

“FOR THE LOVE OF GOD! OPEN THIS DOOR!”: INDIVIDUAL RIGHTS VERSUS PUBLIC SAFETY UNDER THE “DIRECT THREAT” STANDARD OF THE AMERICANS WITH DISABILITIES ACT AFTER THREE DECADES OF LITIGATION

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* John E. Ryan Professor of International Business & Workplace Law, Atlanta’s John Marshall Law School, Atlanta, Georgia, USA. This article is dedicated to the memory of a friend and faculty colleague, Hon. Willie Lovett, Jr., (1963–2017), Presiding Judge, Fulton County Juvenile Court. *See Savannah-Born Judge Dead At Age 53*, SAVANNAH MORNING NEWS (Feb. 2, 2017), <http://www.savannahnow.com/news/2017-02-02/savannah-born-judge-willie-lovett-jr-dead-53>. This article is also dedicated to the long friendship enjoyed by the author with former faculty colleague Professor Lucille (“Lucy”) Jewel, who since 2013 has served on the faculty of the University of Tennessee College of Law. Professor Jewel’s example of dynamic scholarship of contemporary relevance and enduring excellence is an inspiration to the author every day.

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INTRODUCTION

Sometimes, a picture really is worth a thousand words. A photograph of French emergency rescue workers laboring at the crash site of Germanwings Flight 9525 near Seyne-les-Alpes, France, on March 24, 2015, is one such picture. Likewise, it is true that a picture can also launch many thousands of additional words, as is the case here. For that photo encapsulates what proves to be a lengthy story about a commercial airline flight in which a co-pilot with a serious mental disability meticulously planned and executed the stunning murder of 144 passengers and 5 fellow crew members while simultaneously committing suicide.¹ On March 24, 2015, the co-pilot intentionally locked the aircraft's captain out of the cockpit during a bathroom break and set the Airbus A-320 aircraft on a crash course into the "Massif des Trois-Évêchés, a range of 9,000-foot peaks northwest of Nice," France.²

The suicidal-homicidal pilot, Andreas Lubitz, had his first documented episode of "major depression" in 2008, while in a Lufthansa-sponsored pilot training program, from which he had to drop out at age 21.³ He returned to his hometown in Germany, and began outpatient psychiatric care:

Lubitz spent nine months in the psychiatrist's care. In July 2009, only six months into the treatment, the doctor declared that "a considerable remission had been obtained" with the meds and recommended in a letter to German aviation officials that Lubitz be allowed to resume his training in Bremen: "Patient alert and mentally fully oriented, with no retentivity or memory disorders. Mr. Lubitz completely recovered, there is not any residuum remained. The treatment has been finished." Yet the doctor continued to treat Lubitz—and prescribe him powerful drugs—through

1. Joshua Hammer, "For The Love Of God! Open This Door!": The Real Story Of Germanwings Flight 9525, GQ (Feb. 22, 2016), <https://www.gq.com/story/germanwings-flight-9525-final-moments>. The photograph described in the text appears in this article with the caption, "Somehow, amid a vast field of debris scattered over a mountainside in the French Alps, the cockpit voice recorder was located less than a half hour after the first of the first responders arrived on the scene." Id. Details of the events described in this popular article can be confirmed by the report of French aviation authorities. Bureau d'Enquêtes Et d'Analyses Pour La Sécurité De L'aviation Civile--Ministère De l'Ecologie, Du Développement Durable Et De l'Energie, *Preliminary Report: Accident on 24 March 2015 at Prads-Haute-Bléone (Alpes-de-Haute-Provence, France) to the Airbus A320-211 registered D-AIPX operated by Germanwings*, Bureau d'Enquêtes et d'Analyses, (May 2015), <https://www.bea.aero/docs/2015/d-px150324.en/pdf/d-px150324.en.pdf>.

2. Hammer, *supra* note 1. See also Rene L. Duncan, *The Direct Threat Defense under the ADA: Posing a Threat to the Protection of Disabled Employees*, 73 MO. L. REV. 1303 (2008).

3. Hammer, *supra* note 1.

October, three months after having assured officials that Lubitz had fully recovered. German aviation officials took several more months to restore Lubitz's student pilot's license and his fit-to-fly medical certificate, amending them with the designation SIC, for "specific regular examination." This notation would stay on Lubitz's record. Any further psychiatric treatment for depression, any more meds, would result in his automatic grounding. As Lubitz was surely aware, this would almost certainly mean the end of his flying career.⁴

When Lubitz was to go for his actual in-aircraft flight training at Lufthansa's facility in Arizona, he lied in his application to the Federal Aviation Administration (FAA) by stating that he'd never been treated for mental illness.⁵ German aviation officials, with whom the FAA cross-checked airman certificate applications, ferreted out this lie.⁶ Yet, simply because Lubitz confessed when confronted with his lie, FAA and German officials allowed him to proceed with his flight training, which he completed.⁷ However, new psychiatric troubles surfaced in late 2014, and by early 2015,

Lubitz was certain he was going blind. He began visiting ophthalmologists and neurologists at the rate of three or four appointments a week, complaining that he was seeing stars, halos, flashes of light, streaks, and flying insects. He was also suffering from light sensitivity and double vision. "He was full of fear," one ophthalmologist noted. Doctors examined his eyes and brain using a variety of state-of-the-art equipment, but found nothing wrong. One neurologist diagnosed him with a "hypochondriacal disorder." Lubitz, according to the doctor's records . . . "repeated with remarkable frequency and detail the nature of the symptoms affecting his vision, and was unable to accept suggestions of alternative diagnoses, including ones positing psychological causes. In fact, he broke off treatment at this point." His family doctor diagnosed an "emergent psychosis" and urged him to check himself into a psychiatric clinic. Lubitz ignored her.⁸

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

At the urging of Lubitz's mother, he returned to consult with the psychiatrist who had treated him for his first episode of major depression.⁹ "Lubitz began psychotherapy and—even as he continued his normal work and flight schedule—again took the powerful meds mirtazapine and lorazepam."¹⁰ Lubitz, however, did not notify Lufthansa, nor—incredibly—did his psychiatrist, even though under German law they were required to do so.^{11 12}

Unaware of his worsening disability, Lufthansa continued to put Lubitz as first officer in the cockpit of regional commercial flights in its budget-carrier, Germanwings.¹³ During this time in which he co-piloted dozens of flights, Lubitz's mind took a sinister turn:

By early March, Lubitz's thoughts drifted toward death. He searched the Internet for the most efficient means of committing suicide: "producing carbon monoxide"; "drinking gasoline"; "Which poison kills without pain?" On March 18, a Düsseldorf physician wrote a sick-leave note for Lubitz, effective for four days, indicating that Lubitz suffered from "a persistent vision disorder with a thus far unknown origin." A couple of days later, while at home, a new method of self-extinction took shape in his mind. That evening, March 20, he searched the Internet for information about the locking mechanism on an Airbus A320 cockpit door.¹⁴

And that is exactly what Lubitz did on March 24, 2015, two days after the day he had marked in his diary as "Decision Sunday."¹⁵ He locked the Captain out of the A320 cockpit while co-piloting Germanwings Flight 9525, from Barcelona to Dusseldorf, and meticulously set the aircraft's autopilot on a crash-course with a French mountain.¹⁶

[The Captain] returned three minutes later, at 10:34. On a keypad outside the cockpit, he punched in his access code, then hit the pound sign. Access denied. "It's me!" he exclaimed, rapping on the door. Flight attendants—preparing to wheel their snack-and-beverage carts down the aisle now that the plane had reached cruising altitude—looked toward the commotion. A closed-circuit camera

9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*

transmitted the captain's image to a small television screen inside the cockpit; Lubitz didn't react. Alarmed, [the Captain] started hammering on the door. Still, Lubitz didn't respond. ***"For the love of God," the [Captain] yelled. "Open this door!"*** The plane was at about 25,000 feet. Passengers, feeling the steep decline now and gripped by the first wave of panic, began leaving their seats and moving through the aisles.¹⁷

At the moment the plane crashed into the French Alps, the Captain was hammering at the cockpit door with a crowbar he'd had a flight attendant retrieve.¹⁸

The aftermath included "families [who] were flown to Marseille and then bused to Le Vernet, the village closest to the crash site, where they attended the mass burial of several tons of human remains that could not be identified through DNA testing."¹⁹

Consideration of a real-world event can put theoretical discussions of law into useful perspectives – if, for no other reason, by elucidating the real-world stakes at issue in how the law is understood and applied.

The example in this prologue did not occur in the United States, or within the legislative jurisdiction of the United States Congress to legislate employment discrimination laws.

However, it just as well could have.²⁰

On the other hand, workers with mental impairments are also quite vulnerable to irrational stereotypes, hastily drawn false analogies, and suspicions of co-workers and management whose pernicious influence can seem obvious yet very difficult to prove by admissible evidence.²¹ Not every pilot who experiences depression is an Andreas Lubitz. Not every employee who has a mental impairment is a threat to co-workers.²² Indeed, experience

17. *Id.* (emphasis added).

18. *Id.*

19. *Id.* In the article, the photograph was reproduced with the following caption: "Eleven weeks after the crash, a convoy of hearses carried the remains of victims to the German town of Haltern am See, home to 16 high school students and two teachers who were casualties of Lubitz's monstrous act." Photo: Rolf Vennen Bernd/ EPA/ Corbis. *Id.*

20. *See, e.g.,* Witter v. Delta Air Lines, 966 F. Supp. 1193, 1195–97 (N.D. Ga. 1997), *aff'd*, 138 F.3d 1366 (11th Cir. 1998). The author was co-counsel along with William H. Boice, Esq., and Kilpatrick & Cody, representing Delta Air Lines and Dr. Michael Berry of Houston, Texas, in the case. *Id.* at 1195.

21. *See* Andrew Hsieh, *The Catch-22 Of ADA Title I Remedies For Psychiatric Disability*, 44 MCGEORGE L. REV. 989, 990–91 (2014) (narrating a hypothetical situation in which a worker with Asperger's Syndrome is fired in the wake of media reports suggesting in the wake of the Sandy Hook Elementary School shooting, "that people with autism spectrum disorders" – such as the shooter, Adam Lanza – "might be more prone to violence because they lacked a 'capacity for empathy.'")

22. *See id.*

and statistics both show that the vast majority of workers with mental impairments are successful in the workplace.²³

What is the framework in which the ADA separates the truly dangerous from the truly stereotyped? Is that framework effective?²⁴

Nearly twenty years ago, in the early years of the Americans With Disabilities Act (ADA),²⁵ the author published an article in which he explained the ADA's approach to "qualification standards" for employment, and discussed a special provision of the ADA that allows employers to exclude applicants and employees from employment in which they pose "a direct threat to health or safety,"²⁶ a term of art peculiar to the ADA and to its federal-law ancestor, the Rehabilitation Act of 1973.²⁷ In that article, the author observed that the ADA permits

employers that use "qualification standards" to demonstrate that the qualifications are lawful even though they may disadvantage protected individuals. Qualification standards are the "personal and professional" job requirements established by the employer that "an individual must meet in order to be eligible for the position held or desired." These attributes may include "skill, experience, education, physical, medical, safety and other requirements." In a highly relevant though vague provision, the ADA states that qualification standards "may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." The statutory definition of "direct threat" provides little additional insight—"direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation"—and in fact raises more questions than it answers. For example, which events pose a cognizable "risk" to others? What risks are "significant"? What information is required to establish that a "significant risk" exists? What accommodations must be considered to

23. As eloquently explained by a long-time friend of the author from his law practice days, when the author spoke on panels with Andrew J. Imperato, Esq., who was then serving as Counsel to EEOC Member Paul Stephen Miller. See AAPD, *Countdown to the ADA – AAPD Speaks to Andy Imparato*, YOUTUBE (Jul. 9, 2009) <https://www.youtube.com/watch?v=yVA5TQnVYM>. Mr. Imperato is currently the Executive Director of the Association of University Centers on Disabilities (AUCD). *Leadership, ASS'N OF UNIV. CRTS. ON DISABILITIES*, <https://www.aucd.org/template/page.cfm?id=148> (last accessed Sept 2, 2018).

24. See John A. Conway, *The Americans with Disabilities Act: New Challenges in Airline Hiring Practices*, 59 J. AIR L. & COM. 945 (1994), for some early thoughts about these questions in context of the safety-sensitive commercial airline industry.

25. 42 U.S.C. §§ 12101-213 (2012).

26. 29 U.S.C. § 12113(b) (2012).

27. 29 U.S.C. §§ 701-797 (2012).

“eliminate” the risk? How much risk must be “eliminated” before an accommodation is considered sufficient? How do the nature of the employment and the magnitude of the potential harm affect the analysis?²⁸

After examining the origins of the direct-threat standard and its reification in Section 103 of the ADA,²⁹ the author observed:

Ultimately, these are not legal questions within the province of courts or juries. The courts do not have the medical or scientific competency to answer such questions in a systematic way. Instead, the “direct threat” standard leaves courts and juries to make medical judgments, which is unsatisfactory because, although they are “neutral arbiters,” they are “generally less skilled in medicine than the experts involved.” At best, courts and juries must pick and choose among the competing medical opinions offered by parties in litigation. This is exactly what the AMA in *Arline* stated was not to be the function of the courts. Moreover, the litigation process requires parties to “hire” medical professionals to support their respective positions. For plaintiffs who do not have the out-of-pocket resources to hire a medical professional with the required competency, or even to hire one at all, the judicial approach to “direct threat” assessments is likely not to work in their favor. Moreover, given the nature of litigation itself, the judicial approach is unlikely to provide effective consistency, continuity, and above all, accuracy in the regulation of employment in safety-sensitive industries.³⁰

Thus, the author suggested that the Equal Employment Opportunity Commission (EEOC) use its rulemaking power to issue regulations that provided for a medical panel review process to make the determination of whether an employee or applicant poses a disqualifying “direct-threat” in any litigation under Title of the ADA in which “direct threat” is an issue.³¹

So, what has happened over the intervening 19 years from the author’s article appearing in the *Harvard Journal of Law & Public Policy* to today?

28. Jeffrey A. Van Detta, “Typhoid Mary” Meets the ADA: A Case Study of the “Direct Threat” Standard Under the Americans with Disabilities Act, 22 HARV. J.L. & PUB. POL’Y 849, 851–52 (1999) [hereinafter “Typhoid Mary”].

29. 42 U.S.C. § 12113(b) (2012).

30. *Typhoid Mary*, *supra* note 28, at 956–957 (citing Sch. Bd of Nassau Cty v. Arline, 480 U.S. 273 (1987), quoting Knapp v. Nw. Univ., 101 F.3d 473, 485 (7th Cir. 1996)).

31. *Typhoid Mary*, *supra* note 28, at 957–58.

The EEOC has *not*, in fact, exercised its rule-making powers to improve “direct-threat” assessments. Even more distressingly, direct threat litigation under the ADA certainly has *not* moved to a more science-and-expertise based determination. In fact, it appears that a movement has drifted in precisely the opposite direction. In a 2015 opinion from a panel in the U.S. Tenth Circuit Court of Appeals, an astonishing proposition has been propounded.³² That proposition is that to disqualify an employee or applicant from particular employment on the basis that s/he poses a “direct threat” under the ADA, the employer does not have to satisfy the jury that the employee or applicant *actually* poses a “direct-threat.”³³ Instead, the employer must merely prove that the employer “reasonably believed” the employee or applicant posed a direct threat.³⁴

Management-side employment lawyers have been quick to jump on this decision as a boon to employers. “ADA Direct Threat Defense Just Got A Little Easier,” crowed a headline in a national legal publication.³⁵ Similar pronouncements have been made.³⁶

In the balance of this article, we first discuss some issues both resolved – and un-resolved – in the “direct-threat” standard in the nearly 20 years since the author’s earlier argument was published (Section I). We next discuss the key issues to be addressed in this article – in an ADA lawsuit, “who decides whether an individual poses a ‘direct threat’ to health or safety, and what exactly does that decider decide?”—in Section II. In so doing, we will place the *Beverage Distributors* decision into a larger context of five possible approaches to this problem:

32. EEOC v. Beverage Distrib. Co., 780 F.3d 1018, 1021–22 (10th Cir. 2015).

33. *Id.*

34. *Id.*

35. Brittany Blackburn Koch, *ADA “Direct Threat” Defense Just Got A Little Easier*, NAT’L L. REV. (Apr. 22, 2015), <https://www.natlawreview.com/article/ada-direct-threat-defense-just-got-little-easier>.

36. *E.g.*, Michael R. Lied, *Court: Employer May Rely on Reasonable Belief That Disability Posed Direct Threat*, CHI. L. BULL. (Apr. 2, 2015), https://howardandhoward.com/user_area/uploads/CDLB%20-%20Lied%204-2-15.pdf.

Who's the decider, and what does that decider decide? OPTIONS:

- (1) Employer, in good faith
- (2) Employer, if employer can get a medical opinion (and “reasonably believes” that the individual poses a direct threat)
- (3) Employer, if employer can get a medical opinion with which the jury agrees
- (4) The jury gets to decide, considering evidence from both sides
- (5) The decision should be made through a model of expert medical consultation

Each one of these approaches will be discussed and a critique of each will be offered in Subsections II.A through II.D. Included within this survey will be discussions of two recent cases from the Seventh³⁷ and Sixth³⁸ Circuits that take different – but not necessarily more productive – positions on the “who decides and what does the decider decide” question. In Section III, we will explore anew how the author’s proposal for using a tripartite medical review model of expert medical consultation can make the “direct threat” standard workable for safety-sensitive industries, including how safety-sensitive industries can use legal developments in mandatory arbitration under the Federal Arbitration Act (which have transpired since my original article). It is the author’s position that this model is essential to ensure the kind of expert medical decision-making that the author believed in 1999, and still believes, to be the only sensible way for properly harmonizing a disabled individual’s ADA rights with the public’s right to safety—especially by preventing staggering tragedies like that of Germanwings Flight 9525 while preserving employment opportunities and workplace protections for the millions of individuals with a mental impairment who do not pose threats to health and safety. Section IV offers a summation and concluding observations.

I. PERSISTENT DIRECT-THREAT ISSUES, BOTH SETTLED AND UNSETTLED

Early in the enforcement of the ADA and the litigation of “direct-threat” cases, two issues arose that proved to be particularly vexing. The first

37. *Stragapede v. City of Evanston*, 865 F.3d 861 (7th Cir. 2017).

38. *Michael v. City of Troy Police Dep’t*, 808 F.2d 304, 307, 309 (6th Cir. 2015); *see also Wurzel v. Whirlpool Corp.*, 482 Fed.App’x. 1, 12 (6th Cir. 2012).

issue was whether the “direct-threat” standard applies to risks of harm posed predominantly to the individual with a disability, as opposed to others in the workplace or with whom the individual would be interacting or for whom the individual would be responsible.³⁹ The second issue was whether the “direct-threat” issue was an affirmative defense for the employer to prove, as the statutory structure suggests; or whether if the employer challenges the individual as a “direct-threat,” the individual is left to sue the employer for discrimination under the ADA and to prove that s/he is not a direct threat as part of proving the *prima facie* showing that s/he is “a qualified individual with a disability, who can perform the essential functions of the job in question, either with or without reasonable accommodation.”⁴⁰ As we elaborate below, one of these issues has been settled — at least, unless or until the U.S. Supreme Court overrules its administrative-deference rule in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁴¹ — and the other issue remains mired in a conflict among the U.S. Appeals Courts that have ruled on it, and remains entirely open in several Circuits, including the Sixth Circuit, that have yet to rule upon it.

A. “Direct Threats” to Self?

The statute speaks of threats “to the health or safety of *other individuals* in the workplace” when it defined “direct threat.”⁴² The statute did not, however, say that an individual whose disability poses a significant risk of substantial harm to the disabled individual solely (or primarily) is a direct threat. Thus, an early question that arose under the ADA is does the “direct-threat” standard apply to threats to the health or safety of *the individual*, rather than of others?⁴³

Employers soon began pushing for an expansion of what we shall call the “threatened class” so that it included risks posed by a disabled individual only to the individual, not others.⁴⁴ This view had the potential to expand the scope of disqualified individuals substantially by extending the “direct-threat” defense not only to employees or applicants whose work

39. See *Typhoid Mary*, *supra* note 28, at 864 n.60.

40. See *id.* at 865 n.64.

41. *Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

42. 42 U.S.C. § 12101(3)(2012) (“The term ‘direct threat’ means a significant risk to the health or safety of *others* that cannot be eliminated by reasonable accommodation” (emphasis added)); 42 U.S.C. 12113(b)(2012) (“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.”(emphasis added)). The legislative history of these sections includes a House and Senate report that does not endorse the “threat to self” gloss on “direct threat,” and a House Labor Committee Report that does. See Amanda J. Wong, Comment, *Distinguishing Speculative And Substantial Risk In The Presymptomatic Job Applicant: Interpreting The Interpretation Of The Americans With Disabilities Act Direct Threat Defense*, 47 UCLA L. REV. 1135, 1148–51 (2000).

