatment model used in Title VII and ADEA. The special treatment model recognizes to a greater degree the physical and mental differences between disabled and nondisabled persons. This recogni-

\textsuperscript{137} Id. at 371 (emphasis added) (footnotes omitted).
\textsuperscript{139} Johnson Controls argued and both the district and appellate courts agreed that the discrimination was of a disparate impact type rather than disparate treatment and therefore the business necessity inquiry was proper. \textit{Id.} at 1200. The Supreme Court held, however, that the policy was facially discriminatory and thus, the BFOQ defense was the proper one. \textit{Id.} at 1204.
\textsuperscript{140} \textit{Id.} at 1207. The Court affirmed the dictate of \textit{Dothard} that "danger to a woman herself does not justify discrimination." \textit{Id.} at 1205.
\textsuperscript{141} \textit{Id.} at 1206.
\textsuperscript{142} \textit{Id.} at 1205. The debate between the majority and Justice White's concurrence focused on how broadly the phrase should be read. Justice White thought that the term was wide enough to encompass safety to fetuses as third persons. \textit{Id.} at 1212 (White, J., concurring). The majority read the phrase more narrowly, noting that "[t]hird party safety considerations properly entered into the BFOQ analysis in Dothard and Criswell because they went to the core of the employee's job performance ... [which] involved the central purpose of the enterprise." \textit{Id.} at 1206. Regardless of the outcome, both sides assumed that the individual employee could assume the risk of personal injury. \textit{Id.} at 1208, 1211.
tion evinces a determination on the part of Congress to take greater steps to protect against discrimination based on those differences. Accordingly, there is no justification for a safety defense under ADA that is more stringent on protected employees. Rather, the use of the special treatment model and the case law regarding the safety issue in the context of Title VII and ADEA serve as additional support that the proper standard under ADA is one of risk-to-others.

B. RIGHT-TO-KNOW STATUTES AND SELECTION OF RISK

Many states have enacted “right-to-know” statutes, which require employers to inform employees of risks or potential risks, usually relating to hazardous substances in the workplace.\(^1\) One purpose of these statutes is to allow employees to weigh the risks associated with employment and determine for themselves whether they wish to take those risks.\(^2\) In addition, safety standards adopted by the Occupational Safety and Health Administration (OSHA) require many employees to be informed of the dangers associated with numerous hazardous substances.\(^3\) Both of these requirements demonstrate that society favors allowing individuals to choose the workplace risks that they are willing to tolerate, rather than allowing employers to choose the risks that a particular individual is allowed to undertake.

Of course, the difference in the context of right-to-know legislation is that the risk cannot be eliminated. Society has determined that the benefits of the product outweigh the potential harm it may cause. In the risk-to-self context, however, the risk can be eliminated by enforcement of a rule comparable to the one that the EEOC has adopted. In the first case, the potential harm is present because of something inherent in the substances to which an employee is exposed. In the second case, the presence of the risk is caused by the existence of a disability. In other words, the second case—where the risk can be eliminated by hiring different persons—will not arise absent a disability. Therefore, allowing a risk-to-self defense is tantamount to saying, “If you are ‘able-bodied’ you have a right to make certain decisions, but if you are disabled, you must allow society to make those decisions for you.”

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This is the same paternalistic attitude that the ADA was intended to eliminate. The fact that, in the context of right-to-know legislation, society has made a decision that someone will be harmed so that the public may have the benefits of certain products does not reduce the important statement of right-to-know statutes: if there is a risk involved in employment, the individual who will be exposed to that risk, and not the employer, has the right to decide whether he or she wishes to be exposed to that risk. This right should not be denied simply because a disability causes a risk to be present. Disabled persons should be afforded the right to select for themselves which risks they are willing to tolerate.

Indeed, the policy in favor of allowing employees to choose their own risks is even stronger when those employees are disabled individuals protected by a federal disability law. The very purpose of a civil rights law is to eradicate discrimination based on the protected feature. Thus, not only is there no valid reason for refusing to allow disabled persons the same right as nondisabled persons to choose the risks associated with employment, there is every reason to strongly support and protect that right. Allowing employers to use a risk-to-self defense permits the precise behavior that civil rights legislation is intended to prohibit. The defense fails to treat disabled persons with equal concern and respect. Thus, the risk-to-self defense is not only incorrect from a legal point of view, it is indefensible from a moral point of view.