43. See Wong, *supra* note 42, at 1143.

44. *Id.* at 1145–46.

might be done separate and apart from others, but also to those who were in “pre-symptomatic” stages of a disability, where the employer sought to argue that employing the individual in a particular job would increase the risk of harm from the underlying condition.⁴⁵ This raised concerns that the ADA could be turned on its head to disadvantage the very groups of individuals it was enacted to help:

The problem is that if direct threat is interpreted to encompass risk to self and other . . . then a loophole is created that allows employers to avoid potential liability by simply not hiring those who are at potential risk of injury or disease. Adverse employment decisions based on speculation and future risk of injury are illegal under the ADA; but if an employer is able to characterize speculation regarding future risk of injury as a direct threat to self, then it becomes a valid reason for disqualification.⁴⁶

Of even greater concern to some advocates for the rights of disabled individuals was—and is—the potential for paternalism inherent in a “direct-threat’ to self” regime. “Even if the employer’s intentions are not suspect and his actions are taken out of a genuine concern for the individual,” wrote a commentator, “individuals with disabilities have questioned whether the employer should be allowed to make this decision on behalf of the employee” because “[a]llowing the employer such power illustrates the paternalism that disability rights groups and individuals with disabilities feared.”⁴⁷

The EEOC of the President George H.W. Bush Administration, however, looked to the fact that the Rehabilitation Act of 1973, on which the ADA was to a degree modeled, had been interpreted by two federal courts as extending “direct threat” exclusion to significant risks of substantial harm posed by the disabled individual himself or herself.⁴⁸ Its regulation implementing Sections 12101(3) and 12113(b) of the ADA defined the direct-threat defense to encompass both risks to others as well as risks to the disabled individual posed in performing the job in question.⁴⁹ The position espoused by the EEOC has been denounced as a continuing sign of pro-employer prerogative and anti-disabled individual paternalism, which “allows employers to treat people with disabilities differently from other minorities even though the courts and society have refused to allow overprotective rules against women,”⁵⁰ such as in the famous case of *United*

45. *Id.* at 1142–46.

46. *Id.* at 1145.

47. *Id.* at 1145–46.

48. *Id.* at 1151–52 (citing *Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985); *Bentivegna v. US Dep’t of Labor*, 694 F.2d 619 (9th Cir. 1982)).

49. 29 C.F.R. § 1630.2(r)(2012).

50. D. Aaron Lacy, *Am I My Brother’s Keeper: Disabilities, Paternalism, And Threats To Self*, 44 SANTA CLARA L. REV. 55–56 (2003).

Auto Workers v. Johnson Control, Inc.,⁵¹ in which the Supreme Court invalidated a battery manufacturer's rules to keep women of child-bearing years out of certain, high-paying operations within the plant without imposing the same restriction on men in their years of fertility.⁵² According to some advocates, the EEOC's regulation encourages "employers to claim they know what is best for individuals with disabilities and to continue to keep individuals with disabilities as a subordinate class" at a time when "society generally allows adults to decide for themselves what risks are too great to take in choosing where to work."⁵³ Thus, the EEOC's regulation was denounced as "a paternalistic infringement on the right of a person with a disability to make the decision to work in a dangerous environment," a restriction which "infringes on the right of a person with a disability to have full control and autonomy to make decisions about what is in his best interest."⁵⁴

The federal appeals courts split on whether the EEOC's rule was a permissible exercise of agency discretion under the *Chevron* standard, with the Eleventh Circuit implicitly saying "yea,"⁵⁵ the Ninth Circuit saying "nay,"⁵⁶ and the Seventh Circuit trying to occupy some middle ground.⁵⁷ When the Ninth Circuit decision reached the U.S. Supreme Court, it ruled, 5–4 that the "yeas" prevailed⁵⁸—and the EEOC's regulation stood, despite its anomalous relationship to plain statutory language and the predominance of the legislative history, because of deference to administrative agencies charged by statute to make regulations implementing a federal statute.⁵⁹ In a rare opinion by Justice Souter not to have drawn a single dissent, the Court

51. *United Auto Workers v. Johnson Control, Inc.*, 499 U.S. 187, 191–92, 211 (1991).

52. *Id.* at 200–11 (applying Title VII § 703(a)).

53. *Lacy*, *supra* note 50, at 56.

54. *Id.*

55. *Moses v. Am. Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996). Several other federal appeals court decisions also assumed that "threats to self" were encompassed within direct threats. *See, e.g., 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).

56. *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063 (9th Cir. 1999), *rev'd*, 536 U.S. 73 (2002).

57. *Koshinski v. Decatur Foundry, Inc.*, 177 F.3d 599, 603 (7th Cir. 1999) (citing *Kohnke v. Delta Airlines, Inc.*, 932 F. Supp. 1110, 1111–12 (N.D. Ill. 1996)). As the Seventh Circuit observed:

Koshinski argues that the ADA is not a paternalistic statute designed to protect a disabled person from himself, and that an employee should not be fired or otherwise denied employment because he may become unwilling to do his job at some point in the future. In principle we do not disagree with *Koshinski's* argument. It would be hard to imagine, for example, that a court would sanction an employer's decision to fire a qualified employee simply because his degenerative heart disease makes a future heart attack inevitable.

Koshinski, 277 F.3d at 603.

58. *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 76 (2002).

59. *Id.* at 84–85.

held that the EEOC's regulation was within the goalposts of permissibility established by *Chevron* deference:

Since Congress has not spoken exhaustively on threats to a worker's own health, the agency regulation can claim adherence under the rule in *Chevron* so long as it makes sense of the statutory defense for qualification standards that are "job-related and consistent with business necessity." 42 U.S.C. § 12113(a). *Chevron's* reasons for calling the regulation reasonable are unsurprising: moral concerns aside, it wishes to avoid time lost to sickness, excessive turnover from medical retirement or death, litigation under state tort law, and the risk of violating the national Occupational Safety and Health Act of 1970, 84 Stat. 1590, as amended, 29 U.S.C. § 651 et seq.⁶⁰

After examining the potential effects under OSHA, for example, of employing someone who posed a "direct threat" to himself or herself alone, the *Echazabal* Court concluded, "[t]he EEOC was certainly acting within the reasonable zone when it saw a difference between rejecting workplace paternalism and ignoring specific and documented risks to the employee himself, even if the employee would take his chances for the sake of getting a job."⁶¹

At the time of the writing of this article, shortly after its presentation at the Symposium that was its *raison d'être*, a new sheriff, so to speak, entered town.⁶² And that sheriff — Justice Brett Kavanaugh⁶³ — is reputed to be mighty skeptical of *Chevron* deference.⁶⁴ As former Tenth Circuit federal appeals court judge and current Stanford Law School faculty member and senior fellow at the Stanford University's Hoover Institute, Michael McConnell,⁶⁵ has predicted:

60. *Id.* at 84.

61. *Id.* at 86.

62. A famous photograph of William O. Douglas when he became the second Chairman of the Securities & Exchange Commission comes to mind. See BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS, AMERICA'S MOST CONTROVERSIAL SUPREME COURT JUSTICE* 466 app. at 6 (2003) (photograph of William O. Douglas wearing a ten-gallon hat with a Colt revolver on his desk, captioned, "A new marshal in town: Douglas as Chairman of the Securities and Exchange Commission, prepares to do battle").

63. Robert Barnes, Ann E. Marimow & Marissa J. Lang, *At Kavanaugh's Supreme Court Debut, Protesters Outside, Business As Usual Inside*, *Washington Post*, Oct. 9, 2018.

64. See, e.g., Ilya Somin, *Overturing Chevron Would Not Gut the Administrative State—but It Would Strengthen the Rule of Law*, *VOLOKH CONSPIRACY* (Aug. 13, 2018, 10:04 AM), <https://reason.com/volokh/2018/08/13/overturing-chevron-would-not-destroy-th> (noting then-Judge Kavanaugh's skepticism of *Chevron*).

65. Michael McConnell, *HOOPER INST.*, <https://www.hoover.org/profiles/michael-mcconnell> (last visited Nov. 11, 2018).

The late Justice Antonin Scalia was an enthusiast for the *Chevron* doctrine, at least in its early years, but Judge (now Justice) Neil Gorsuch and Judge (now nominee) Brett Kavanaugh have been powerful critics. They argue that *Chevron* deference is an abdication of the court's Article III duty to independently interpret the law, and that it aggrandizes the power of the executive branch at the expense of both the legislative and the judicial. If Kavanaugh is confirmed, it seems likely that one of the most significant changes will be the curtailment if not outright abandonment of *Chevron* deference.⁶⁶

This article shall not digress into an examination of then-Judge Kavanaugh's opinions or dissents while a member of the D.C. Circuit that deal with *Chevron* deference – that is an enterprise of much labor, requiring much subtlety, which must be left to others.⁶⁷ It suffices here to make two observations. First, then-Judge Kavanaugh has questioned *Chevron* deference in a high-profile scholarly publication.⁶⁸ Second, Justice Souter's application of *Chevron* deference to uphold the EEOC's "direct threat to self" gloss on a perfectly clear and unambiguous statute remains open to question—and some scholars have called it wrongly decided, inviting efforts to overturn it.⁶⁹ Whether that portends a future, successful challenge by those who would see *Echazabal*, and in turn the EEOC's regulation, overturned is a matter that remains gestating in the womb of time.⁷⁰

B. Is "Direct Threats" an Affirmative Defense—or an Element of an ADA Plaintiff's Prima Facie Case?

A split among federal appeals courts has existed for quite some time about whether the presence of a direct threat must be proven by an employer as an affirmative defense—or whether a worker challenging an adverse

66. Michael McConnell, *Kavanaugh And The "Chevron Doctrine"*, Defining Ideas: A Hoover Inst. J., THE HOOVER INSTITUTION (Jul. 30, 2018), <https://www.hoover.org/research/kavanaugh-and-chevron-doctrine>.

67. See Kent H. Barnett, Christina L. Boyd & Christopher Walker, *Judge Kavanaugh, Chevron Deference, and the Supreme Court*, THE REGULATORY REVIEW (Sept. 3, 2018), <https://www.theregview.org/2018/09/03/barnett-boyd-walker-kavanaugh-chevron-deference-supreme-court/>.

68. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) (Reviewing HON. ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

69. Craig Robert Senn, *Fixing Inconsistent Paternalism Under Federal Employment Discrimination Law*, 58 UCLA L. REV. 947, 996 (2011) ("[T]he Court wrongly decided *Echazabal* for three distinct reasons.").

70. A phrase that appears in Justice Benjamin Cardozo's unpublished concurring opinion in the (in)famous—depending on one's perspective—Hughes Court 5–4 decision in the "Minnesota Mortgage Moratorium Case," *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934); ANDREW M. KAUFMAN, CARDOZO 501–02 (1998).

employment action must prove, as part of the prima facie case, that s/he does not pose a direct threat.⁷¹ The author noted this dissonance in 1999.⁷² As he explained at the time:

The awkwardness of the organization of the ADA's provisions arises from the fact that (1) it is part of an employee's case to prove that he or she meets the employer's lawful qualification standards; (2) the "direct threat" test is such a qualification standard; (3) yet the statutory provision regarding "direct threats" appears as a "defense to a charge of discrimination," suggesting that it is an affirmative defense to be pled and proved as required by Fed. R. Civ. P. 12(b) by the employer. The courts, however, have not agreed who should bear the burden in the "direct threat" cases. Some courts, relying on the peculiar structure of the statute, have ruled that it is an affirmative defense, while others have ruled that the ability to perform a job without posing a "direct threat" is part of the plaintiff's burden to establish his or her qualifications to perform the essential functions of a job.⁷³

This circuit split persists in 2018⁷⁴ and is limned in the following chart:

71. See, e.g., Rene L. Duncan, *Direct Threat Defense under the ADA: Posing a Threat to the Protection of Disabled Employees*, 73 MO. L. REV. 1303, 1313–14 (2008) (discussing EEOC v. Wal-Mart Stores, Inc., 477 F.3d 561, 571–72 (8th Cir. 2007), which noted the Circuit split and ruled it to be an affirmative defense); Ann Hubbard, *Understanding and Implementing the ADA's Direct Threat Defense*, 95 NW. U. L. REV. 1279, 1337–1345 (2001).

72. See *Typhoid Mary*, *supra* note 28, at 942 & n. 411.

73. *Id.* at n. 411.

74. Steven F. Befort, *Direct Threat and Business Necessity: Understanding and Untangling Two ADA Defenses*, 39 BERKELEY J. EMP. & LAB. L. (forthcoming 2018).

Circuit	Party With Burden	Case Authority
1st	Usually Plaintiff	<i>EEOC v. Amego, Inc.</i> , 110 F.3d 135, 144 (1st Cir. 1997)
2nd	Defendant	<i>Lovejoy–Wilson v. NOCO Motor Fuel, Inc.</i> , 263 F.3d 208, 220 (2d Cir.2001)
3rd	Undecided	<i>New Directions Treatment Servs. v. Reading</i> , 490 F.3d 293, 306 n.9 (2007)
4th	Uncertain	No 4th Circuit Appeals Court opinion decides.
5th	Inconclusive	<i>Rizzo v. Children’s World Learning Ctrs.</i> , 213 F.3d 209 (5th Cir. 2000) (en banc); <i>Nall v. BNSF Railroad Company</i> , 917 F.3d 335, 343 n. 5 (5th Cir. 2019)
6th	Undecided	<i>Wurzel v. Whirlpool</i> , 482 Fed.Appx. 1, 12 n.14 (6th Cir. 2012)
7th	Defendant	<i>Branham v. Snow</i> , 392 F.3d 896, 906 (7th Cir.2004)
8th	Defendant	<i>EEOC v. Wal–Mart Stores, Inc.</i> , 477 F.3d 561, 571 (8th Cir.2007)
9th	Defendant	<i>Echazabal v. Chevron, U.S.A., Inc.</i> , 336 F.3d 1023, 1027 (9th Cir.2003)
10th	It Depends	<i>Jarvis v. Potter</i> , 500 F.3d 1113, 1122 (10th Cir. 2007)
11th	Plaintiff	<i>Moses v. Am. Nonwovens, Inc.</i> , 97 F.3d 446, 447 (11th Cir.1996)
D.C.	Undecided	<i>Taylor v. Rice</i> , 451 F.3d 898, 905–06 (D.C.Cir.2006)

An annotated version of this chart, with detailed footnotes, appears as the Appendix to this article.

Which of these approaches actually makes sense? Judge Edith Jones made the best case for imposing the burden on the individual – but it is not all that persuasive a case.⁷⁵ On the other hand, Professor Steven Befort, in a recent article, corralled all of the justifications for treating “direct threat” as an affirmative defense, and came up with five separate rationales.⁷⁶ However, the author, taking a textualist approach, thinks that the language of the statute itself establishes beyond doubt that Congress intends direct threat

75. See McConnell, *supra* note 66.

76. Legislative history; treatment afforded other ADA defenses; EEOC viewpoint expressed in its Enforcement Guidance document on Psychiatric Disabilities; practical advantages of the employer in terms of knowledge of the job and the business; vindication of Congressionally stated purpose of ending stereotyping of disabled individuals by making employer prove them unfit rather than making them prove themselves fit. See Befort, *supra* note 74, at 29–31.

to be proven by the employer as an affirmative defense to denying an employment opportunity to a disabled individual admittedly because of his or her disability. In direct-threat cases, employers are not arguing that they did not discriminate. Quite to the contrary, in the “direct-threat” paradigm, the whole case is founded upon the employer’s admission that it [a] did indeed discriminate and [b] discriminated because of the applicant’s or employee’s disability—coupled with the contention, solely within the employer’s province, that it was justified in discriminating because of the disability for the reason that the disability posed a direct threat. That is why the statute expressly places “direct threat” among the affirmative defenses.⁷⁷ The statute does not speak to prima facie cases or what their components might be. While the statute does talk of protecting “qualified individuals with disabilities who can perform essential job functions without or without accommodation,”⁷⁸ that use of the word “qualified” does not in some talismanic way transform what the statute sets forth as a defense to be proven by admittedly discriminating employers into a new component of proving that one is a qualified individual with a disability, thereby being prima facie protected by the statute. That is enough for the Supreme Court to decide this issue in favor of the text and, therefore, in favor of requiring employers to prove up direct threats.⁷⁹

A second—and related—textualist point: the text of statutes with Congressional findings should be interpreted consistently with and informed by those findings. Eight of the nine Congressional findings that open the ADA of 1990 are rooted in the financial and economic disadvantaging that disabled individuals have suffered and continued to suffer.⁸⁰ It would be nothing short of perverse for Congress to then have required that disabled individuals would have to muster the resources to enlist the finances and medical expertise to prove a negative—that they are not direct threats—as

77. American with Disabilities Act of 1990, Pub. L. No. 101-336, § 103(a)–(b), 104 Stat. 327, 333–34 (1990).

78. *Id.* at § 101(8), § 102(a).

79. The author’s views on this subject have evolved over the last twenty years, when he agreed more with Judge Edith Jones’ position articulated in her dissent from the *Rizzo* en banc opinion. See *Typhoid Mary*, *supra* note 28, at 865 n. 64. As for the textualist approach by which the author’s thinking evolved, it must be noted that while useful here, textualism, taken to an extreme, can pose problems for the implementation of employment discrimination laws. See Stephen R. Greenberger, *Civil Rights and The Politics of Statutory Interpretation*, 62 U. COLO. L. REV. 37, 53–54, 56–70 (1991); see, e.g. *Kieber v. CareFusion Corp.* 914 F.3d 480 (7th Cir. 2019)(en banc), rev’g 888 F.3d 868 (7th Cir. 2018)(quickly becoming infamous for the en banc court’s view, reached using the tools of textualism, that the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, does not permit outside job applicants to sue an employer under the ADEA for hiring practices that have a demonstrably disparate impact on applicants who are age 40 and over — a position rejected even by the likes of Judge Frank Easterbrook, who dissented).

80. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, §2 (a)(2)–(9), 104 Stat. 327, 328–29 (1990).

the cover charge to seek relief under the ADA when they lack the very resources to do so.⁸¹

II. WHO IS THE DECIDER? AND WHAT, EXACTLY, IS THE DECIDER TO DECIDE?

The greatest issues raised by the ADA's "direct threat" standard are interconnected and sequential. First, who is the decider as to whether a particular disabled individual is lawfully excluded from employment because s/he poses a direct threat?⁸² Second, what exactly is the nature of the issue that the decider is to decide?⁸³ At the time that the author wrote his *Harvard Journal of Law and Public Policy* study of the "direct-threat" standard, these issues had not been adequately identified, explored, and resolved in the case law. The purpose of this section is determine the extent to which, in the intervening 20 years, the federal courts have identified, explored, and resolved these two foundational issues.

81. A recent commentator who has argued for burdening the disabled individual with the direct-threat proof has swept past the textual, structural, purposeful, and legislative historical considerations and plunged into making *ex cathedra* policy declarations that defy the text, the structure, the Congressional findings and purpose, and the legislative history of the ADA:

A better view is that safety is always paramount and thus an essential function of every job, and the burden of proof is always on the employee to show that he or she can safely perform the job. However, there can be a question as to the burden of production. The employer should first be required to produce credible evidence of a safety threat. Then, the worker will have the burden to rebut that evidence, and he or she will also carry the ultimate burden of persuasion.

Lawrence P. Postol, *ADA Open Issues: Transfers to Vacant Positions, Leaves of Absence, Telecommuting, and Other Accommodation Issues*, 8 ELON L. REV. 61, 94 (2014).

82. See, e.g., Brian S. Prestes, *Disciplining the Americans with Disabilities Act's Direct Threat Defense*, 22 BERKELEY J. EMP. & LAB. L. 409, 410 (2001) (arguing that employers should make direct threat determinations with statistical guidance from the EEOC and OSHA and noting that "juries, left to their own devices and ambiguous statutory commands, are likely to produce inconsistent and inaccurate results"); Teresa L. Clark, *A Map for the Labyrinth: How to Conduct Job Interviews and Obtain Medical Information Without Violating the Americans with Disabilities Act*, 13 LAB. LAW 121, 148 (1997) (recommending that direct threat determinations should be made by human resource officers, not interviewers or hiring managers).

83. See, e.g., Patrick J. Schwedler, *Prescription Drugs and Dangerous Jobs: When Can Disclosure Be Required for Public Safety under the ADA?*, 17 EMP. RTS. & EMP. POL'Y J. 93, 114-115 & n. 133, (noting that the EEOC uses direct threat analysis to make "public safety" exception determinations); Nathan J. Barber, *"Upside Down and Backwards": The ADA's Direct Threat Defense and the Meaning of a Qualified Individual After Echazabal v. Chevron*, 23 BERKELEY J. EMP. & LAB. L. 149, 184 (2002) (arguing in favor of "the common sense notion that an applicant who will be harmed by the work environment is not qualified for the position irrespective of whether or not the applicant poses a direct threat to himself").

Based on the author's law-practice, teaching, and scholarly experience with the ADA and "direct-threat" issues thereunder, he has identified five possible paradigms in which to consider the answer to the questions of "who decides and what do they decide":

***Who's the decider, and what does the decider decide?* OPTIONS:**

1. Employer, in good faith
2. Employer, if employer can get a medical opinion (and "reasonably believes" that the individual poses a direct threat)
3. Employer, if employer can get a medical opinion with which the jury agrees
4. The jury gets to decide, considering evidence from both sides
5. The decision should be made through a model of expert medical consultation

The real interplay here are the role(s) that the employer, a medical consultant, a federal district judge, and a federal court jury are to play in terms of both "who decides" and "what is to be decided." We will examine each.

A. The Employer, In Good Faith

1. Employer Prerogative—The Origins Of A Good-Faith Standard, Which Has For Over 40 Years Been The Foundation For Arguing That Certain Workplace Issues Remain Outside Of The Reach Of Federal Employment Discrimination Laws

Since the earliest days of the Employment Discrimination Laws EDLs, employers have argued that they retain a large share of employer prerogative to make personnel decisions, a zone of privilege that employers insist is isolated from the reach of EDLs.⁸⁴ "Although the change in the

84. The first time the term "prerogative" appears in the published federal cases in reference to a zone of employer discretion immune from the limitations of EDLs is, ironically, in a case in which the legendary Judge John R. Brown reversed a trial court judgment for General Motors in a case arising out of its Lakewood, Georgia assembly plant, where jobs had been segregated until 1962:

American workplace that would inevitably occur by eliminating race and sex discrimination must have been recognized as enormous even in 1964, proponents of the Civil Rights Act provided assurances that the traditional prerogatives of management would be left undisturbed to the greatest extent possible.⁸⁵ Many federal courts, including the Supreme Court, have bought into this vision.⁸⁶ As Professor Cardi has explained:

Just as it influenced the Court's reasoning in *Price Waterhouse*, a concern for employer freedom—manifesting in the common-law, employment-at-will principle—plays a significant role in courts' application of employment discrimination statutes.⁸⁷

In *Furnco Constr. Corp. v. Waters*,⁸⁸ Justice Rehnquist famously wrote for a 7–2 majority that

The dangers of embarking on a course such as that charted by the Court of Appeals here, where the court requires businesses to adopt what it perceives to be the ““best”” hiring procedures, are nowhere more evident than in the record of this very case. Not only does the record not reveal that the court's suggested hiring procedure would work satisfactorily, but also there is nothing in the record to indicate that it would be any less “haphazard, arbitrary, and subjective” than *Furnco's* method, which the Court of

Akin to this is the contention that “experience” was essential and only the long-employed Whites—and conversely, not the recently hired Blacks—had the “experience”. Without gainsaying, as *Griggs, supra*, makes so plain, that *qualifications* are **an employer's prerogative**, the standards cannot be automatically applied to freeze out newly freed Blacks because for the years of its segregated policy GM hired no Blacks to afford them an opportunity to acquire experience. And on this GM—apart from its incantation of “experience” needs—made no effort to show that in these ebb and flow lay-offs and rehiring, that none of the affected Blacks was job-disqualified.

Rowe v. Gen. Motors Corp., 457 F.2d 348, 351, 358 (5th Cir. 1972) (citing *Griggs Co. v. Duke Power*, 401 U.S. 424 (1971)) (original emphasis & emphasis added).

85. Martha Chamallas, *Evolving Conceptions of Equality under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 UCLA L. REV. 305, 306, n. 7 (1983) (citing H.R. REP. No. 914, at 29, *reprinted in*, EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 2150).

86. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (“Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers’ freedom of choice. This balance between employee rights and employer prerogatives turns out to be decisive in the case before us.”).

87. W. Jonathan Cardi, *The Role of Negligence Duty Analysis in Employment Discrimination Cases*, 74 OHIO ST. L.J. 1129, 1140 (2014) (footnote omitted).

88. 438 U.S. 567 (1978).

Appeals criticized as deficient for exactly those reasons. Courts are generally less competent than employers to restructure business practices, and, unless mandated to do so by Congress, they should not attempt it.”⁸⁹

From this foundation evolved a series of cases that more and more gave rise to a palpable deference to employer “prerogatives” that, sub silentio, became counterweights which allowed courts to recharacterize an EDL plaintiff’s claim as one of disputing employer judgment rather than “true” discrimination. And since the EDLs did not require employers to exercise even good – let alone the best – judgment because of the scope of their prerogative, the fact that an employer had the facts wrong or investigated them ineptly before taking an adverse employment action was held as a matter of law to be beyond the reach of the EDLs. The 1980s produced some of the most-cited gems in this repertoire (especially by management-side lawyers in briefs supporting summary judgment motions and in proposed jury instructions). Some courts said: “It scarce need be said that Title VII is not a shield against harsh treatment at the workplace; it protects only in instances of harshness disparately distributed.”⁹⁰ Other courts observed that “[a] court does not sit as a super-personnel department that reexamines an entity’s business decisions.”⁹¹ These thoughts morphed into a more general set of assertions that further expanded the widely-enveloping area into which employer prerogative had expanded since 1964. “If you honestly explain the reasons behind your decision, but the decision was ill-informed or ill-considered, your explanation is not a ‘pretext,’” that doyen of law and economics and plain-spoken stylist, Judge Frank Easterbrook of the Federal Court in Chicago wrote. “A reason honestly described but poorly founded is not a pretext, as that term is used in the law of discrimination.”⁹² Not satisfied with the watering down of the whole notion of pretext from the McDonnell Douglas/Burdine formulation of the prima facie case, Judge Easterbrook elaborated in a call to arms for employers asserting their business prerogatives against what he plainly saw as economically indefensible incursions by federal EDLs, that “[a] district judge does not sit in a court of industrial relations. No matter how medieval

89. *Id.* at 578.

90. *Jackson v. City of Killeen*, 654 F.2d 1181, 1186 (1981) (reversing the trial judge’s finding of facts and resulting conclusions of law in favor of a Title VII plaintiff). After a full bench trial, the federal district judge had ruled that “Patricia Jackson, a black female with a bachelor’s degree in library science and two years of library experience in a junior high school” was discharged in violation of Title VII by the Killeen Public Library, and had ordered “her reinstated and awarded her \$1,389 in back pay and \$1,500 in attorneys’ fees.” *Id.* at 1182, 1183.

91. *Dale v. Chi. Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986).

92. *Pollard v. Rea Wire Magnet Co.*, 824 F.2d 557, 558, 559 (7th Cir. 1987) (in the same vein, noting “[i]f the only question were whether Pollard was injured, we would accept the judge’s conclusion without hesitation. But no federal rule requires just cause for discharges.”).

a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, Title VII and § 1981 do not interfere."⁹³ Somewhere in that great robing room in the sky, Oliver Wendell Holmes, Jr., must have nodded approvingly.⁹⁴

Perhaps among management-side lawyers writing defendants' jury instructions in EDL cases, the most oft-cited synthesis of these ideas about employer prerogative came from Judge Edith Hollan Jones, who wrote in a case ironically finding a fact-issue for trial in an airline employee's ADEA claim:

[W]e do not hold that a verdict for Bienkowski would be supportable only on evidence that American's reasons for firing him are not justified or supported by objective facts. The Supreme Court has cautioned that --

The fact that a court may think the employer misjudged the qualifications of the applicants does not in itself expose him to [employment discrimination] liability, although this may

93. *Id.* at 560. Judge Easterbrook prefaced the quoted language:

In the end, the district judge believed that Rea was not well run (it had no written rules on absences, did not ask Pollard to bring in an excuse, and tolerated an inconsistency between the rule in the collective bargaining agreement that requires discharge for missing five days and a point system that does not) and as a result of a coincidence (Pollard's request for leave the week of July 23) erred in not believing Pollard's excuse. An arbitrator who came to these conclusions could order Pollard reinstated with back pay. A district judge does not sit in a court of industrial relations.

Id.

94. *Lamson v. Am. Axe & Tool Co.*, 58 N.E. 585 (Mass. 1900) (Holmes, C.J.). Of this case, another court wrote:

[An] employs a servant to paint hatchets under a rack upon which they are placed to dry. During this employment this rack which safely held the hatchets is removed, and a new one is substituted for it which is dangerous because the jar sometimes dislodges the hatchets and causes them to fall upon the workman below. Nevertheless, the servant continues to paint beneath them. A hatchet falls upon and injures him. He cannot recover of his master for the injury, because he has voluntarily assumed the risk; and this is none the less true, says Mr. Justice Holmes, that fear of loss of his place induced him to stay.

St. Louis Cordage Co. v. Miller, 126 F. 495, 502 (8th Cir. 1903) (citing *Lamson*); see ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* 128–130 (2000) (“Holmes’ appointment to the bench required him to confront the present – in particular, the working conditions of industrialized America. . . . [H]is opinions for the Supreme Judicial Court of Massachusetts reveal less about his theory of torts than about his tough-minded approach to human suffering and his failure to address ‘considerations of social advantage.’”).

be probative of whether the employer's reasons are pretext for discrimination.

The ADEA was not intended to be a vehicle for judicial second-guessing of employment decisions, nor was it intended to transform the courts into personnel managers. The ADEA cannot protect older employees from erroneous or even arbitrary personnel decisions, but only from decisions which are unlawfully motivated.⁹⁵

Thus, as Professor Chambers has observed,

[the] Court has gradually limited protections for employees under Title VII by providing employers increasing latitude to structure the workplace in ways that may facilitate discrimination. Title VII was designed to restrict the employer's ability to discriminate but was not designed to completely eliminate employer autonomy. However, when employer autonomy intersects with or leads to discrimination, Title VII's prohibition on discrimination ought to prevail. Nonetheless, the Supreme Court has been subtly allowing employer prerogative to override employment discrimination statutes by allowing employers to structure their actions to avoid liability or by removing coverage for decisions that the Court believes ought to be within the employer's discretion. This may affect how well Title VII meets its overarching objectives.⁹⁶

This is a persistent strain of judicial thought, a kind of accompaniment playing steadily in the background as federal courts make important decisions about what various EDL provisions mean and how they are to be implemented. At times, however, this (dis)harmony can crescendo to overwhelm the melody of a court's decision, laying bare for all to see the continuing power that the employer prerogative's idea carries. We see that in various ways in the *Beverage Distributors*⁹⁷ and *Michael*⁹⁸ cases discussed in Subsections II.B and II.C, *infra*.

95. *Bienkowski v. Am. Airlines, Inc.*, 851 F.2d 1503, 1507–08 (5th Cir. 1988) (citations & footnote omitted).

96. Henry L. Chambers Jr., *The Supreme Court Chipping Away at Title VII: Strengthening It or Killing It?*, 74 LA. L. REV. 1161, 1166 (2014) (footnote omitted); see also Henry L. Chambers, Jr., *Neoliberalism and the Lost Promise of Title VII*, JOTWELL: WORKLAW (April 11, 2018), <https://worklaw.jotwell.com/neoliberalism-and-the-lost-promise-of-title-vii> (reviewing Deborah Dinner, *Beyond "Best Practices": Employment-Discrimination Law in the Neoliberal Era*, 92 IND. L.J. 1059 (2017)).

97. *EEOC v. Beverage Distrib. Co., LLC*, 780 F.3d 1018, 1021–22 (10th Cir. 2015).

98. *Michael v. City of Troy Police Dep't*, 808 F.3d 304, 307, 309 (6th Cir. 2015).

2. To Dream The Impossible Dream—Employers Arguing For The Direct-Threat Issue To Be Decided By Employers, Subject Only To A Requirement That They Decide “In Good Faith” Whether An Individual Poses A Direct Threat

For some in the employer community, our inquiry should not proceed beyond this:

Who’s the decider, and what does the decider decide? OPTIONS:

(1) **Employer, in good faith**

But is any of this “employer prerogative” and “good-faith decisions” equated to “non-discriminatory decisions” appropriate to the ADA setting? Employers have gotten some traction with arguing prerogative as the genesis for at least some allocations of decision-making under the ADA. For example, since the early days after the Title I employment provisions of the ADA took effect, courts have consistently invoked employer prerogative in choosing among available “reasonable accommodations” that would permit an employee to perform the essential functions of a job.⁹⁹ This statement has typically come up when the employee sought accommodation X but

99. See *Jay v. Internet Wagner Inc.*, 233 F.3d 1014, 1017 (7th Cir. 2000) (“It is the employer’s prerogative to choose a reasonable accommodation; an employer is not required to provide the particular accommodation that an employee requests.”). As one district court recently ruled, citing *Jay*, a 1973 Rehabilitation Act failure-to-accommodate case could not be resolved on summary judgment because the facts permitted two rational views of the evidence on the failure-to-accommodate issue raised by a pharmacy technician who had a permanently and seriously disabled right hand:

Viewing the evidence in the light most favorable to Bredemeier, a reasonable jury could conclude that she needed the dictation software to perform her job duties in light of her disability and that the VA’s prolonged failure to get the dictation software up and running again despite repeated requests and numerous e-mails back and forth about the problem constitutes a failure to reasonably accommodate her disability. On the other hand, viewing the evidence in the light most favorable to the VA, a reasonable jury could also conclude that—dictation software problems aside—the VA reasonably accommodated Bredemeier by providing her with numerous other accommodations, including transitional duty assignments, a new ergonomically designed workstation, software training, and new headsets.

Bredemeier v. Wilkie, No. 15 C 7514, 2018 WL 3707803, at *7 (N.D. Ill. Aug. 4, 2018).

employer rejected that accommodation and offered only Accommodation Y.¹⁰⁰

However, fundamentally and functionally, the ADA is different. It requires a form of affirmative action – reasonable accommodation – which in and of itself is a substantial limitation on employer prerogative.¹⁰¹ As one experienced attorney in the field has written, “[t]he ADA is different from all other discrimination laws, since the other laws merely level the playing field,” which effectively allows employers to “put on blinders and treat all workers the same, irrespective of race, color, sex, age, etc.,” while “the ADA creates an affirmative duty for employers by requiring employers to provide reasonable accommodations, which can impose significant costs and burdens on employers.”¹⁰²

The “direct-threat” standard was a particularly distinguishing feature of the ADA. As Linda Hamilton Krieger has perceptively written about its pantheon in the EDL universe:

The ADA and its implementing regulations had yet another remarkable feature: they limited an employer’s prerogative to exclude a disabled person from a particular job based on a scientifically unsound assessment of the risks to health and safety posed by the person’s disability. Under the new law, an employer could exclude a disabled individual from a particular job on safety grounds only if the person presented a “direct threat” to the health or safety of others in the workplace, as that term had been narrowly interpreted under the Rehabilitation Act of 1973. Specifically, under the direct

100. See, e.g., *Vande Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538, 542–43 (7th Cir. 1995) (Posner, J.); Cass R. Sunstein, *Cost-Benefit Analysis Without Analyzing Costs of Benefits: Reasonable Accommodation, Balancing, and Stigmatic Harms*, 74 U. CHI. L. REV. 1895 (2007); Carrie Griffin Basas, *Back Rooms, Board Rooms - Reasonable Accommodation and Resistance Under the ADA*, 29 BERKELEY J. EMP. & LAB. L. 59 (2008); but see *Kauffman v. Peterson Healthcare VII, LLC*, 769 F.3d 958 (7th Cir. 2014) (Posner, J.) (while employer may get the ultimate choice, employer who offers essentially no choice created triable fact issue on plaintiff’s failure-to-accommodate claim).

101. See Americans with Disabilities Act of 1990, Pub. L. No. 101-336, §102(5)(A)–(B), 104 Stat. 327, 332 (1990).

102. Postol, *supra* note 81, at 62. Mr. Postol goes on to observe about the “direct-threat” standard in particular:

The issue of the safety of the employee and others, the “direct threat” defense, continues to be a difficult issue because it is so fact-specific and deals with medical issues for which there are not always easy and clear answers. Certainly courts are not as quick to say a disabled employee can perform the essential duties of his or her job when it exposes the worker or others to a risk of significant injury. But the courts cannot agree as to what medical evidence is required to determine if there is a safety risk and who bears the burden of proof.

Id. at 64–65 (footnotes omitted).

threat defense an employer could exclude a disabled individual from a particular job only upon a “reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence,” taking into account the duration of the alleged risk, the nature and severity of the potential harm, and the imminence and actual likelihood of potential harm.

Because stigmatizing conditions are so often associated with irrational perceptions of danger, and because risk assessment in any context is more often based on popular myths and stereotypes than on sound scientific analysis, the ADA’s direct threat defense was potentially transformative. No longer, it seemed, could a disabled person be excluded from a particular job because his or her presence was in good faith viewed as presenting an elevated health or safety risk. In making any such assessment, the ADA seemed to require that an employer replace an “intuitive” or “popular” approach to risk assessment with more scientific methods and standards.¹⁰³

But as a management-side employment lawyer representing airlines at the time the ADA’s Title I employment provisions took effect in 1992, it is the author’s view that Professor Kreiger’s description of the true nature of the direct-threat standard is too chaste, too restrained, and too murky. From where the author stood, the direct-threat standard was an affirmative defense that amounted to the same kind of defense that the defendant has to prove truth in a case of defamation. The defendant in both kinds of cases has the burden of proving truth.¹⁰⁴ Not “a reasonable version of the truth.” No, absolute truth, in the eyes of the factfinder.¹⁰⁵ And that is a mighty formidable burden.

In its first rendezvous with the “direct-threat” standard after the *Arline* case, the U.S. Supreme Court rejected “good faith employer belief” as the governing standard for the decider and what is to be decided in ruling on the direct-threat defense under the ADA. The case was *Abbott v. Bragdon*, and it arose out of an asymptomatic, HIV-positive dental patient’s suit against a dentist who refused because of the patient’s HIV status to fill her cavity in his office and insisted on performing this routine procedure only in

103. Linda Hamilton Krieger, *Foreword -- Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1, 5–6 (2000) (footnotes omitted).

104. See RESTATEMENT (SECOND) OF TORTS § 581A cmt. B (AM. LAW. INST. 1976) (“It has been consistently held that the truth is an affirmative defense which must be raised by the defendant and on which he has the burden of proof.”).

105. *Id.*

a hospital.¹⁰⁶ Admitting that he had discriminated against the patient because of her disability, the dentist argued that he had determined, in good faith, that the risk that her HIV virus might be transmitted to him during the routine dental procedure was a direct threat to his health and safety that absolved him from liability under ADA Title II (public accommodations).¹⁰⁷ In an opinion by Justice Kennedy, the Court rejected the dentist's argument that his good faith fear for contracting HIV was a shield. A "belief that a significant risk existed, even if maintained in good faith, would not relieve" a discriminator from liability for excluding someone as a "direct threat."¹⁰⁸ Although not an ADA Title I employment case, *Abbott v. Bragdon* set the rule for Title I cases, too, since "direct-threat" concept is the same between the two Titles of the ADA. Amazingly, counsel for employers still on occasion will attempt to rescue their clients from the wages of inept, non-medically supported decision-making by reviving some variant of the very argument resoundingly rejected in *Abbott v. Bragdon*.¹⁰⁹

B. Employer, if Employer Can Get a Medical Opinion (and "Reasonably Believes" That the Individual Poses a Direct Threat)

1. Employer Prerogative Clothed in the Language of Objectivity

This is a curious category, and one the author might never have conceived on his own. But in response to a recent federal appeals court case, which otherwise defies description, this category suggested itself. For this is a position that is only slightly removed from the defer-to-my-good-faith-belief stance that the U.S. Supreme Court rejected in *Abbott v. Bragdon*:

106. 524 U.S. 624, 628–29 (1998).

107. *Id.* at 648.

108. *Id.* at 649.

109. *Stragapede v. City of Evanston*, 865 F.3d 861, 867 (7th Cir. 2017) ("The City's primary argument is that it does not matter whether Stragapede actually posed a direct threat to health or safety; it's enough that the City thought he was a direct threat. The Supreme Court disagrees . . . Bragdon holds that an employer's 'belief that a significant risk existed, even if maintained in good faith, would not relieve him from liability.' Rather, a 'direct threat' defense is based solely on 'medical or other objective evidence.'" (citations omitted). The *Stragapede* decision is discussed further *infra* at nn. 154–68 and accompanying text.