VI. THE PATERNALISTIC NATURE OF THE RISK-TO-SELF STANDARD

The House Labor Report states that “[i]t is critical that paternalistic concerns for the disabled person's own safety not be used to disqualify an otherwise qualified applicant.” Furthermore, “employment decisions must not be based on paternalistic views about what is best for a person with a disability. Paternalism is perhaps the most pervasive form of discrimination for people with disabilities and has been a major barrier to such individuals.” The risk-to-self standard is overly paternalistic and should therefore be rejected. It allows the employer (and in later stages a court) to substitute its own judgment for that of the disabled, yet fully competent, individual in determining the types of risks he or she wishes to assume in an employment context. A disabled person who desires to take a job, knowing that performing the duties of the position may well aggravate a current injury or cause a new injury because of his or her disability should not be questioned in making the decision, so long as he or she is legally competent.

Paternalism is a topic that has been debated by philosophers and political

146. House Labor Report, supra note 41, at 72; see also Senate Labor Report, supra note 41, at 38.
147. Id. at 74.
148. See Tucker, supra note 64, at 899. "To foster the purpose of section 504, as a general rule handicapped adults should be permitted to decide for themselves whether to accept any risks inherent in a job . . . ." Id.
thorists for centuries. In his classic work, On Liberty,149 John Stuart Mill took an absolute position against all paternalism. According to Mill, unless an individual's actions placed another at risk, neither the state nor anyone else had any authority to prohibit that person from acting, regardless of beliefs of his or her best interest.150 Mill stated that

[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.151

The absolute nature of Mill's position has not, of course, gone unopposed152 and it is clear that modern society has not adopted Mill's anti-paternalistic message. Thus, the question is not whether the EEOC position is incorrect because it is paternalistic, but whether it is overly paternalistic in the context of risks to employees in the workplace, particularly with regard to employees protected by federal civil rights laws.

As the examination of other legislation has shown, competent persons are generally given the choice of whether to accept or reject a position of employment based on their own evaluations of personal risk. This is especially true where the persons are protected by federal civil rights laws.153 Therefore, one need not accept Mill's harm principle in order to find the risk-to-self standard unacceptable. Rather, one can reject the principle simply because it is overly paternalistic in the context of what society generally accepts.

VII. RISK OF TORT LIABILITY TO EMPLOYERS

There is one policy argument in favor of the risk-to-self standard that should be addressed. It can be argued that an employer may be subject to
liability if a disabled employee is injured on the job and, therefore, to protect the employer, the disabled individual who poses a risk of future injury to himself or herself may be denied employment. The response to this argument is that the employer would not in fact be liable for injuries to an employee that result from an aggravation of the employee's disability.

In most cases, a disabled employee who is injured on the job would be able to, and in fact required to, recover for the injuries through the workers' compensation system. Workers' compensation schemes generally cover aggravation of pre-existing injuries as any other on-the-job injury. The only requirement is that the aggravation or acceleration of the pre-existing injury be caused by the employees' work. Coverage of these injuries should not change merely because an anti-discrimination statute is enacted. Aggravation and acceleration of pre-existing injuries have typically been covered, and should continue to be covered, by state and federal workers' compensation systems.

Even if the injured disabled employee was not restricted to recovery under workers' compensation, it is highly unlikely that recovery could be obtained in tort, absent some employer negligence that would have resulted in employer liability in a situation not involving a disabled person. When an employee sues in tort, the employer will have assumption of the risk or a similar doctrine as a defense, as well as contributory negligence.

The Supreme Court addressed a similar issue tangentially in Johnson Controls. The Court discussed whether an employer is liable for prenatal injuries to a fetus. The injuries could result from pregnant females' exposure to lead even though an employer could not, under Title VII, exclude those women from lead-exposure jobs. The Court stated:

If, under general tort principles, Title VII bans sex-specific fetal-protection policies, if the employer fully informs the woman of the risk, and if the employer has not acted negligently, then the basis for holding an employer liable seems remote at best.