Who's the decider, and what does the decider decide?**OPTIONS:**

- (1) Employer, in good faith
- (2) Employer, if employer can get a medical opinion (and “reasonably believes” that the individual poses a direct threat)**

Generally, American lawyers and judges respond with an almost Pavlovian enthusiasm to standards and rules clothed with at least a patina of objectivity. And when one goes from “good-faith” to “reasonable” as the modifier for “belief,” many are the lawyers and judges who will conclude we have gone from lawless to orderly decision-making.¹¹⁰ But the semantical nuance does not necessarily create a practical difference in application. In the case of this standard, it stealthily accomplishes much of what *Abbott v. Bragdon* forbade. The best way in which to see that is to examine the recent, remarkable Tenth Circuit opinion in *EEOC v. Beverage Distributors*, which accomplishes its judicial sleight-of-hand in part through some unfortunate language included, with seeming carelessness, in Justice Kennedy’s *Abbott v. Bragdon* opinion!¹¹¹

2. *EEOC v. Beverage Distributors*: When Generalist Judges Don’t Discern Important Legal Distinctions

In *EEOC v. Beverage Distributors*,¹¹² the agency brought suit against a Colorado employer after it had conditionally hired but then dismissed a legally blind worker for the job of Night Loader in one of its beverage distribution warehouses.¹¹³ Before the Americans with Disabilities

110. See, e.g., Deborah L. Brake, *Retaliation in an EEO World*, 89 IND. L.J. 115, 136 (“When legal scholars have criticized retaliation law, they have mostly taken issue with the reasonable belief doctrine,” criticizing courts’ “narrow” view of reasonableness.); Matthew W. Green, Jr., *What’s So Reasonable About Reasonableness: Rejecting a Case-Law Centered Approach to Title VII’s Reasonable Belief Doctrine*, 62 U. Kan. L. Rev. 759, 761 (2013-2014) (noting that the reasonable belief doctrine is “problematic to plaintiffs challenging discrimination” and that the Supreme Court “has failed to define the reasonable belief doctrine.”).

111. *EEOC v. Beverage Distrib. Co.*, 780 F.3d 1018, 1021 (10th Cir. 2015) (“For this defense, Beverage Distributors had to show that it reasonably determined that Mr. Sungaila posed a direct threat.”) (relying on the “objective reasonableness” standard of *Bragdon v. Abbot*, 524 U.S. 624, 650 (Kennedy, J.), as construed in the Tenth Circuit by *Jarvis v. Potter*, 500 F.3d 1113, 1122 (10th Cir. 2007)).

112. *Id.* at 1018.

113. *EEOC v. Beverage Distrib. Co.*, No. 11-cv-02557-CMA-CBS, 2013 WL 6458735, at *1 (D. Colo. Dec. 9, 2013), *rev’d in part*, 780 F.3d 1018 (10th Cir.2015).

Amendments Act of 2008 (ADAAA),¹¹⁴ the employer would likely have argued that the worker was not “disabled” because he was not excluded from a sufficiently broad class of jobs by his vision impairment.¹¹⁵ However, the ADAAA specifically targeted such narrowing interpretations by the U.S. Supreme Court and federal appeals courts for overruling.¹¹⁶ Thus, the employer could not defeat the case at the summary judgment stage, and was forced to try the case.¹¹⁷ Since the employer admitted disqualifying the worker based solely on his physical impairment, the employer was left to raise an affirmative defense to avoid liability.¹¹⁸ The employer did not raise a defense that the worker’s impairment could not be accommodated without undue hardship.¹¹⁹ Thus, the only affirmative defense left to the employer in the face of its admitted discrimination was to prove the “direct threat” defense.¹²⁰

The case was tried to a jury, which rejected the employer’s direct-threat defense and awarded the worker over \$132,000 in back pay.¹²¹ The court also ordered injunctive relief which included reinstatement with lost pay for the plaintiff and the retention of a consultant to assist the company in coming into legal compliance with the ADA, because, as the court noted, “[a]t trial, the testimony of Beverage Distributors managers and human resources professionals demonstrated a lack of sufficient knowledge about the ADA, its interactive process, and the requirement that reasonable accommodations be provided to employees” – as well as the fact that its “Employee Handbook contain[ed] an inaccurate statement of the law” to the effect it would provide reasonable accommodations, “unless doing so would

114. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

115. *E.g.*, *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002); *see generally* Jeffrey A. Van Detta & Dan Gallepeau, *Judges And Juries: Why Are So Many ADA Plaintiffs Losing Summary Judgment Motions And Would They Fare Better Before A Jury? A Response To Professor Colker*, 19 REV. LITIG. 505 (2000) (With Dr. Dan Gallepeau)(ADA Symposium Issue).

116. ADA Amendments Act of 2008, §§ 2(a)(5)–(7), 2(b)(4)–(6), 4(1), 122 Stat. 3553-3354, 3356.

117. Scholars have pointed out, however, that some employers and courts are shifting the old “summary judgment paradigm” from whether the worker has a “disability” “and onto the workplace itself . . . [b]y broadly defining a job’s essential functions—and by deferring to employers’ unsubstantiated characterizations of essential job function” which has the effect of “embedding able-bodied norms into the definition of work itself.” Michelle A. Travis, *Disqualifying Universality Under the Americans With Disabilities Amendments Act*, 2015 MICH. ST. L. REV. 1689, 1698 (2015).

118. *EEOC v. Beverage Distribs. Co.*, 780 F.3d 1018, 1020, 1021 (10th Cir. 2015).

119. 42 U.S.C. § 12112(b)(5) (2017). *See* Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1122, 1135–42 (2010).

120. *See Jarvis v. Potter*, 500 F.3d 113, 1122 (10th Cir. 2007); *see also EEOC v. Beverage Distribs. Co.*, 780 F.3d at 1020.

121. *EEOC v. Beverage Distribs. Co.*, No. 11-cv-02557-CMA-CBS, 2013 WL 6458735, at *1 (D. Colo. Dec. 9, 2013).

result in an undue hardship . . . or *create the risk of harm* to the health or safety of the applicant, associate, or others.”¹²²

The employer appealed the liability verdict to the Tenth Circuit.¹²³ The employer hung its hat on an argument that the following unremarkable jury instruction was erroneous as a matter of law:

To establish this defense, Beverage Distributors must prove both of the following by a preponderance of the evidence:

1. Mr. Sungaila’s employment in a Night Warehouse position posed a significant risk of substantial harm to the health or safety of Mr. Sungaila and/or other employees; and
2. Such a risk could not have been eliminated or reduced by reasonable accommodation.¹²⁴

In evaluating the employer’s argument, the Tenth Circuit panel staked out a position on the nature of the “direct threat” issue presented to the trier of fact that is inconsistent with the ADA and the origins of the “direct threat” standard in the Rehabilitation Act of 1973 and the *Arline* decision.¹²⁵ Concluding that “[t]he instruction did not accurately convey the direct-threat standard,” the panel offered the following ratiocination for its conclusion:

The first part of the instruction required Beverage Distributors to prove more than what was legally necessary. *According to the first part, Beverage Distributors had to prove that Mr. Sungaila posed a direct threat.* That was not accurate under our case law. *Beverage Distributors should have avoided liability if it had reasonably believed the job would entail a direct threat; proof of an actual threat should have been unnecessary.*¹²⁶

The panel cited but one decision as “our case law”:

122. *Id.* at *8 (emphasis added). Of course, the Handbook should have stated that would provide reasonable accommodations, “unless doing so would result in an undue hardship . . . or create a *significant* risk of harm to the health or safety of the applicant, associate, or others, *that cannot be eliminated through reasonable accommodation.*” *See id.* (emphasis added).

123. *See* EEOC v. Beverage Distrib. Co., 780 F.3d at 1018. During the period pending appeal, the employer sought stay of the monetary judgment and reinstatement of plaintiff into his job, which was granted with the posting of a \$132,000 supersedeas bond and stay of the district court’s order to hire a human-resources consultant to assist the employer with ADA-compliance, which the district court denied. *Id.*

124. EEOC v. Beverage Distrib. Co., 780 F.3d at 1021.

125. *Typhoid Mary*, *supra* note 28, at 856–60 (referencing Sch. Bd. of Nassau Cty. v. Arline, 480 U.S. 273 (1987)).

126. EEOC v. Beverage Distrib. Co., 780 F.3d at 1022 (emphases added).

See Jarvis v. Potter, 500 F.3d 1113, 1122 (10th Cir.2007) (“[T]he fact-finder does not independently assess whether it believes that the employee posed a direct threat.”)¹²⁷

This changes the fundamental nature of the “direct-threat” defense from the employer having to marshal the expert medical testimony necessary to prove that an employee or applicant in fact constitutes a direct threat – a truly objective inquiry—to a standard of what the employer “reasonably believes,” which makes the issue more about the employer and less about the science behind the determination. It comes, in fact, perilously close to an “honest belief” standard, which has been applied in other kinds of EDL cases in which employees discharged for work-rule violations who claim that they

127. *Id.* at 1021–22. The *Jarvis* court’s ratiocination is worth reading in the original:

In evaluating an employer’s direct-threat contention, the fact-finder does not independently assess whether it believes that the employee posed a direct threat. Nor must it accept the contention just because the employer acted in good faith in deciding that the employee posed such a threat. As we understand *Bragdon v. Abbott*, 524 U.S. 624, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998), the fact-finder’s role is to determine whether the employer’s decision was objectively reasonable. In *Bragdon* the defendant refused to provide dental care in his office to an HIV-positive patient. The patient alleged discrimination in violation of the ADA. After affirming the circuit court’s holding that HIV infection is a disability under the ADA, the Court considered whether the patient was entitled to summary judgment on the dentist’s contention that her HIV posed a direct threat to his health and safety. *See id.* at 648, 118 S.Ct. 2196. The Court rejected the proposition that the dentist’s good-faith belief that she posed a direct threat relieved him of liability. *See id.* at 649, 118 S.Ct. 2196. But it also ruled that the circuit court properly refused to consider evidence of safety that was not available to the dentist when he made his decision. *See id.* at 650, 118 S.Ct. 2196. The Court said that the proper test was the “objective reasonableness of the views” of the dentist. *Id.* We recognize that *Bragdon* was not an employment case. It was decided under 42 U.S.C. § 12182(b)(3), a provision of the ADA. But the Court explicitly pointed out that the ADA contains parallel language in its employment provisions, *id.* §§ 12111(3), 12113(b); *see Bragdon*, 524 U.S. at 648–49, 118 S.Ct. 2196, and we see no reason not to apply *Bragdon*’s analysis to employment cases.

Perhaps a more important difference between *Bragdon* and this case is that the defendant in *Bragdon* was a health-care professional, presumably a person better trained to assess dangerousness than a typical employer. Nevertheless, we believe that even nonexpert employers should be protected when they make objectively reasonable assessments, recognizing, of course, that objective reasonableness may well depend on whether professional advice is obtained. *See* 29 C.F.R. § 1630.2(r) (“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.”)

Jarvis v. Potter, 500 F.3d 1113, 1122–23 (10th Cir. 2007).

did not violate the rule and that the employer simply invoked the rule as a pretext for terminating them because of the employer's bias against one or more of their protected characteristics. That line of cases—long and dubious in and of itself—is certainly not relevant to the hard science of determining whether an employee or applicant is a direct threat.

The *Beverage Distributors* case did indeed elaborate on this theory of the direct-threat standard as an employer-focused rather than a science-focused determination in litigation, hanging its hat on another Tenth Circuit panel's interpretation in *Jarvis v. Potter* of the Supreme Court's 1998 decision in *Abbott v. Bragdon*.¹²⁸

But the passage of Justice Kennedy's opinion in *Abbot* on which the *Jarvis* court relies does not actually set the standard for proving the direct-threat defense as determining whether the employer "reasonably believed the job entailed a direct threat," as the *Beverage Distributors* panel suggested. In fact, Justice Kennedy's opinion opens the door to looking beyond whether there is a reasonable basis for the employer's position to whether the employer's position is actually reasonable.¹²⁹ "In assessing the reasonableness of petitioner's actions, the views of public health authorities, such as the U.S. Public Health Service, CDC, and the National Institutes of Health, are of special weight and authority," Justice Kennedy wrote in that case where a dentist made a medical determination about whether treating a particular HIV-positive patient posed a "direct threat" to the dentist.¹³⁰

The trouble with the way that *Jarvis*, and then *Beverage Distributors*, uses *Abbot* may come from the passage in which Justice Kennedy goes onto suggest that "[t]he views of these organizations are not conclusive, however. A health care professional who disagrees with the prevailing medical consensus may refute it by citing a credible scientific basis for deviating from the accepted norm," a proposition for which he cites the 1984 edition of a leading torts hornbook at the time.¹³¹ This is a particularly curious assertion and citation. First, how is the credibility of the "scientific basis for deviating from the accepted norm" to be assessed? Justice Kennedy did not explain this. But the citation to a torts hornbook is both more telling and more troubling. Justice Kennedy apparently sought to analogize the direct-threat determination to the very different question whether a physician being sued for medical malpractice acted within a range of acceptable practice that is epitomized in the customary standard of care applicable in such situations.¹³²

128. *See id.*; *Abbott v. Bragdon* is discussed *supra* at nn. 106–08 and accompanying text.

129. *Abbott v. Bragdon*, 524 U.S. 624, 650–51 (1998).

130. *Id.* at 650. (citing *Arline*, 480 U.S. at 288; 28 CFR pt. 36, App. B, p. 626 (1997)).

131. *Abbott v. Bragdon*, 524 U.S. at 651 ("See W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON LAW OF TORTS § 32, p. 187 (5th ed.1984)").

132. *See* Jeffrey A. Van Detta, *Dialogue With A Neurosurgeon: Towards A Dépeçage Approach To Achieve Tort Reform And Preserve Corrective Justice In Medical Malpractice Cases*, 71 U. PITT. L. REV. 1, 16–17 (2009). As the author wrote about the virtually unique origin, role, and function of physician-established standards-of-care in medical malpractice cases:

Perhaps this analogy seemed apt in *Abbot v. Bragdon*, because the defendant was a dentist making a medical determination about whether he could safely treat a patient with HIV in his dental office.¹³³ But it is not apt for extrapolation from that specific context and the specific kind of medical judgment at issue in *Abbott*. In fact, Justice Kennedy's observations were made completely divorced from the direct threat standards provided in the statute and implementing regulation, which, as demonstrated in Section II.B, *infra*. That becomes obvious when one considers how the physician standard of care is defined: "[P]hysicians must exercise at least the skill, knowledge, and care normally possessed and exercised by other members of their profession in the same school of practice in the relevant medical community."¹³⁴ In actual practice, jury instructions on this standard further water it down by "add[ing] a good deal of rhetoric that repeatedly emphasizes instances of non-liability"¹³⁵:

For instance, the trial judge may well the jury . . . that the law presumes the physician exercised proper care. Other rhetorical instructions are commonly given. . . . For example, trial judges often see that the doctor-defendant is not required to exercise the highest degree of care, only the ordinary care of his profession; that the physician is not liable for a bad result or for a mistake where he acted in good faith; that medicine is an inexact science; or that the physician is not an insurer of the plaintiff's health or a

Principle seems utterly absent in the development of the standard of care. If anything, it appeared originally to be self-serving and political--a precise locality standard of care, which we may infer was the choice of early medical lobbyists because they knew that doctors in most communities, would be reluctant to provide testimony against colleagues. Even if they agreed to provide testimony, the insistence on expert testimony to establish a standard--really, an industry custom-of care actually allowed the medical profession to set its own standards of negligence. In no other area of negligence is this the case. This very different standard allows what Learned Hand ruled in *The T.J. Hooper* would not occur in other areas of negligence law--reliance upon industry custom to set the standard of care without regard to whether that custom met an objective test of reasonableness, such as Judge Hand's *Carroll Towing* formula. Thus, medical malpractice claims are part of a relatively small class of professional negligence claims that are adjudicated under a standard created by one's own peers and not by the principles used in the rest of the tort system where the standard of reasonable behavior is that of a reasonable person.

Id. (footnotes omitted).

133. 524 U.S. at 631.

134. DAN B. DOBBS, PAUL T. HAYDEN, & ELLEN M. BUBLICK, *HORNBOOK ON TORTS*, § 21.5, at 504. (2d ed. 2016) ("The Traditional Medical Standard Of Care") [hereinafter, "DOBBS ET AL., TORTS"].

135. *Id.*

guarantor of her recovery. . . . [Such instructions] inject[t] subjective, good faith issues into the objective negligence test and may lead the jury to think that bad faith, not departure from professional standards, is the test of liability.¹³⁶

This is hardly a permissible basis for the Court – in a moment of careless rhetoric not even at the heart of the issue the Court was charged with deciding in *Abbott v. Bragdon*¹³⁷ – to add such a disruptive gloss to a clear statutory command that required no glossator’s hand to be implemented. Instead, this acorn of happenstance – which the author has found too often in Justice Kennedy’s opinions¹³⁸ – was left to be nurtured into a mighty oak of misunderstanding by the federal appeals courts.

In fact, whenever a court reaches for readily available principles or rules of tort law to “illuminate” EDL, the court does a disservice to both. As the author pointed out in a recent essay:

The “tortification” of Title VII — a perhaps crude but evocative word that I choose here to never let us forget just how unwarranted and unnatural has been the raiment with which the 1991 CRA forcibly fitted Title VII — creates many disadvantages for the evolution of civil rights in our country, for the eradication of discrimination in our workplaces, and for the attainment of the amended Title VII’s § 703(m) goals of lightening the terrifically difficult

136. *Id.* at 504–06.

137. Compare Justice Kennedy’s identification of the specific issues from the Certiorari Petition that the Court had agreed to decide in *Abbott v. Bragdon*, 524 U.S. at 628 (“first, whether HIV infection is a disability under the ADA when the infection has not yet progressed to the so-called symptomatic phase; and, second, whether the Court of Appeals, in affirming a grant of summary judgment, cited sufficient material in the record to determine, as a matter of law, that respondent’s infections with HIV posed no direct threat to the health and safety of her treating dentist”).

138. And a trait noticed by others. *See, e.g.*, Russell Shaw, *The Incoherent, Dangerous Formulations of Justice Kennedy*, THE CATHOLIC WORLD REPORT (June 15, 2015), <https://www.catholicworldreport.com/2015/06/30/the-incoherent-dangerous-formulations-of-justice-kennedy/>. Indeed, one writer described Justice Kennedy as “a Cadillac’s intellect in a Lamborghini’s job. His writing ranged from needlessly flowery to completely incoherent.” Max Brantley, *Don’t Cry For Justice Kennedy: He Wasn’t All That*, THINK PROGRESS (June 27, 2018), <https://thinkprogress.org/kennedy-was-a-bad-justice-76e464024d78/>. The same observer aptly noted, “[Mr. Justice] Kennedy could have been a perfectly adequate lower court judge, but he was in over his head at the Supreme Court. And, for that reason, his most celebrated opinions will be very easy to dismantle.” *Id.* Another decision that exemplifies this tendency towards incoherence – of leaving the law more confused than he found it – is *J. McIntyre Machinery v. Nicastro*, 564 U.S. 873 (2011), in which he had the opportunity to resolve the issue of how and when the “stream of commerce” metaphor could be properly used in determining the constitutionality of a state court’s extra-territorial exercise of personal jurisdiction in a products liability case that was left in confusion after the Court’s decision in *Asahi v. Superior Court*, 480 U.S. 102 (1987), yet utterly failed to do so.

burden of proof in these supposedly “post-racial” times. I myself argued in prior writings that Title VII is a statutory tort, but I did so in a metaphorical sense. My focus was on comparing the effect of a prima facie case of tort to a prima facie case of discrimination under Title VII and the other EDL statutes. I certainly did not intend to suggest that the limiting doctrines on negligence invented by nineteenth and early twentieth century courts to protect business interests should be applied to Title VII. Yet, the Roberts-Retro Supreme Court has apparently espoused that view in its most unfortunate recent decision in *Proctor v. Staub Hospital*, where the Court purported to interpolate proximate causation doctrine from the common law of tort into the law of federal employment discrimination.¹³⁹

As the author observed in that essay, “[n]o one has better chronicled and exposed the ills of torification” of the EDLs than Professor Sandra Sperino of the University of Cincinnati College of Law in “a series of well thought out, closely argued, and incontrovertibly reasoned publications” demonstrating the inherent inappropriateness of “the tort label.”¹⁴⁰ As with the other EDLs, the “tort label” doesn’t work with the ADA, either. In fact, the ADA is not nearly as much about compensating injury as it is preventing injury. For example, as the preamble section of the ADA states, “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.”¹⁴¹ Of all the ADA’s goals, this one is the keystone.¹⁴² Thus, to treat the “direct threat” standard of the ADA as if it were properly descended from medical malpractice law is to miss the essence of the ADA.

Like a stack of Jenga blocks from which one is removed at the base,¹⁴³ the whole edifice of the *Beverage Distributors* approach to “direct threat” determinations comes tumbling down when you remove Justice Kennedy’s reliance on inapposite tort principles from the decision in *Abbott*

139. Jeffrey A. Van Detta, *The Strange Career of Title VII’s § 703(m): An Essay on the Unfulfilled Promise of the Civil Rights Act of 1991*, 89 ST. JOHN’S L. REV. 883, 897 (2015) (Symposium Issue: “Title VII at 50”) (footnotes omitted).

140. *Id.* (citing Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1 (2013); Sandra F. Sperino, *Let’s Pretend Discrimination Is a Tort*, 75 OHIO ST. L. J. 1107 (2014); Sandra F. Sperino, *The Tort Label*, 66 FLA. L. REV. 1051 (2014)).

141. 42 U.S.C. § 12101(a)(7)(2016).

142. See S. REP. NO. 100-116, at 10 (1989) (“[T]he critical goal of [the Americans with Disabilities Act is] to allow individuals with disabilities to be part of the economic mainstream of our society.”) (emphasis added).

143. See *Knowledge & Insights, The Jenga Metaphor*, ENLIGHTENED BEYOND EXPECTATION (Dec. 28, 2017), <https://www.enlightened.com/insights/the-jenga-metaphor/> for an explanation of the Jenga metaphor.

v. Bragdon, and you then remove *Abbot v. Bradgon* as the authority for the Tenth Circuit’s holdings in *Jarvis* and *Beverage Distributors*. When the dust settles from overthrowing this erroneous precedent, where are we left? With a standard that cannot withstand serious scrutiny, and the need to keep searching for one that can. That is the subject of the remaining subsections in Section II.

C. Employer, If Employer Can Get a Medical Opinion, With Which the Jury Agrees; The Jury Gets to Decide, Considering Evidence From Both Sides

While conceptually separate, in practice, the next two options hug a fine line that might be illustrated this way –

Who’s the decider, and what does the decider decide? OPTIONS:

(3) Employer, if employer can get a medical opinion with which the jury agrees

————— *A FINE LINE!* —————

(4) The jury gets to decide, considering evidence from both sides

The fineness of this line, and a further complication in the line dividing them, is best understood by examining two recent federal appeals court cases that operate in a zone around that fine line.

1. Dancing on the Side of Committing “Direct Threat” to Jury Determinations: The Seventh Circuit in *Stragapede v. City of Evanston, Illinois*

The Seventh Circuit’s position on the real question posed by the direct-threat defense – that “it is the employer’s burden to show that an employee posed a direct threat to workplace safety that could not be eliminated by a reasonable accommodation” – provides a point of view seemingly at variance with the Tenth Circuit’s doctrine about what an employer is to prove in litigating the direct threat defense.¹⁴⁴ Examination of one of the Seventh Circuit’s most recently decided ADA direct-threat-defense cases confirms this dissonance.

144. *Jay v. Internet Wagner Inc.*, 233 F.3d 1014, 1017 (7th Cir. 2000).

*Stragapede v. City of Evanston, Illinois*¹⁴⁵ addresses what, exactly, the employer must prove to make out the direct-threat defense under the ADA. Plaintiff Stragapede had been employed with a municipal water department for 14 years when he suffered an accident in the home that caused a traumatic brain injury.¹⁴⁶ After a leave for treatment and recuperation, Stragapede sought to return to work, and after a three-day trial of his abilities to do his job, he was cleared by the municipality's consulting physician and the municipality to resume his job with the benefit of reasonable accommodations:

In anticipation of Stragapede's return to work, the City made two accommodations for him: He was permitted to be off-task to consult with his supervisors if he had any questions, and he could use a map, pen and paper, and a tape recorder as needed to perform his duties. From June 7 until June 22, Stragapede appeared to do his job without much trouble.

Beginning on Wednesday, June 23, however, the City noticed some worrisome developments that continued over the following week. On that day Stragapede requested assistance to change out a water meter. The next day a city employee observed Stragapede driving through an intersection while looking down at his lap; the light was green, no pedestrians were present, and his momentary inattention did not result in an accident. On Friday Stragapede spent two hours at a job site installing a meter but was unable to complete the task. The following Monday Stragapede mistakenly went to the wrong location—Green Bay Road rather than Gross Point Road—for a “JULIE locate,” which involves locating and marking obscured water mains and sewer lines. On Wednesday Stragapede had another directional mishap, arriving at Colfax Place instead of Colfax Street for a water turn-on. Finally, on Thursday, July 1, Stragapede tripped on a set of steps and hurt his toes.¹⁴⁷

At that point, the municipality decided to put Stragapede on leave while it further consulted with its consulting physician about whether he should be allowed to continue working.¹⁴⁸ The physician reviewed the reports of these incidents and opined that Stragapede was unable to perform the

145. 865 F.3d 861 (7th Cir. 2017).

146. *Id.* at 863.

147. *Id.* at 864–65.

148. *Id.* at 865.

essential functions of his job and therefore could be fired, which the municipality promptly did.¹⁴⁹

Unlike so many ADA plaintiffs,¹⁵⁰ Stragapede located a Chicago lawyer¹⁵¹ conversant with the ways of the ADA. She sued the municipality, avoided summary judgment, and took the case to trial before a jury – which resulted in a very expensive series of days in federal district court for the municipality:

On March 13, 2015, after a week-long trial, the jury returned a verdict for Plaintiff Biagio “Gino” Stragapede, finding that Defendant City of Evanston (the City) fired him on the basis of his disability in violation of the Americans with Disabilities Act. The jury also awarded Stragapede \$225,000 in compensatory damages for past and future emotional pain and suffering. The issue of equitable remedies—front pay and back pay—was reserved for this Court, which later held that Stragapede was entitled to \$354,070.72 in back pay plus post-judgment interest, but no front pay.¹⁵²

At trial, the municipality had argued that Stragapede was not qualified to continue in his employment because he posed a “direct threat” to himself and others.¹⁵³ However, its anecdotal evidence about his mishaps was not sufficient to meet the direct-threat burden; and its consulting physician contributed little to the defense, as noted by U.S. District Judge Edmond Chang in denying the municipality’s panoply of post-trial motions:

Lastly, the City relies again on Dr. Grujic’s testimony in an effort to prove that Stragapede was a safety risk, but the City identifies no specific testimony about *safety*. In fact, in response to the question, “You do not have any opinion based upon a reasonable degree of medical certainty as to whether Mr. Stragapede’s brain injury caused him to have safety issues on the job; is that correct?”, Dr. Grujic replied: “I don’t know, since I’m not sure of their inner workings of the Water Department. I’m not sure what all the safety issues that are involved there.” Flat out, Dr. Grujic did not formulate a medical opinion about Stragapede posing a

149. *Id.*

150. Van Detta & Gallipeau, *supra* note 115.

151. As revealed in the District Court’s opinion, *Stragapede v. City of Evanston*, No. 12 C 08879, 2016 WL 278854 (N.D. Ill. Jan. 22, 2016), plaintiff’s attorney was Tracey E. Stevenson, then a shareholder of Robbins Solomon & Platt, Ltd, <http://www.rsplaw.com/>, who subsequently opened her own boutique law firm. See <http://www.tracystevensonlaw.com>; see also <https://www.iadtc.org/members/?id=20404581>.

152. *Stragapede*, 2016 WL 278854, at *1 (N.D. Ill. Jan. 22, 2016).

153. *Id.* at *4.

safety risk. The City focuses on Dr. Grujic's September 9 letter, the one in which he opined that Stragapede could not perform the essential functions of his job (though the opinion was based only on the facts the City presented to the doctor). But there was ample evidence to support the jury's finding that Stragapede *could* adequately perform his job, and thus infer from that evidence that he could also do his job safely.¹⁵⁴

On appeal, the municipality renewed its direct threat contentions.¹⁵⁵ The headnote writer at West Publishing summarized this section of the Seventh Circuit's decision as "Issue of whether city employee's traumatic brain injury posed significant risk to health or safety, within meaning of ADA's direct threat defense, was for the jury in employee's claim of discrimination under the ADA."¹⁵⁶ While the panel did not employ those exact words, the panel's discussion of the direct-threat defense is, indeed, fairly summarized in that sentence:

The medical and objective evidence here was mixed. To support the defense, the City relied on testimony from Stragapede's supervisor, the incident in which Stragapede took his eyes off the road while driving through an intersection, the incidents in which Stragapede mistakenly reported to the wrong location, and Dr. Grujic's opinion.

The jury was free to discount this evidence or to treat it as insufficient to support an inference that Stragapede posed an actual threat to his own safety or the safety of others. Stragapede testified in general terms that he followed safety protocols. He also testified that the intersection incident occurred only because he was reaching to grab a clipboard that had bounced off the seat and fallen. He noted, moreover, that the light was green and no pedestrians were present. Reasonable jurors could accept this explanation and reject the City's argument that the incident supports an inference that Stragapede was a safety threat. The jury also might reasonably have concluded that the two directional mishaps were not a safety issue at all. Lastly, as we've noted, the jury was free to discount Dr. Grujic's July and September opinions, which relied entirely on the City's characterization of Stragapede's performance.

154. *Id.* at *5.

155. *Stragapede*, 865 F.2d at 864.

156. *Id.* at 862 (Headnote 10).

We take the City at its word that “not just anyone” can do Stragapede’s job. But the more focused inquiry is whether Stragapede could do it without significant risk to health or safety. It was reasonable for the jury to conclude that he could.¹⁵⁷

The Seventh Circuit’s approach here certainly seems in better harmony with the ADA direct-threat provisions and the EEOC’s implementing regulation.¹⁵⁸ There is no element of deference here as there was in the Tenth Circuit decisions in *Beverage Distributors* and *Jarvis*.¹⁵⁹ But while closer to the statutory mark, does the approach epitomized by *Stragapede* really make sense for ADA “direct-threat” litigation in the long run?

2. Dancing on the Side of Having Judges Take the “Direct Threat” Determination Away From Juries: The Sixth Circuit in *Michael v. City of Troy Police Department*

Judge Raymond Kethledge – an oft-mentioned, short-listed nominee for the U.S. Supreme Court since 2016¹⁶⁰ – writing the majority opinion for his Sixth Circuit U.S. Appeals Court panel has an answer for the kind of problem posed by the approach that *Stragapede* epitomizes. Judge Kethledge is laboring against the cold wind of letting juries second-guess medical opinions, which may be just about as undesirable as wholesale deference to either the employer’s view (the good-faith standard rejected in *Abbott v. Bragdon*) or to the employer’s “reasonable” reliance on its ability to find a doctor who will support the employer’s view (the upshot of the Tenth Circuit’s reversal in *Beverage Distributors* of a trial court jury instruction that had articulated a position close to that the Seventh Circuit took in *Straegepde*).¹⁶¹ Judge Kethledge’s approach, however, is not to conclude that

157. *Id.* at 867.

158. As practitioners specializing in ADA advice and litigation have noted. *See, e.g.*, William Brian London, *Make Sure You’re On Target When Using Direct Threat Defense*, FISHER PHILLIPS (Oct, 2 2017), available at <https://www.fisherphillips.com/pp/newsletterarticle-using-direct-threat-defense.pdf?67595>.

159. *Id.*

160. Dara Lind & Dylan Matthews, *Your Guide To President Donald Trump’s Supreme Court Shortlist*, VOX (May 19, 2016), <https://www.vox.com/2016/5/18/11703416/trump-supreme-court-shortlist> (describing Judge Kethledge as “appear[ing] to be the kind of judge who very much enjoys telling people why they’re wrong.”); Elizabeth Slattery & John Malcolm, *Courts Meet the 6 Stellar Judges Leading the Pack on Trump’s Supreme Court Short List Heritage Foundation Commentary—Courts*, THE HERITAGE FOUNDATION (July 3, 2018) <https://www.heritage.org/courts/commentary/meet-the-6-stellar-judges-leading-the-pack-trumps-supreme-court-short-list> (noting his varied professional experience, including clerking for Sixth Circuit Judge Ralph Guy and U.S. Supreme Court Justice Anthony Kennedy, and noting his memorable admonition to the bar in a 6th Circuit opinion that “[t]here are good reasons not to call an opponent’s argument ‘ridiculous,’ . . . includ[ing] civility . . . [b]ut here the biggest reason is more simple: the argument that State Farm derided as ridiculous is instead correct.”).

161. Lind & Matthews, *supra* note 160; Slattery & Malcolm, *supra* note 160

perhaps there's something more deeply flawed with the way courts have been approaching the "who decides and what does the decider decide" questions that suggests that another analytic model outside of the judge-jury-trial process might be in order for meaningfully answering those questions.¹⁶² Instead, Judge Kethledge's solution is to use existing litigation structures to commit to trial judges the authority to make quite a few "direct-threat" calls as a matter of law – and in favor of employers.¹⁶³ The case at hand is *Michael v. City of Troy Police Department*,¹⁶⁴ and Judge Kethledge's approach might be illustrated as follows —

***Who's the decider, and what does the decider decide?* OPTIONS:**

*****(3) Employer, if employer can get a medical opinion with which the jury agrees**

————— — **A FINE LINE!—RULE 56 SPOILER!**

(4) The jury gets to decide, considering evidence from both sides

In *Michael*, the disabled individual was a police officer who was placed on extended unpaid leave.¹⁶⁵ In the appeals court's recounting of the tale, "[t]he City did so for two reasons: first, Michael had engaged in a two-year pattern of aberrant behavior from 2007–09; and second, after Michael underwent brain surgery in 2009, two doctors concluded in detailed reports that Michael could not safely perform the functions of a patrol officer."¹⁶⁶ The origins of the plaintiff's medical troubles lay in a brain tumor, which took multiple surgeries to remove and which left residual neurological complications.¹⁶⁷ Two years of obsessive behavior to regain possession of some steroid vials his wife had given plaintiff's boss out of concern for plaintiff's well-being raised the antennae of the police department.¹⁶⁸ After he underwent a third brain surgery, the city's police department declined to return the plaintiff to work unless and until he passed a medical examination, and plaintiff was referred to a neuropsychologist for that purpose.¹⁶⁹ This was the first in a series of consultations and referrals, some initiated by the city, some initiated by the individual; what resulted was a fairly unstructured process that produced medical opinions from six doctors and a tangled conflict in the conclusions reached in those opinions:

162. *Id.*

163. *Id.*

164. 808 F.3d 304, 307, 309 (6th Cir. 2015).

165. *Id.* at 305.

166. *Id.*

167. *Id.* at 306.

168. *Id.*

169. *Id.*

To that end, the City referred Michael to a neuropsychologist, Dr. Firoza Van Horn. She interviewed and tested Michael for seven hours in her office, and then drafted a detailed report in which she ultimately concluded that Michael “may be a threat to himself and others.” Based on Van Horn’s report, the City placed Michael on unpaid leave. Michael then sought a second opinion from Dr. Philip Leithen, another neuropsychologist, who interviewed Michael and pronounced him fit for duty. The City then sent Michael to another neuropsychologist, Dr. Bradley Sewick, who examined Michael in his office and wrote a detailed report that reached the same conclusion that Dr. Van Horn had reached. Two other doctors who reviewed Michael’s file (but did not examine him) at the request of Michael’s disability-insurance company, on the other hand, concluded that he could return to work. Finally, again on his own initiative, Michael saw Dr. Linas Bieliauskas, a professor of neuropsychology at the University of Michigan. After interviewing Michael and performing tests, Dr. Bieliauskas concluded that Michael has weak “executive functioning,” that “I cannot recommend that the patient return to full patrol duties[,]” and that “[s]afety with use of weapons and high-speed driving would be in question.”¹⁷⁰

In the sum total of this fog of medical pronouncements, the city police department opted not to return plaintiff to work.¹⁷¹ Unhelpfully for plaintiff, he kept the last medical opinion that he’d sought out – that of Dr. Bieliauskas that was unfavorable to his quest to return to work — concealed unto himself.¹⁷²

In addressing the “who decides and what does the decider decide” question, Judge Kethledge unhesitatingly struck out on a path different in important nuance from the neighboring Seventh Circuit’s:

Reasonable doctors of course can disagree—as they disagree here—as to whether a particular employee can safely perform the functions of his job. That is why the law requires only that the employer rely on an “objectively reasonable” opinion, rather than an opinion that is correct. Indeed, in many cases, the question whether one doctor is right that an employee can safely perform his job functions, or another doctor is right that the employee cannot, will be

170. *Id.*

171. *Id.*

172. *Id.* at 309.

unknowable—unless the employer runs the very risk that the law seeks to prevent.¹⁷³

Judge Kethledge further elaborated that the “objectively reasonable” standards requires very little from the employer other than selecting the “right” medical expert to opine: “An employer’s determination that a person cannot safely perform his job functions is objectively reasonable when the employer relies upon a medical opinion that is itself objectively reasonable.”¹⁷⁴

But Judge Kethledge was not done fashioning a distinctive “who decides and what does the decider decide” standard for the Sixth Circuit. In further enlarging the significant zone of employer prerogative and District Judge control over the “direct threat” issue, he declared that medical evidence was not required to prove a direct threat and that, indeed, non-medical, anecdotal evidence, such as that of an employee’s erratic behavior in the workplace, was – if the District Judge found it “objective” – sufficient to establish that the employee indeed poses “a direct threat”, and likely sufficient to do so as a matter of law: “An employer need not rely on a medical opinion, however, to determine that a person poses a direct threat. Rather, ‘testimonial evidence’ concerning the employee’s behavior “can provide sufficient support for a direct threat finding.”¹⁷⁵

The author has written elsewhere, and extensively, about the distorting effect and vitiating impact the aggressive use of the Fed. R. Civ. P. 56 summary judgment device has wreaked upon the EDLs.¹⁷⁶ The solution offered here is not the one that the statute or the regulations have in mind. It is a procedural and semantic slight-of-hand, executed with brilliant subtlety, that seeks to avoid the unthinkable – allowing juries to decide the complex issues limned in *Arline* in a context in which a jury determination was not at all part of the equation – through the use of procedural devices that simply allow a judge to say, in effect, “well, the employer just did what the doctor told him in excluding you from employment.”¹⁷⁷ Direct threats are about science and scientific objectivity, not about empowering federal judges to

173. *Id.*

174. *Id.*

175. *Id.* (quoting *Darnell v. Thermafiber, Inc.*, 417 F.3d 657, 660 (7th Cir. 2005)).

176. See Van Detta & Gallipeau, *supra* note 115; Jeffrey A. Van Detta, “*Le Roi est Mort; Vive le Roi!*”: An Essay On The Quiet Demise Of McDonnell Douglas And The Transformation Of Every Title VII Case After *Desert Hotels v. Costa* Into A “Mixed-Motives” Case, 52 DRAKE L. REV. 71 (2003)[hereinafter “*Le Roi*”]; Jeffrey A. Van Detta, “*Le Roi Est Mort*” Redux: Section 703(m), *Costa*, *McDonnell Douglas*, and the Title VII Revolution, and a Reply To Hedican, Hudson, and Hedican, 52 DRAKE L. REV. 427 (2004)[hereinafter “*Le Roi Est Mort*”]; Jeffrey A. Van Detta, *Requiem For A Heavyweight: Costa As Countermonument To McDonnell Douglas—A Countermemory Reply To Instrumentalism*, 67 ALB. L. REV. 965 (2004) [hereinafter “*Requiem For A Heavyweight*”]; Van Detta, *supra* note 149.

177. See Van Detta & Gallipeau, *supra* note 115; *Le Roi*, *supra* note 176; *Le Roi Est Mort*, *supra* note 176; *Requiem For A Heavyweight*, *supra* note 176; Van Detta, *supra* note 149.

protect employers from themselves.¹⁷⁸ While Judge Kethledge is surely correct that we do not want employers to “run the very risk that the law seeks to prevent,” the law is not simply a “safety-first” regulator.¹⁷⁹ The ADA takes strong account of the individual’s right to be employed free of bias, fear, prejudice, and ignorance against the individual’s disability and its implications.¹⁸⁰ The delicate balance between public and individual rights is best served by putting the best medical minds to work on the problem of “direct threat” – rather than making it ride on whether and how well an employer shops for a doctor. As Senior Circuit Judge Ronald Lee Gilman warned in his dissent,

[T]here must come a point where a medical opinion ceases to be objectively reasonable. A contrary rule would allow an employer to avoid liability for an adverse employment action simply by seeking the opinion of a doctor known to consistently favor the employer. This expedient would strip employees of the protections that the ADA was intended to provide, and it accordingly cannot be the law.¹⁸¹

Fortunately, there *is* a better solution – one that comes from the railroad and airline experience with tripartite medical review panels under the Railway Labor Act. That solution is discussed, *infra*.

D. The Decision Should be Made Through a Model of Expert Medical Consultation

As the author proposed in 1999¹⁸² and sets about here to update and revitalize in light of 20 years’ worth of ADA litigation, the best answer to the question “who is the decider and what does the decider decide” is provided by expert medical consultation as realized in a tripartite medical review process.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Michael v. City of Troy Police Dep’t*, 808 F.3d 304, 315 (6th Cir. 2015) (Gilman, J., dissenting). Judge Gilman is about as down-to-earth a federal appeals court judge as one can ever hope to find, despite degrees from MIT and Harvard. See Ronald Lee Gilman, *My Rookie Year On The Federal Bench*, 60 OHIO ST. L. J. 1085 (1999).

182. *Typhoid Mary*, *supra* note 28.

Who's the decider, and what does the decider decide?

OPTIONS:

1. Employer, in good faith
2. Employer, if employer can get a medical opinion (and “reasonably believes” that the individual poses a direct threat)
3. Employer, if employer can get a medical opinion with which the jury agrees
4. The jury gets to decide, considering evidence from both sides
5. **The decision should be made through a model of expert medical consultation**

In the succeeding subsections of Section II.D, the author will defend this thesis by (1) examining the relevant statutory and regulatory texts, (2) examining the problematic nature of jury determination of the medical issues at the heart of the direct-threat standard, (3) zeroing in on how the American experience with employee medico-safety issues under Railway Labor Act in the railroad and airline industries provides the key to proper implementation of the ADA's direct-threat standard.