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155. Id.
156. Several cases illustrate that coverage by workers' compensation is typical. See, e.g., Crum v. General Adjustment Bureau, 738 F.2d 474 (D.C. Cir. 1984) (angina pain exacerbated by work compensable); Gardner v. Director, Office of Workers' Compensation Programs, 640 F.2d 1385 (1st Cir. 1981) (varicose veins aggravated by work held compensable); Pezzolanti v. United Terminals, Inc., 524 F.2d 1136 (2d Cir. 1975) (cancer of the jaw aggravated when falling carton hit employee's jaw held compensable); Lambert's Point Docks, Inc. v. Harris, 718 F.2d 644 (4th Cir. 1983) (back injury aggravated by employee's spina bifida and osteoporosis that made employee more susceptible to injury held compensable); Martin Indus., Inc. v. Dement, 435 So. 2d 85 (Ala. Civ. App. 1983) (aggravation of rheumatoid arthritis compensable); Pezzolanti v. Green Bus Lines, Inc., 114 A.D.2d 553, 494 N.Y.S.2d 168 (App. Div. 1985) (aggravation of wrist tumor by trauma compensable); U.S. Fidelity & Guar. Co. v. Beardon, 700 S.W.2d 247 (Tex. App.—Tyler 1985, no writ) (congenital disease that caused employee's emphysema and bronchia asthma aggravated by repeated exposure to chicken feed and chicken dust held compensable); Texas Employers Ins. Ass'n v. Murphy, 506 S.W.2d 312 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.) (pneumonia caused by aggravation of preexisting bronchitis and emphysema by inhalation of lead and zinc fumes compensable).
158. Id. at 1208.
Furthermore, if state tort principles did allow for recovery when the injury is caused by compliance with Title VII, the court indicated that the state law then would be preempted.\textsuperscript{159} Although the foregoing language in \textit{Johnson Controls} was dicta, it provides a valid response to employer concerns about the risk-to-self standard that are based on potential tort liability. If the disabled employee is fully informed about the risk of future injury and the employer has not been negligent but, to the contrary, has acted in compliance with the clear language of the ADA, the employer should not be held liable under state tort law. If state tort law would allow recovery, then the state law action should be preempted by the ADA.\textsuperscript{160} However, if the injury is one which would have been suffered regardless of the disability, it is a different issue and the employer will be liable to the same extent as if the plaintiff-employee was not disabled.\textsuperscript{161}

\textbf{VIII. CONCLUSION}

Ample evidence exists to show that Congress has expressed its intent regarding the determination of the precise issue at hand. That issue is whether the term "direct threat" or the safety defense based on a qualification standard includes a risk-to-self standard. The plain language of the ADA in defining the terms "direct threat" and "qualification standard" as referring to a risk to others demonstrates the exclusion of the risk-to-self standard. If a term is defined as applying to X, it is not ambiguous as to whether that term applies to Y; it does not apply.\textsuperscript{162} Under the \textit{Chevron} rule,\textsuperscript{163} therefore, courts are required to adhere to this intent and to reject the EEOC interpretation. Even if this statute is ambiguous on the risk-to-self issue, the legislative history combined with the express language make clear Congress' intention to include a risk-to-others standard and to exclude a risk-to-self

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\textsuperscript{159} \textit{Id.} at 1209. "When it is impossible for an employer to comply with both state and federal requirements, this Court has ruled that federal law pre-empts that of the States." \textit{Id.} (citing Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)); see also Farmers Union Educ. and Coop. v. WDAY, Inc., 360 U.S. 525, 531 (1959)(Federal Communications Act provision, which prevented censorship, preempted state libel action against radio station that broadcasted speech in compliance with the Act).

\textsuperscript{160} The "non-preemption" provision of the EEOC Regulations does not foreclose the possibility of preemption under these circumstances. In fact, the EEOC Regulations make clear that while the ADA does not preempt a state law with consistent obligations, it does preempt state laws that impose obligations inconsistent with the ADA. "An employer allegedly in violation of this part cannot successfully defend its actions by relying on the obligation to comply with the requirements of any state or local law." EEOC Final Rule, \textit{supra} note 13, at 35,740.

\textsuperscript{161} There are numerous issues concerning insurance which arise under the ADA, none of which are within the scope of this Comment. For example, are caps on AIDS insurance coverage discriminatory? If an employer fails to provide an employee with reasonable accommodation and the employee is injured as a result, can the employee sue in tort, or must he or she rely on the workers' compensation system to remedy the situation? A development which remains to be seen is the effect of ADA on the already troubled state workers' compensation schemes.

\textsuperscript{162} See \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137, 174 (1803). "Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all." \textit{Id.}

\textsuperscript{163} See \textit{supra} text accompanying notes 30-34.
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standard. Therefore, the EEOC's interpretation fails as exceeding the agency's authority and its construction must be rejected by the courts.

In addition to the contrary intent expressed in the statute and the legislative history, the risk-to-self standard is not fully supported by the case law developed under the Rehabilitation Act of 1973. When these factors are coupled with the policy arguments against a risk-to-self standard and the policy adopted in other federal civil rights statutes, the preferred course of action is clear: the EEOC should change its position. If this action is not taken, courts must refuse to follow the regulations and instead must follow the plain language and clear meaning of the ADA.