1. The EEOC's Direct-Threat Regulation and the Statutory Text It Implements: Textualism That Brings Clarity

In their now-classic text on interpreting statutes, the late Justice Scalia and Professor Bryan Garner remind us of two sound principles of interpretation that are particular applicable to understanding the foundational texts articulating the direct-threat standard. First, the “supremacy-of-text” principle states that “[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.”¹⁸³ Second, the canon *casus omissus pro omisso habendus est* instructs us that “[n]othing is to be added to what the text states or reasonably implies.”¹⁸⁴

The EEOC's regulation concerning the definition of “direct threat” provides –

183. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 56–68 (2012).

184. *Id.* at 93–100.

(r) Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by 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.¹⁸⁵

What this regulation does not say is who makes the “determination” that an employee or applicant poses a direct threat, or who makes the individualized assessment of the threat. Some courts, such as the Tenth Circuit in *Beverage Distributors* and *Jarvis*, assert that this is the employer’s determination to make, and that the statute and the regulations create a range of “reasonableness.”¹⁸⁶ Thus, such courts would say that if the employer’s determination that an employee poses a “direct threat” falls within that range of reasonableness, then the fact-finder in an ADA suit must defer to it.¹⁸⁷

But this interpretation runs roughshod over other specific language in the regulation that shows that it is not quite so simple or deferential. The “individualized assessment,” we are told, shall be based on a “reasonable medical judgment.”¹⁸⁸ Medical judgments are rarely within the wheelhouse of most employers. Further, the medical judgment to be used is not that of “the average, competent” physician, as we frequently see juries instructed in medical malpractice cases. To the contrary, a medical judgment is only “reasonable” for purposes of the statute and regulation if it meets two criteria:

185. 29 C.F.R. § 1630.2(r) (2012).

186. *See* EEOC v. Beverage Distrib. Co., LLC, 780 F.3d 1018, 1021–22 (10th Cir. 2015); *see also* *Jarvis v. Potter*, 500 F.3d 1113, 1122 (10th Cir. 2007).

187. *Id.*

188. *Id.*

1. The medical judgment relies on the most current medical knowledge; and
2. The medical judgment relies on the best available objective evidence.¹⁸⁹

So, to say, as did the Tenth Circuit, that an employer “should have avoided liability if it had reasonably believed the job would entail a direct threat; proof of an actual threat should have been unnecessary” flies in the face of these twin commands.¹⁹⁰ The medical judgment on which the employer relies must not be merely “reasonable” or within some range of “reasonableness.” Instead, the most current medical knowledge must support the medical judgment, and the best available objective evidence must be the foundation of that medical judgment.¹⁹¹ This demands actual, factual accuracy – not mere “reasonableness” from the employer’s perspective or one physician’s perspective.¹⁹² From these observations, it is evident that the District Court in Beverage Distributors correctly instructed the jury the employer must prove that a particular individual’s employment “posed a significant risk of substantial harm to the health or safety” of either the individual or of others and that there was no reasonable accommodation to reduce or eliminate that risk.

The jury is being asked to decide is not whether the employer acted reasonably, but whether the employer actually relied upon the judgment of medical experts and, if so, whether the experts’ judgment was (1) individualized, (2) based on the most current medical knowledge, and (3) based on the best available objective evidence.¹⁹³ If a medical judgment has these three qualities, it is not merely reasonable; it is optimized. This is tantamount to saying that the medical judgment both [a] established the existence of an actual threat and [b] was correct – for what else is a judgment that relies on the most current medical knowledge and the best available medical evidence?

Indeed, the statute does not support any other intelligible reading. The ADA mentions “direct threat” in its definition section not as a product of the employer’s “reasonable belief,” but rather, as a *factual absolute*: “The term “direct threat” means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.”¹⁹⁴

Note that the term is not defined, ““direct threat” means the employer’s reasonable belief, based on medical evidence, that an individual employee or applicant poses a significant risk to the health or safety of others

189. *Id.*

190. *Id.*

191. EEOC v. Beverage Distribs. Co., LLC, 780 F.3d 1018, 1021–22 (10th Cir.2015).

192. *Id.*

193. *Id.*

194. 42 U.S.C. § 12111(3)(2012).

that cannot be eliminated by reasonable accommodation.”¹⁹⁵ Similarly, the statute delineates the direct-threat defense itself in a consistent manner: “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.”¹⁹⁶

The language here is tellingly consonant with the statutory definition of direct threat. It clearly allows the employer to require that—as a matter of medical, scientific fact—an individual shall not pose a direct threat. “Shall” is not the language of discretion, the language evoking ranges of reasonableness, the language allowing an employer to use “a” medical opinion as a shield. Shall – a powerful intransitive verb – requires an absolute state of objective fact. It is not enough for an employer to hold “a reasonable belief” that employee poses a direct threat, even when that employee “reasonably relies” on a medical opinion. That employer must be able to prove – using that medical opinion – that the individual in fact poses a direct threat. Otherwise, the “direct-threat” standard will quickly do much to promote “doctor-shopping” and much less to promote the “health and safety” of the disabled individual or other people in his work environs.

The question here can be analogized to the criminal law concepts that distinguish between the grounds for allowing police to stop an individual and interrogate – reasonable suspicion; the grounds for granting police a search warrant – probable cause; and the grounds for sustaining a criminal conviction – proof beyond a reasonable doubt. Certainly “reasonable beliefs” of an employer regarding potential safety risks that an employee’s medical condition might create will open the door for an employer to make medical inquiries that normally cannot be made under the ADA.¹⁹⁷ If those inquiries yield objective evidence that sustains an employer’s reasonable belief about the threat, the employer may require the employee to submit to medical tests otherwise prohibited by the ADA.¹⁹⁸ But only if the employee actually, factually poses a direct threat can the employer deny an otherwise qualified individual with a disability the statutorily guaranteed right to work.¹⁹⁹ The burden is not simply for an employer to show it “reasonably believed” the employee posed a direct threat; as the Seventh Circuit has said in a number of cases, “it is the employer’s burden to show that an employee posed a direct threat to workplace safety that could not be eliminated by a reasonable accommodation.”²⁰⁰

195. *Id.*

196. 42 U.S.C. § 12113(b)(2012).

197. *See, e.g.*, U.S. Equal Employment Opp. Comm’n, Questions & Answers about Diabetes in the Workplace and the Americans with Disabilities Act (ADA), ¶¶ 6, 7.

198. *Id.* ¶17

199. *See* 29 C.F.R. § 1630.2(r), app. at 356 (1999); *see also* EEOC Technical Assistance Manual on the ADA § 8.7,

200. *Branham v. Snow*, 392 F.3d 896, 906 (7th Cir. 2004) (citations omitted).

2. Why Approaches to the Direct-Threat Defense That Leave It to Juries to Determine What a “Direct Threat to Health or Safety” Is in Any Given Situation Poses Its Own Special Kind of Perniciousness

While there is much to be said for the Seventh Circuit’s approach in *Stragapede* as opposed to the Tenth Circuit’s approach in *Beverage Distributors* and *Jarvis* (and much to be said against the kind of approach proffered by the Sixth Circuit in *Michael*), the author remains firm in the conviction he reached in 1999 – after litigating ADA cases since the effective date of the Act’s employment provisions in 1992 – that committing the “direct-threat” determination to juries, while certainly better than simply deferring to an employer’s “objective belief” on the question (or, as surrogate for that, having judges defer to employer’s reliance on “a” medical opinion), leaves such to be desired.²⁰¹ There are a number of reasons that lead inescapably to this conclusion:

201. Little has improved from the assessment that the author made of the extant cases law 19 years ago:

The ‘direct threat’ cases are susceptible to classification by the particular factor or group of factors from the Arline test that predominate in the analysis. For example, a large body of cases can be categorized as ‘catastrophic consequences’ cases. These cases focus primarily on the nature and severity of potential harm posed by the individual at issue, who in many cases is an HIV-positive employee or applicant. The courts in such cases have focused primarily on the catastrophic consequences of transmission to others. The courts have placed little emphasis on the fact that no transmission of HIV may ever have been medically documented in circumstances relevant to the employment in question or on the fact that the risk of such transmission is extremely difficult to quantify. Such cases not only involve HIV-positive persons who seek to participate in invasive surgery, but also HIV-positive persons who practice dentistry or work with cutting tools in a grocery store, as well as persons with another infectious disease such as Hepatitis B who seek to work in public safety occupations. Interestingly, when the obverse case has presented itself--the danger of an infectious disease being transmitted from a patient to the health care professional providing the treatment--the courts have focused on the lack of evidence documenting transmission in the relevant circumstances, rather than on the ‘catastrophic consequences’ of transmission from patient to practitioner.

Another discrete line of cases involves dangerous ‘situations’ and ‘instrumentalities’ in public safety occupations--such as firefighting or police work--where the courts have focused primarily on the unquantifiable risk that an officer might not be able to perform his or her duties when his co-workers most need him or her or might become incapacitated or impaired while in control of a dangerous instrumentality such as a firearm or a police car. Most of the cases which uphold exclusions of disabled individuals do not probe very deeply into the ‘duration of risk,’ ‘likelihood of potential harm,’ or ‘imminence

of harm' factors of the 'direct threat' test. However, a few cases in this area have found no 'direct threat' when a sufficient connection has not been established between the impairment at issue and the instrumentality in question.

Virtual blanket exclusions have dominated the realm of transportation cases, and most courts have upheld exclusions of individuals whose medical conditions--particularly diabetes and epilepsy--have posed risks of unconsciousness or incapacitation, especially when those seeking the employment have experienced them in the past. For these courts, the beginning and end of their analysis has not been *Arline*. Their analysis has been condensed into an insurance analysis--should an employer be required to act as the insurer of safety when the stakes are human lives and the instrumentalities involved are the least forgiving of error? Indeed, these courts seem to have replaced *Arline* with the policymaking liability analysis formula suggested by Circuit Judge Learned Hand in *United States v. Carroll Towing Co.* Under the 'Hand formula,' the liability of an alleged tortfeasor is determined by whether the burden ('B') of taking adequate precautions is exceeded by the product of the probability ('P') of injury occurring and the gravity of that injury ('L') if it occurs-- $B < PL$. This formula has been described as the classic 'American formula of balancing magnitude of risk and gravity of harm against utility of conduct' and criticized for 'its emphasis on economic efficiency and its implicit denial of 'soft' or 'human' variables and individual rights.' Whatever its merits in allocating common law fault, however, a 'Hand-like' approach to 'direct threat' cases substitutes an economic analysis for the *Arline* analysis of scientific evidence intended to protect individual rights from unfounded stereotyping about disabilities. Moreover, even in the transportation area, the courts' approach can be volatile. When given the opportunity to apply this 'insurer' analysis to Exxon's rule excluding past alcoholics from safety-sensitive positions in the wake of concrete events--such as the Exxon Valdez oil spill--the court expressly rejected the same 'employer-as-insurer' argument that other courts had recognized in cases lacking such substantial history. In any event, the general tendency courts have displayed to cast *Arline* aside in transportation cases is at odds with the evolving willingness of safety regulators--such as the FAA in the case of diabetic private pilots--to reconsider long-held exclusions upon the urging of medical experts at the forefront of research in their fields.

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

Typhoid Mary, *supra* note 28, at 932-36 (footnotes omitted).

1. With the standards articulated in the Tenth Circuit cases of *Jarvis* and *Beverage Distributors*, we end up with cases in which excessive deference is given to the employer's position without a way for many plaintiffs to thoroughly sift through and vigorously test the employer's position. Indeed, "employees and applicants have been victimized by lawyering that appears not to have been up to the task of marshalling the medical and scientific evidence needed to survive an employer's summary judgment motion under Rule 56 of the Federal Rules of Civil Procedure."²⁰² On the other hand, with the approach of Seventh Circuit cases such as *Stragapede*, we put juries in the unenviable position of having to choose between dueling expert witnesses when the employer and the employee each have medical expert witnesses who have at least apparently addressed the *Arline* factors in some detail and have at least prima facie credibility.²⁰³ As the author observed in 1999:

Although there appear to be few "direct threat" cases that have been presented to juries rather than resolved on motions, there is no reason to believe that a jury verdict would provide any better resolution of the medical issues and frequently conflicting medical opinions that characterize a "direct threat" case. Indeed, the jury would seem to be a fairly poor means of resolving "direct threat" issues. The anonymous and outcome-oriented decisionmaking that characterizes juries simply will not suffice in the application of the "direct threat" standard. The "direct threat" standard involves the weighing of scientific data, evolving scientific theories, possibly competing methodologies, and often conflicting expert opinions regarding the "direct threat" factors of "risk," "harm," "severity," "likelihood," and "imminence." For this analysis to be meaningful, it cannot simply be expressed in a jury verdict that ultimately finds a defendant liable or not liable for alleged discrimination on the basis of a claimed disability. Even special interrogatories to a jury cannot do justice to a legal analysis that recognizes the relevant factors but does not—and cannot—supply the relevant medical or scientific background and context that is crucial to assigning relative importance and perspective to those factors in a specific case. The best that any jury can do is to pick between two simplified, polarized views of a body of scientific or medical evidence that may in reality command a spectrum of subtle interpretation and implication. Such a condensation of complex issues can

202. *Id.* at 937.

203. *Id.* at 937–38.

hardly be expected in the long run to serve the rights of either the disabled or the public interest in safety. The ultimate determination is not merely a question of whether the plaintiff was discriminated against because of a statutorily protected classification as in, for example, Title VII and ADEA cases. The ultimate determination in a “direct threat” case may have life and death consequences for the plaintiff, his or her co-workers, and members of the public at large.²⁰⁴

2. As the author has seen from his own experience representing employers in safety-sensitive industries, “[t]he jury also falls short of the demands made by the ‘direct threat’ test in the area of long-term regulation of safety-sensitive industries.”²⁰⁵ The reasons for this become clear as one considers the immense challenges that a scenario like that of pilot Andreas Lubitz and GermanWings would present if a U.S.-based airline, which is more aggressive in protecting passengers and less deferential to pilot rights than its European counterparts, had acted decisively to avert disaster before it happened by disqualifying the pilot from flight duty. ADA litigation—of the kind the author experience first-hand in *Witter v. Delta Air Lines*²⁰⁶—would result in federal court. Indeed, the *Witter* case involved a senior passenger jet captain who had manifested disturbing behaviors in the cockpit creating real safety risks.²⁰⁷ An aeromedical consultant to whom the airline referred the pilot diagnosed him under the DSM-IV criteria as displaying the kinds of thoughts and behaviors typically associated with narcissistic personality disorder and bipolar disorder.²⁰⁸ However, in those relatively early days of ADA Title I litigation, the airline avoided having to grapple with the direct-threat defense, because the ADA, as it was interpreted by the U.S. Supreme Court at the time, allowed the airline to successfully argue that, as a matter of law, the pilot failed to show he was disqualified from a sufficiently broad range of jobs that he could be considered “disabled” within the meaning of the Act.²⁰⁹ However, the ADA Amendments Act of 2008 would today not permit resolution of the case on that ground.²¹⁰ The direct-threat defense would have to be raised by the airline, and the complications

204. *Id.* at 938–39 (footnotes omitted).

205. *Id.*

206. *Witter v. Delta Air Lines, Inc.*, 966 F. Supp. 1193 (N.D. Ga. 1997), *aff’d*, 138 F.3d 1366 (11th Cir. 1998).

207. *Id.*

208. *Id.*

209. Indeed, the United States Civil Rights Commission singled the *Witter* case out for highlighted discussion—and criticism without regard to the safety-sensitive nature of the passenger airline industry—in a major 1998 report. See U.S. CIVIL RIGHTS COMMISSION, HELPING EMPLOYERS COMPLY WITH THE ADA: AN ASSESSMENT OF HOW THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IS ENFORCING TITLE I OF THE AMERICANS WITH DISABILITIES ACT 88–89 (Roy G. Moy, ed 1998).

210. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified in scattered sections of 29 and 42 U.S.C.).

of litigating the case before a jury would be immense for an employer of thousands of pilots in the most safety-sensitive of civilian industries:

Although the ADA emphasizes determinations focused on “individuals,” the “direct threat” analysis addresses important and recurring situations in safety-sensitive industries. The consequences of the “direct threat” analysis for both the disabled individual, his or her employer, and the general public demand that any “direct threat” decision be fully explained and supported by relevant medical and scientific evidence. The guidance from such a determination is not just important to the individuals and entities concerned in a particular case. That case may provide guidance that proves to be essential in defining many parameters of safety-sensitive employment in the future (for example, what constitutes a “significant risk” in a particular safety-sensitive occupation, what kinds of harm must be eliminated to reduce the risk to an “acceptable” level, under what circumstances is potential harm “severe” and “imminent,” what functions of the job are both essential and safety-sensitive, and what kinds of measures either do or do not sufficiently reduce a “significant risk” to “acceptable” levels?). A jury verdict is woefully inadequate to provide that crucial element in potentially precedent-setting applications of the “direct threat” test. At best, a jury would be called upon to choose between two sets of competing medical or scientific expert opinions. The jury is not allowed to compromise between, harmonize, or blend such competing opinions. Nor is a jury competent to do so.²¹¹

The legislative history of the ADA, the regulations promulgated by the EEOC, and the other governmental documents issued to implement the ADA’s provisions and the EEOC’s regulations show that next to no meaningful analysis was given to the competency of the courts to deal with “direct-threat” questions or what kinds of procedures or adjunct processes would need to be developed to create a meaningful infrastructure to create competency lacking in the typical litigation process.²¹² That is why the author,

211. *Typhoid Mary*, *supra* note 28, at 932–36 (footnotes omitted).

212. As the author wrote in 1999:

Congress left largely unaddressed whether such a policy choice is justified in the cases involving ‘direct threats’ to safety or health. Although Congress specifically provided for some of the ‘direct threat’ determinations to be made

drawing upon his experience with the airline industry and his study of other safety sensitive industries, opined that the process to bring coherence to the incoherence Congress and the EEOC have left in this portion of the direct-threat defense was one long-used in safety-sensitive industries. “Indeed, the answer is as old as the rise of safety-sensitive industries themselves,” the medical review panel, in which the employee or applicant is thoroughly examined and evaluated by a physician of the employer’s choice; a physician of the employee’s or applicant’s choice; and, if those physicians disagree as to whether employing the individual in the job in question poses a “direct threat,” a neutral physician designated by mutual agreement of the other two physicians.²¹³

3. How the Nation’s Experience Through the Quintessential Safety-Sensitive American Railroad and Airline Industries Under the Railway Labor Act Illuminates the Path to Coherence Through the Tripartite Medical Review Process

The Supreme Court blessed just such an approach in *Gunther v. San Diego & Arizona E. Ry. Company*,²¹⁴ a proceeding under the Railway Labor Act (RLA),²¹⁵ in which the Court enforced an arbitration award that reinstated an employee based on a medical panel’s opinion, when the employee’s employer, a rail carrier, refused compliance.²¹⁶ Mr. Justice Black’s opinion for the Court is quite succinctly illuminating on this point:

by the Secretary of Health and Human Services regarding infectious diseases in food-handling occupations, Congress did not have much in the way of deliberations over the issue of whether the judiciary should be the institution which makes the determinations affecting other safety-sensitive industries under the ‘direct threat’ standard.

Id. at 936 (footnote omitted).

213. As to the provenance of such medical review panels:

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

Id. at 945 (footnote omitted).

214. 382 U.S. 257, 258–60 (1965).

215. 45 U.S.C.A. § 151 et seq. (2012).

216. *Gunther*, 382 U.S. at 358–62.

The courts below were also of the opinion that the [Adjustment] Board went beyond its jurisdiction in appointing a medical board of three physicians to decide for it the question of fact relating to petitioner's physical qualifications to act as an engineer. We do not agree. The Adjustment Board, of course, is not limited to common-law rules of evidence in obtaining information. The medical board was composed of three doctors, one of whom was appointed by the company, one by petitioner, and the third by these two doctors. *This not only seems an eminently fair method of selecting doctors to perform this medical task but it appears from the record that it is commonly used in the railroad world for the very purpose it was used here.* In fact, the record shows that under respondent's present collective bargaining agreement with its engineers provision is made for determining a dispute precisely like the one before us by the appointment of a board of doctors in precisely the manner the Board used here. This Court has said that the Railway Labor Act's 'provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field. On a question like the one before us here, involving the health of petitioner, and his physical ability to operate an engine, arbitrators would probably find it difficult to find a better method for arriving at the truth than by the use of doctors selected as these doctors were.'²¹⁷

The RLA still provides the best model for resolving the very kinds of questions at issue in determining whether an employer has met its burden under the ADA of proving that a particular individual with a disability poses a disqualifying "direct-threat" under the ADA that cannot be accommodated without continuing to pose a significant risk of substantial harm to either the individual or to others within the zone of the individual's work.²¹⁸ Indeed, "the procedures outlined in *Gunther* describe a multi-stage process that fosters and maximizes achievement of two important, but otherwise often inconsistent, goals — consideration of a range of medical views and finality in the resolution of medical issues about which medical professionals may disagree."²¹⁹ As Arbitrator Richard R. Kasher has observed in the airline industry context,

[t]he establishment of tripartite medical boards or single neutral doctor review procedures in cases when an

217. *Id.* at 371 (footnote omitted).

218. *Id.*

219. *Typhoid Mary*, *supra* note 28, at 948 (footnotes omitted).

employee's physical condition is in controversy is not uncommon; and has been viewed by the Supreme Court of the United States as being an "eminently fair" procedure. Obviously, the parties here recognized the fairness of such a procedure because they established one [in their collective bargaining agreement].²²⁰

Taking Arbitrator Kasher's final point, the question for us is how such a procedure can be established in the ADA context. (Indeed, it is a process that has suggested itself to employer and employees to resolve ADA disputes even in industries outside of railways and airlines.²²¹) That is the subject of Section III, *infra*.

III. MAKING TRIPARTITE MEDICAL REVIEW PANELS FOR ADJUDICATING THE EMPLOYER'S DIRECT-THREAT DEFENSE TO ADA CLAIMS WORKABLE IN IMPLEMENTATION, PARTICULARLY FOR SAFETY-SENSITIVE SECTORS

The challenge we meet in this Section is: How to adapt a process from the RLA and the realm of collectively-bargained procedures in the railway and airline industries so that it becomes an integral part of the process for litigating the "direct-threat" defense in ADA cases? In traversing this terrain, we will start with the basic proposition that the author suggested in 1999, but we will expand upon it and fortify it with further ideas and opportunities that either were not available 20 years ago, or have come to the fore in the intervening span of time.

A. EEOC Regulations

The EEOC clearly has rule-making powers to implement the ADA – it was part of the original statutory command, and it was re-invigorated with

220. In the Matter of an Arbitration Between Delta Air Lines, Inc. and Air Line Pilots Ass'n, Grievance No. 92-14 (April 25, 1993) (unpublished award); *Witter v. Delta Air Lines, Inc.*, 966 F. Supp. 1193, 1196–97 (N.D. Ga. 1997), *aff'd*, 138 F.3d 1366 (11th Cir. 1998), discusses general the airlines' tripartite medical review process. Of course, under the Railway Labor Act, there is judicial review, albeit appropriately deferential and circumscribed, of a system board of adjustment's decision founded upon a tri-partite medical review panel determination. See generally Alvin L. Goldman, *Selecting The Correct Standard For Judicial Review Of Airline Grievance Arbitration Decisions*, 9 U. PA. J. LAB. & EMP. L. 743 (2007).

221. *Borgialli v. Thunder Basin Coal Co.*, 235 F.3d 1284, 1285–89 (10th Cir. 2000)(describing a tri-partite medical review approach arising when employer and employee ended up with physicians offering diametrically opposed medical assessments of whether blaster in mine diagnosed with several psychiatric and physical disorders was a "direct threat" to himself and others).

the ADA Amendments Act of 2008.²²² The call the author made for the EEOC to use its rule-making powers in this area is every bit as relevant today:

If the “direct threat” standard is to be implemented in a meaningful and consistent manner that effectuates the rights of the disabled and other constituencies in our society, the EEOC must take a leadership role in developing a procedure for making “direct threat” determinations. The full extent of the substantive and procedural regulations needed to promote resolution of “direct threat” issues cannot be made in the abstract. Nevertheless, the process for developing those regulations would contain a number of discrete stages.²²³

To start the rule-making process, the author called upon the EEOC to identify the safety-sensitive industries and occupations that require special attention under the “direct threat” standard.²²⁴ As a mechanism for initiating this effort, the author invited the EEOC to “issue a public call for the identification of such industries,” and suggest that this might best be done, “through an advance notice of proposed rule-making under the Administrative Procedure Act,” or APA.²²⁵ In addition, the EEOC needs to work with other constituencies with a vital interest in the matter, including “medical associations, labor organizations, consumer groups, disability advocacy groups, and employer and trade associations”²²⁶ and “safety-sensitive industries that require special attention” such as “the airline industry, railroads, marine shipping, over-the-road transportation, medical care providers, law enforcement, public safety, and food processing and handling.”²²⁷ As a result of this process, the author argued, “the EEOC should publish a list by industry and, where appropriate, by occupation, for which it will develop regulations to establish standards and procedures for making the

222. See ADA Amendments Act of 2008, Pub. L. No. 110-325 (codified as amended at 42 U.S.C. § 12101).

223. *Typhoid Mary*, *supra* note 28, at 950.

224. *Id.*

225. *Typhoid Mary*, *supra* note 28, at 950–51 (footnotes omitted) (citing 5 U.S.C. §§ 552, 553, 556–57 (discussing rule-making by federal agencies)). As the author noted, “[t]his was the means that the EEOC used in 1990 ‘to inform the public that the Commission had begun the process of developing substantive regulations pursuant to Title I of the ADA and inviting comment from interested groups and individuals.’” *Id.* at 951. The author also encouraged the EEOC to “take the initiative to contact directly and work closely with federal and state agencies that regulate medical qualifications for employment in various safety-sensitive industries. *Id.* at 951.

226. *Id.* at 951 (footnotes omitted).

227. *Id.* (footnotes omitted).

necessary determinations when an applicant or employee is excluded on the grounds that he or she constitutes a ‘direct threat.’”²²⁸

The next step in the author’s vision of EEOC rule-making on “direct threats” would be to create specific industry-specific bipartisan panels” in each safety-sensitive industry to “advise and assist the EEOC in preparing regulations to establish the process for determining ‘direct threat’ issues in that industry,” because the “specialized knowledge and authorities understanding of the issues” possessed by each panel would be a crucial component to creating legitimacy for those issues on which the EEOC does not possess the requisite business and industry specific knowledge.”²²⁹ Another aspect of the author’s regulatory proposal focused on elucidating more scientifically and relevantly the contexts for and core concepts of the *Arline* factors, including the concept of “risk” and “concepts of risk, significance of risk, nature of harm, and imminence of representative risk-creating events for the principal safety-sensitive occupations within the industry.”²³⁰

On this last point, a very insightful article with a proposal of significance was published two years after the author’s, and that proposal dovetails nicely with the one described here. In *Disciplining the Americans with Disabilities Act’s Direct Threat Defense*, Brian Prestes proposed that the EEOC “adopt explicit numerical benchmarks to serve as” a “‘modulus’ by which to measure whether a risk is clearly significant, clearly insignificant, or somewhere in between.”²³¹ The proposal is intriguing, but it would only work if integrated into the kind of holistic rule-making process for “direct threats” that this author has advocated. Indeed, the EEOC has sometimes shown difficulty on its own in even sorting out the basics of what is a safety-sensitive industry – having recently opined driving a public transportation bus in a municipal bus service is not a safety sensitive job.²³² This is an

228. *Id.* at 951–52 (footnotes omitted). At that point, “the list should encourage self-identification and participation in the EEOC’s rule-making process by industries or groups not previously identified.” *Id.*

229. *Id.* at 952.

230. *Id.* at 952. Similarly, the author notes that

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

Id.

231. Brian S. Prestes, *Disciplining the Americans with Disabilities Act’s Direct Threat Defense*, 22 BERKELEY J. EMP. & LAB. L. 409, 411 (2001).

232. See Paula Barran, *So Which Positions Are Safety Sensitive?*, DJC OREGON (May 23, 2008), <http://djcoregon.com/news/2008/05/23/so-which-positions-are-safety-sensitive/> (last

emblematic example of why close collaboration with the full panoply of safety-sensitive industries and the experts who work within those industries is essential to an intelligent rule-making effort in the “direct-threat” area.

What the author proposed as the “heart” of these “direct threat” regulations is “the codification of a tripartite medical review process that ensures objectivity, neutrality, fairness, and due process to employees and applicants — without resort to litigation in the courts.”²³³ How is that to be done? The following are the author’s prescriptions:

1. First, “the regulations should provide that whenever an employer seeks to exclude an applicant or employee from employment because that individual purportedly poses a ‘direct threat’ in performing essential job functions, or fails to meet safety-based qualification standards, the employer can only do so if (1) it has retained a qualified, independent physician with an established medical expertise (preferably “Board certified”) in the health problems that allegedly pose the “direct threat” and (2) that physician analyzes each of the *Arline* factors and concludes after examining the individual, reviewing his or her medical history, and consulting with his or her treating physician, if any, that the individual poses a “direct threat” that cannot be reduced to an acceptable level through a reasonable accommodation.”²³⁴

2. Second, “[t]he regulations should provide that the individual may retain and designate a similarly qualified medical specialist of his or her own choosing to provide an independent analysis using the same procedure.”²³⁵

3. Third, the regulations should require that “[i]n the event that the individual’s medical specialist disagrees with the employer’s designated specialist and concludes that the individual does not pose a “direct threat,” that the two specialists shall agree upon and designate a third medical specialist to review the case and make the final determination whether the individual poses a ‘direct threat,’ or whether reasonable accommodation can reduce the risk below the ‘direct threat’ threshold.”²³⁶

visited Sept. 30, 2018)(describing EEOC Office of Council Opinion Letter that found city bus drivers were not employed in “safety-sensitive” positions).

233. *Typhoid Mary*, *supra* note 28, at 953–54.

234. *Id.*

235. *Id.* at 954.

236. *Id.*

4. Fourth, acknowledging that “[t]his process may be expensive . . . [and] because the medical review process carries a more than de minimis expense that the employer should bear the cost of the process. This will discourage employers from invoking ‘safety’ concerns lightly, and recognizes the usual disparity of resources between employing entities and their employees.”²³⁷

5. Fifth, the regulations should provide, where “the employer’s workers are represented by a labor organization,” legal authority (which may require coordinating amendments of the RLA and the National Labor Relations Act²³⁸) for “the employer and the union to negotiate a different allocation of expense between them through good-faith collective bargaining.”²³⁹

6. The regulations should make clear that “[c]ourt involvement in this process should be minimal.”²⁴⁰ Indeed, only at three junctures would judicial intervention be authorized:

First, if it were to be determined in the medical review process that the employee or applicant would not pose a “direct threat” should the employer provide a reasonable accommodation, the employer would be required to provide the accommodation unless it could prove in a court proceeding that to do so would create an ‘undue hardship’ as defined in the ADA. Second, if an employer or, in rarer occasions, an employee or his labor representative refused to participate in the medical review process, the regulations would provide for judicial intervention to compel compliance, similar to a suit to compel arbitration. Third, the regulations should provide for limited judicial review of the medical panel results. Because the panel of medical experts will have determined the substantive medical issues, the bases for challenging the panel results should be limited to only those required to ensure observance of due process and impartiality by panel members. Accordingly, judicial review of medical panel results should be limited to (1) failure of the panel to comply with the regulations; (2) failure of the panel to confine itself to medical and scientific issues as provided for in the regulations; (3) a panel result that would require an employer to violate a clearly established safety standard or safety-related employment qualification established by a federal or state regulatory agency with

237. *Id.*

238. *Id.* at 954. See 29 U.S.C. § 101 et seq.

239. *Typhoid Mary*, *supra* note 28, at 954.

240. *Id.*

jurisdiction over the industry and occupation in question; or (4) fraud or corruption by a member of the panel or a party to the process.²⁴¹

Of course, just as the case was in 1999, “[t]he author recognizes that the EEOC would likely need considerably more meaningful increases in funding to develop the regulations proposed below in addition to fulfilling its other statutorily mandated duties.”²⁴² The author’s sanguine hopes almost 20 years ago that the EEOC would be better supported and funded in order to carry out such a mission,²⁴³ should the political will arise to make it happen, were met with mixed realities.²⁴⁴

B. Can District Courts Use Fed. R. Civ. P. 53, “Special Masters,” to Create Their Own Tripartite Medical Review Panel Process in ADA Cases?

While the best solution to establishing a sensible procedure for making “direct-threat” determinations in ADA litigation is issuance of a carefully crafted regulation, there are things that courts and employers can do in the meantime to make the current process more rational. First, as discussed in this subsection, federal district courts might consider whether they can use the inherent authority to appoint special masters, as reinforced by Federal Rule of Civil Procedure 53, to implement in each federal district a tripartite medical review panel process for evaluating “direct-threat” issues in ADA cases. Second, as discussed in the next subsection, employers can use the breathtakingly broadened scope of the Federal Arbitration Act wrought by the U.S. Supreme Court to implement tripartite medical review in ADA claims that are subject to pre- and post-employment mandatory arbitration agreements that encompass EDL claims.

Federal courts have long claimed as part of their equity jurisdiction the power to appoint special masters to assist the court in a wide variety of matters and with a wide range of determinations.²⁴⁵ Since the adoption of the

241. *Id.* at 954–55

242. *Id.* at 950 n. 434.

243. *Id.*

244. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *EEOC Budget and Staffing History 1980 to Present*, <https://www.eeoc.gov/eeoc/plan/budgetandstaffing.cfm> (last visited Sept. 30, 2018).

245. Hon. Shira A. Scheindlin & Jonathan M. Redgrave, *The Evolution And Impact Of The New Federal Rule Governing Special Masters*, 51 *FED. LAW.* 34, 35 & 39 n. 1 (2004). As the authors point out, the inherent authority of federal district judges in this area has long been recognized:

See Ex Parte Peterson, 253 U.S. 300, 312–13 (1920) (holding that a federal court has inherent authority to appoint a master whether sitting in equity or law); *Kimberly v. Arms*, 129 U.S. 512, 524–25 (1889) (stating that the reference of a case to a master has always been within the power of a court of chancery).

Federal Rules of Civil Procedure in 1938, most of the practice around the appointment, use, and authority of special masters has been focused on the provisions of Rule 53, captioned “Masters.”²⁴⁶ In pertinent part, Rule 53 provides in its current form:

(a) Appointment.

(1) *Scope*. Unless a statute provides otherwise, a court may appoint a master only to:

(A) perform duties consented to by the parties; [or]

(B) hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by:

(i) some exceptional condition; or

(ii) the need to perform an accounting or resolve a difficult computation of damages; or

(C) address pretrial and post trial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.²⁴⁷

In considering how this rule applies to the author’s proposal, Sections (a)(1)(A) and (a)(1)(B) would provide grounds for using the rule to implement a tripartite medical review panel process. If the disabled individual and the employer agreed to submit the “direct-threat” determination to a tripartite medical review panel process, then Rule 53(a)(1)(A) would make it very easy to implement. Whether both parties would agree is a different—and much more variable—question. The party who believes it is likely not to end up with a medical opinion that favors its litigation process, for example, is likely not to agree to the appointment. Likewise, a party who wants to appeal to the sympathies of a jury, on the one hand, or to the jury’s fears and prejudices, on the other hand, may very well also withhold its consent. Furthermore, a party who wants to accept Judge Raymond Kethledge’s position in *Michael* – that medical evidence is not

Id. at 35 n. 1; see also Jerome I. Braun, *Special Masters in Federal Court*, 161 F.R.D. 211 (1995); Irving R. Kaufman, *Masters in the Federal Courts: Rule 53* 58 COLUM. L. REV. 452 (1958).

²⁴⁶ See Fed. R. Civ. P. 53.

²⁴⁷ *Id.*

necessary and that the factfinder (or the district judge on summary judgment!) can “determine” that a disabled individual poses a “direct threat” by non-medical, objective evidence, including “observed” conduct – will want to avoid the sobering rationality of a medical opinion entirely.²⁴⁸

In cases in which the parties do not have a commonality of consent to appointment of a tripartite medical review panel under Rule 53, a court would have to confront whether such an approach is permitted under Rule 53(a)(1)(B).²⁴⁹ The lengthy analysis of the nature of the “direct threat” inquiry in the author’s current and previous articles provide a reasonable foundation on which to argue that the nature of the “direct threat” inquiry presents just such an “exceptional condition” that warrants the appointment.²⁵⁰

Another phrase, however, in Rule 53(a)(1)(B) might be seen as an intractable sticking point. This language comes from the 2003 amendment to Rule 53, to which the Advisory Committee offered these notes:

2003 Amendment

Rule 53 is revised extensively to reflect changing practices in using masters. From the beginning in 1938, Rule 53 focused primarily on special masters who perform trial functions. . . . Rule 53 continues to address trial masters as well, but permits appointment of a trial master in an action to be tried to a jury only if the parties consent. The new rule clarifies the provisions that govern the appointment and function of masters for all purposes. Rule 53(g) also changes the standard of review for findings of fact made or recommended by a master. The core of the original Rule 53 remains, including its prescription that appointment of a master must be the exception and not the rule.²⁵¹

Reading more deeply into the comments, we find the Advisory Committee elaborates even more on the limitations on use of trial masters introduced by the 2003 Amendments:

Trial Masters. Use of masters for the core functions of trial has been progressively limited. These limits are reflected in the provisions of subparagraph (a)(1)(B) that restrict appointments to exercise trial functions. . . . Although the

248. *Michael v. City of Troy Police Dep’t*, 808 F.2d 304, 307–09 (6th Cir. 2015) (affirming summary judgment for employer on, inter alia, the issue whether the disabled individual posed a “direct threat”).

249. *See* Fed. R. Civ. P. (a)(1)(B).

250. *See Typhoid Mary*, *supra* note 28.

251. Committee Notes on Rules - 2003 Amendment, Fed. R. Civ. P. 53.

provision that a reference “shall be the exception and not the rule” is deleted, its meaning is embraced for this setting by the exceptional condition requirement.

The use of a trial master without party consent is abolished as to matters to be decided by a jury unless a statute provides for this practice.²⁵²

This Advisory Committee note might very well be seen as precluding the very thing that the author is suggesting here – that federal district judges could refer the analysis of the “direct threat” issue to a tripartite medical review process. But before jumping to that conclusion, further analysis of what, exactly, is a “matter to be decided by a jury” in an ADA case raising the “direct-threat” issue. As originally enacted in 1990, ADA Title I did not carry any right to a jury trial. Without having given a great deal of obvious thought to the matter of issues such as “direct threat” that are unique to the ADA, Congress simply incorporated wholesale the process for litigation under Title VII extant as of 1990:

(a) POWERS, REMEDIES, AND PROCEDURES—The powers, remedies, and procedures set forth in sections 705, 706, 707, 709, and 710 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9) shall be the powers, remedies, and procedures this title provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this Act, or regulations promulgated under section 106, concerning employment.²⁵³ In 1990, Title VII of the Civil Rights Act of 1964 did not provide a right to jury trial; in fact, it was concern over the bias of juries against plaintiffs that led Congress to create an equitable cause of action tried to district judges.²⁵⁴ It was, however, on the next year that Congress passed a statute with an entirely separate provenance from the ADA’s – the Civil Rights Act of 1991 – which was intended to overturn a number of recent

252. *Id.*

253. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 107 (codified as amended at 42 U.S.C. § 12117(a)).

254. See, e.g., Comment, *The Right to Jury Trial Under Title VII of the Civil Rights Act of 1964*, 37 U. CHI. L. REV. 167, 180 (1969). *Contra* Vincenza G. Aversano, Karen M. Kalikow, & Lisa S. Presser, *Jury Trial Right Under Title VII: The Need for Judicial Reinterpretation*, 6 CARDOZO L. REV. 613, 639 (1985).

Supreme Court decisions interpreting the EDLs.²⁵⁵ One of the provisions of the 1991 Act, now codified at 42 U.S.C. § 1981(a), added tort-type damages (compensatory and punitive) along with a statutory right to a jury trial:

SEC. 102. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION.

The Revised Statutes are amended by inserting after section 1977 (42 U.S.C. 1981) the following new section:

SEC. 1977A. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION IN EMPLOYMENT. SEC. 1977A. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION IN EMPLOYMENT.

255. Civil Rights Act of 1991, Pub. L. No. 102-166, § 3 (codified as amended at 42 U.S.C. § 1981). Section 3 of the 1991 act stated the purposes of the amendments it made as –

SEC. 3. PURPOSES.

The purposes of this Act are--

(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;

(2) to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989);

(3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and

(4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

Id. (emphasis supplied).

(a) RIGHT OF RECOVERY-

(2) DISABILITY- In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)) . . . against a respondent who engaged in unlawful intentional discrimination . . . or who violated . . . section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(c) JURY TRIAL- If a complaining party seeks compensatory or punitive damages under this section--

(1) any party may demand a trial by jury²⁵⁶

“ . . . a trial by jury”. A question virtually leaps at us from these words: “a trial by jury.” And that question is: “A trial by jury” *as to what issue(s)*? The statute actually does not tell us directly. Some might argue that it means as to all issues. But we know that equity (back pay, front pay, reinstatement, reinstatement, and injunction) is a significant part of the picture, and we remember from cases such as *Beacon Theatres, Inc. v. Westover*²⁵⁷ that the jury trial of right does not simply swamp all issues regardless of their nature and pedigree. And while some have suggested the facile analogy of Title VII claims to 18th century tort claims²⁵⁸ for purposes of applying the time-machine test of cases such as *Curtis v. Loether*,²⁵⁹ there is no credible 18th century analogy in common-law civil litigation for determining whether

256. *Id.* § 102(a)(2) & (c).

257. *Beacon Theatres, Inc. v. Westover*, 359 US 500, 510–11 (1959).

258. Aversano et al., *supra* note 254, at 613–17.

259. *Curtis v. Loether*, 415 U.S. 189, 192–295 (1974) (finding 7th Amendment requires Fair Housing Act Claims brought under the Civil Rights Act of 1968 to be jury-tried because it is analogous to common-law torts involving refusal of lodgings claims against innkeepers or defamation.). *But see* *Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry*, 494 U.S. 558, 584 (Kennedy, J., dissenting) (suggesting sensible limits on the use of the Court’s “time-machine” for divining analogies between modern statutory causes of action as compared “to the 18th-century cases permitted in the law courts of England.”).

an employee with a disability poses a direct threat to the health or safety of himself or others – indeed, the question is entirely alien to the difficult world of the Founding Era.²⁶⁰ There’s certainly a hint – since the Act now creates the availability of tort-type damages (compensatory and punitive), and since the right to a jury trial is keyed to those cases in which the plaintiff actually “seeks compensatory or punitive damages,” certainly the damages issues raised by claiming “compensatory or punitive” damages are committed to jury determination.²⁶¹ Yet, does that mean that *all* issues within ADA Title I—which had not yet even taken effect and was not a major focus of the 1991 Act—are committed to a jury? Clearly not, for the 1991 Act contains what appears to be an express reservation for failure-to-accommodate claims where the employer made at least a good-faith effort to comply with the Act:

(3) REASONABLE ACCOMMODATION AND GOOD FAITH EFFORT- In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 . . . , ***damages may not be awarded under this section*** where the covered entity ***demonstrates good faith efforts***, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, ***to identify and make a reasonable accommodation*** that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.²⁶²

If compensatory and punitive damages are not available under such circumstances, then the jury trial keyed into their being claimed would seem to be, perforce, unavailable. Furthermore, there may very well be cases where only back pay, front pay, instatement, and/or reinstatement remedies are sought. By the very limitation of the jury trial right to cases in which plaintiffs “claim compensatory or punitive damages,” those cases would not be subjected to jury trial.

The direct-threat determination is, by its very nature, tied up in the process of determining whether a reasonable accommodation exists to permit a disabled individual to perform the essential functions of a job without posing a significant risk of substantial harm to the individual or to others

260. See, e.g., *The Disabled Vets of the American Revolution*, WASHINGTON COLLEGE (Sept.9, 2015), <https://www.washcoll.edu/live/news/7712-the-disabled-vets-of-the-american-revolution> (discussing the historical research of Benjamin Irvin).

261. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102(c), 105 Stat. 1072, 1073 (codified at 42 U.S.C. § 1981(a)).

262. Id. § 102(a)(3) (emphasis supplied).

within the ambit of the individual's employment.²⁶³ It would seem apparent that in most cases in which an employer sought and obtained a facially reasonable medical opinion before deciding it could not accommodate the individual, the employer has acted in good faith provided that its decision actually was informed by and was made in reliance upon that facially reasonable medical opinion. Thus, it would seem highly unlikely that an ADA plaintiff could plausibly claim compensatory or punitive damages in an ADA case where the employer confronted the "direct-threat" issue by good-faith consultation and involvement of a competent medical expert. It is the author's contention that in such cases, a federal district court can refer the direct-threat determination to a tripartite medical review panel, in which the disabled individual can designate a medical expert on his or her behalf (including one previously consulted before litigation by the disabled individual), and in which the employer's and individual's medical experts can designate a third expert to resolve any conflict between their medical views.

What, however, does Rule 53 permit to be done with the determination by the tripartite process whether a particular plaintiff posed a direct threat? The 2003 amendments to Rule 53(f) also changed the effect of a special master's determination:

(f) Action on the Master's Order, Report, or Recommendations.

(1) Opportunity for a Hearing; Action in General. In acting on a master's order, report, or recommendations, the court must give the parties notice and an opportunity to be heard; may receive evidence; and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions.

(2) Time to Object or Move to Adopt or Modify. A party may file objections to--or a motion to adopt or modify--the master's order, report, or recommendations no later than 21 days after a copy is served, unless the court sets a different time.

(3) Reviewing Factual Findings. The court must decide de novo all objections to findings of fact made or recommended by a master, unless the parties, with the court's approval, stipulate that:

(A) the findings will be reviewed for clear error

263. See, e.g., *Typhoid Mary*, *supra* note 28, at 851–52.

(4) Reviewing Legal Conclusions. The court must decide de novo all objections to conclusions of law made or recommended by a master.²⁶⁴

While the trial judge would be required to perform a de novo review in a hearing outside of the presence of the jury at trial, it seems unlikely that the judge would second-guess the findings of a tripartite medical review panel, particularly given its well-recognized effectualness in the RLA case law.²⁶⁵

A federal district judge might also see the direct-threat question itself as a pre-trial matter, to be determined through a tripartite medical review panel using a Rule 53 reference.²⁶⁶ In that case, the jury trial issue raised by treating the matter as a special master's trial of an issue under Rule 53(a)(1)(B) disappears.²⁶⁷ The jury in such as case might be instructed that the report was entitled to deference, or considerable weight, or even that it is binding as to the determination of whether the plaintiff posed a "... [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."²⁶⁸ That would leave it for the jury to hear evidence from the parties and determine issues such as:

[1] Whether the employer is entitled to rely on the medical analysis, if there is colorable evidence that the employer made up its mind in advance and used the "direct-threat" assertion as a pretext for disability discrimination?²⁶⁹

[2] Whether a reasonable accommodation within a particular employer's business might include employment in or transfer to an open position in which the individual's employment would not pose a "direct threat."²⁷⁰

264. Fed. R. Civ. P. 53(f).

265. *See, e.g.*, *Gunther v. San Diego & Ariz. E. Ry. Co.*, 382 U.S. 257 (1965).

266. *See* Fed. R. Civ. P. 53(a)(1)(C) (empowering court to appoint a special master "to address pretrial and post[-]trial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district").

267. *See* Fed. R. Civ. P. 53(a)(1)(B)-(C).

268. 29 C.F.R. § 1630.2(r)

269. A triable fact issue was found on this very point in *Taylor v. Rice*, 451 F.3d 898, 911-12 (D.C.Cir. 2006)(in reversing a summary judgment that the district court had rendered in employer's favor, the Appeals Court observed that "[e]ven if the Secretary had established that Taylor's pulmonary condition was a non-discriminatory disqualifying characteristic, Taylor has some evidence suggesting that his pulmonary condition was a pretext-that his HIV-positive status is the true reason he was not hired.").

270. *See, e.g.*, *EEOC v. Curry Cty.*, 451 F.3d 1078 (9th Cir. 2006).

[3] If there is an accommodation that might sufficiently reduce the threat but the employer refuses to offer the accommodation on the grounds it would cause an undue hardship, whether the employer has met its burden to prove undue hardship.²⁷¹

These are areas that do not require medical expertise. They may be decided by juries without introducing the kind of incoherence about which the author has been concerned since his law-practice days.

The Chief Judges of each of the 94 federal districts in the United States are encouraged to consider whether to adopt a standing order (or Internal Operating Procedure) to use a tripartite medical review panel process in the special master's role under one of the Fed. R. Civ. P. 53 provisions analyzed above.²⁷² While not necessarily a common practice, such standing orders for the routing and disposition of certain kinds of claims is not unprecedented. For example, the United States District Court for the Northern District of Georgia for many years maintained a standing order that any claim under Title VII of the Civil Rights Act of 1964 would first be referred to a U.S. Magistrate Judge²⁷³ who would, as special master²⁷⁴, conduct all of the proceedings in the case, including where necessary a non-jury trial, and issue a report and recommendation, which could be challenged before the district judge or could be introduced into evidence in a subsequent trial before the district judge,²⁷⁵ if one of the parties demanded that further step.²⁷⁶

271. *Id.*

272. See, e.g., Shira Scheindlin, *We Need Help: The Increasing Use Of Special Masters In Federal Court*, 58 DEPAUL L. REV. 479 (2009).

273. See *Parker v. Dole*, 668 F. Supp. 1563 (N.D. Ga. 1987) (rejecting challenge to the Northern District's Internal Operating Procedure); Lisa B. Golan & Julie S. Northup, *Judge Baverman Provides Valuable View from the Bench to L&E Section*, ATLANTA BAR ASS'N LAB. & EMPL. L. SEC. NEWS, p. 6 (Fall 2019) (discussing the standing order). For a critique of that system from the plaintiffs' bar perspective, see A. Lee Parks and Edward D. Buckley, *The Vanishing Jury Trial in Employment Litigation*, PARKS CHESIN & WALBERT BLOG (Nov. 14, 2013), <http://www.pcwlawfirm.com/vanishing-jury-trial-employment-litigation/>. For a further history of the magistrate referral rule and subsequent modifications thereto, see *Pippen v. Georgia-Pacific Gypsum LLC*, No. 1:07-CV-1565-BBM/AJB, 2009 WL 10670620, at *6–7 (N.D. Ga. Mar. 11, 2009).

274. For an illuminating discussion of the important differences between a Special Master and a United States Magistrate Judge, see David R. Cohen, *Special Masters Versus Magistrate Judges: No Contest*, 61 FED. LAW. 73, 74–75 (2014).

275. See Scheindlin & Redgrave, *supra* note 245, at 35 & n. 9; Kaufman, *supra* note 254, at 458.

276. The Western District of Washington was another federal district court that used a magistrate referral rule, which was upheld against challenge. *White v. Gen. Servs. Admin.*, 652 F.2d 913, 914 (9th Cir. 1981). For another variation on this theme – one not as well structured as the Northern District of Georgia's and thus one that was ultimately invalidated, see *Flowers v. Crouch-Walker Corp.*, 507 F.2d 1378 (7th Cir. 1974)—and for a later success story, see *Baer v. First Options of Chi., Inc.*, No. 90 C 7207, 1994 WL 53777 (N.D. Ill. Feb. 18, 1994).

But can this Title VII practice have any validity under the ADA? Indeed, it can. The original authority for the Northern District's referral rule came from Section 706(f) —

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. *If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.*²⁷⁷

—and the ADA expressly incorporates Section 706 of Title VII.²⁷⁸ Of course, the reference for purposes of resolving the medical issues inherent in a direct-threat defense does not require a statutory provision to allow it. It is simply informative for U.S. District Chief Judges to note that the use of special masters specifically in connection with ADA proceedings was, indeed, recognized and generally permitted in the statute.²⁷⁹ If permitted for this general purpose, it seems all the more appropriate to permit it for the specific purpose described in this article. It is time for the Local Rules Committee of each federal district to consider how to improve the resolution of “direct-threat” cases under the ADA by instituting a reference system for tri-partite medical review.

C. **Employer Use of Pre-and-Post-Employment Arbitration Agreements to Establish a Tri-Partite Direct Threat Process**

When the author entered law school thirty-four years ago, it was virtually unheard of for EDL claims to be the subject of private arbitration. Indeed, the leading precedent at the time, focused on the National Labor Relations Act (NLRA), strongly suggested that even collectively-bargained arbitration clauses did not require that an individual union member's claims under the EDLs be submitted to arbitration.²⁸⁰ But since the focus has changed from the NLRA to the Federal Arbitration Act,²⁸¹ the U.S. Supreme

277. 42 U.S.C. § 2000e-5(f)(5)(2016) (emphasis added).

278. 42 U.S.C. § 12117(a)(2016).

279. See 42 U.S.C. § 2000e-5(f)(5) (2016); see also 42 U.S.C. § 12117(a)(2016).

280. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56 (1974), where Mr. Justice Powell wrote for a unanimous Court.

281. *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20, 25-26 & n.2(1991) (holding, inter alia, that the exclusion in Federal Arbitration Act (FAA) for “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate

Court, charting revolutionary course, has wrought has sea-change in the law.²⁸² Now, it appears that any employment discrimination claim, at least under the federal EDLs, can be subjected to arbitration by either pre-employment agreements between employer and applicant²⁸³ or post-employment agreements between employer and employee,²⁸⁴ or even by agreements between a representative of a group of employees, such a labor union, who may waive the individual rights of its members to pursue their own individual claims against the employer and instead require them to be arbitrated under a collective bargaining agreement.²⁸⁵ Congress provided a further buttress for courts to enforce mandatory arbitration agreements where employees and applicants sought to assert EDL claims in courts through a provision of the Civil Rights Act of 1991.²⁸⁶ Not surprisingly, this can include claims under the ADA.²⁸⁷ Most recently, the court in 2018 has extended this line of cases to include enforcement of employer-employee agreements that not only require EDL claims to be resolved exclusively by arbitration, but

commerce” did not apply to an arbitration agreement contained in securities representative’s securities registration application).

282. With dramatic practical results: “In the early 1990s such agreements covered only 2% of non-unionised workplaces; today they cover more than half.” *Shut Out by the Small Print—The Problem with the Craze for Mandatory Arbitration: Millions Of American Employees Have No Recourse to the Courts*, THE ECONOMIST, Jan. 27, 2018, at 10.

283. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 120 (2001). For a predictive account of how mandatory arbitration would expand after *Gilmer*, see Dennis R. Nolan, *Employment Arbitration After Circuit City*, 41 BRANDEIS L.J. 853 (2003).

284. See, e.g., *Gilmer*, 500 U.S. at 21, 26.

285. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009); *Safrit v. Cone Mills Corp.*, 248 F.3d 306, 307–08 (4th Cir. 2001) (individual EDL claims “clear[ly] and unmistakab[ly]” subject to collective bargaining agreement’s arbitration clause cannot be asserted by employee in federal court even when union declines to seek arbitration of the claims).

286. Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1081, 1081 (captioned “Alternative Means of Dispute Resolution”) (“Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.”); see Pat K. Chew, *Arbitral and Judicial Proceedings: Indistinguishable Justice or Justice Denied*, 46 WAKE FOREST L. REV. 185, 188–90 (2011); see generally Angelito Remo Sevilla, *The End of Duffield and the Rise of Mandatory Arbitration: How Courts Misinterpreted the Civil Rights Act’s Arbitration Provision*, 93 CALIF. L. REV. 323 (2005) (discussing the popularity of alternative dispute resolution systems in employment discrimination suits); For discussion of § 118’s legislative history, see *EEOC v. Luce*, Forward, Hamilton, & Scripps, 303 F.3d 994, 1011–12 (9th Cir. 2002) (Pregerson, J., dissenting), and *EEOC v. Luce*, Forward, Hamilton, & Scripps, 345 F.3d 742, 754, 759–61 (9th Cir. 2003) (en banc) (Pregerson, J., dissenting).

287. See generally *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) (where the principal issue was whether such agreements also bind the EEOC, which the court held they did not).

prohibit the arbitration from proceeding as a class action, limiting each employee to arbitrating his or her own individual claim.²⁸⁸

As the author recently suggested in another article concerning a different EDL context, the rise of mandatory arbitration of EDLs²⁸⁹ can be an opportunity for those supporting the goals of EDLs to make sweet lemonade out of what seemed at first to be simply a pile of lemons.²⁹⁰ For both employees and employers, particularly those whose businesses involve jobs that are safety-sensitive, arbitration can provide the opportunity to avoid the problems inherent in submitting direct-threat issues to judges or juries.²⁹¹ By means of both pre-employment and post-employment arbitration agreements,

288. *Epic Sys. Corp. v Lewis*, 138 S.Ct. 1612 (May 21, 2018) (holding that NLRA did not prohibit enforcement of such agreements under the FAA). The remarkably casual way that such agreements can be formed in our 21st century virtual world is worth noting here:

On April 2, 2014, Epic Systems sent an email to some of its employees. The email contained an arbitration agreement mandating that wage-and-hour claims could be brought only through individual arbitration and that the employees waived “the right to participate in or receive money or any other relief from any class, collective, or representative proceeding.” The agreement included a clause stating that if the “Waiver of Class and Collective Claims” was unenforceable, “any claim brought on a class, collective, or representative action basis must be filed in a court of competent jurisdiction.” It also said that employees were “deemed to have accepted this Agreement” if they “continue[d] to work at Epic.” Epic gave employees no option to decline if they wanted to keep their jobs. The email requested that recipients review the agreement and acknowledge their agreement by clicking two buttons. The following day, Jacob Lewis, then a “technical writer” at Epic, followed those instructions for registering his agreement.

Lewis v. Epic Sys Corp., 823 F.3d 1147, 1151 (7th Cir. 2016), rev’d, 138 S.Ct. 1612 (May 21, 2018).

289. It might be more accurately described as a “proliferation,” not merely a “rise.” For the latest data at the time this article was prepared for publication, see J.S. Colvin, *Report: The Growing Use Of Mandatory Arbitration—Access To The Courts Is Now Barred For More Than 60 Million American Workers*, ECON. POL’Y INST. (April 6, 2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/>.

290. Van Datta, *supra* note 139, at 927–38 & nn. 141–69 (2015).

291. The FAA itself excludes many employees in the railway and airline industries from its coverage under 9 U.S.C. § 1’s provision “but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce,” which the U.S. Supreme Court in *Circuit City* construed to really mean “transportation workers” engaged in interstate commerce. See *Circuit City Stores v. Adams*, 532 U.S. 105, 119–20 (2002). Of course, the tripartite medical review process is typically encompassed within traditional adjust board proceedings provided for by collective bargaining agreements (CBA) negotiated between labor organizations and employers for employees and applicants working in recognized bargaining units. However, for employees of railroads and airlines who are not part of a recognized, union-represented bargaining unit, it appears that the FAA – and its decisional progeny – do not provide the basis for compelling enforcement of arbitration agreements. However, the 1991 Civil Rights Act’s § 118 may provide enough of a foundation to compel arbitration in interstate transportation industries for workers who are not otherwise subject to a CBA.

direct-threat issues can be committed to the kind of tripartite medical review process already well-established a half-century ago, as *Gunther*²⁹² taught us, in the railroad and airline industries.²⁹³ This can reduce—perhaps quite substantially—the jurisprudence of doubt that has arisen from the dissonant case law examined throughout this article. Of course, the direct-threat decision is no more appropriately made by a typical arbitrator than it is to be made by a federal judge or a federal-court jury. Thus, any such arbitration agreement, or modification of an existing arbitration agreement, needs to spell out in detail the tri-partite medical review process. While exploring the details and nuances of such a provision would be the appropriate subject for an entirely separate article, it suffices here to say that there are many exemplars available in the collectively bargained medical review processes that have long endured in the railroad and airline industries.

IV. CONCLUSION: *PLUS ÇA CHANGE, PLUS C'EST LA MEME CHOSE*

The federal courts have heard many ADA cases since the author wrote about the “direct-threat” standard in 1999. Yet, in that nearly 20-year period, they have managed to compile a rather sorry record. Of the major issues that were outstanding 20 years ago, only the issue of whether “threat to self” as well as “threat to others” has been resolved, and it took the U.S. Supreme Court to do that in the only ADA “direct-threat” case they have heard during that time. As for other issues—even as basic as who bears the burden to prove “direct threat”—the U.S. Appeals Courts occupy badly dissonant space and have left the landscape filled with uncertainty – and expensive litigation. Most importantly, the federal courts have no coherent conception of how the process of determining the issue of direct-threat in ADA Title I cases. Without such a coherent conception, we are left with a maze of unpersuasive and half-thought-through answers to the fundamental questions about the ADA’s direct-threat standard that intrigued the author 20 years ago: “Who’s the decider, and what is the decider supposed to decide?”

The EEOC has done little better. It has issued no additional regulations to illuminate the “direct-threat” standard beyond the original regulation it promulgated nearly 30 years ago – in 1991, during the administration of President George H.W. Bush who signed the ADA into law.

Congress, on the other hand, did make a sea-change course correction in the way that federal courts had perversely made virtually every ADA case about whether the plaintiff was even protected under the Act – a draw-dropping anomaly that Congress vigorously corrected in the ADA Amendments Act of 2008, which George H.W. Bush’s son, President George W. Bush, signed into law during his last year in office. However, as laudable

292. *Gunther v. San Diego & Ariz. E. Ry. Co.*, 382 U.S. 257, 258–62 (1965).

293. See, e.g., John F. Foster, Comment, *Review of Adjustment Board Awards Under the Railway Labor Act*, 34 J. AIR L. & COMM. 233 (1968).

as the 2008 Amendments Act was, it did not address the continuing problems with the “direct-threat” standard, which remain little more illuminated today than when this author first encountered them in practice during the mid-1990s. Thus, one might be forgiven, as Justice Jackson once wrote, of feeling as if, at the end of the day, one is exiting through the same door by which they entered – which itself is simply another, classically American way, of saying, “*Plus ça change, plus c’est la même chose.*”²⁹⁴

Undeterred, the author has renewed the call for a sensible process for resolving direct-threat issues in ADA cases, particularly in the numerous safety-sensitive industries that we encounter interminably in the modernity of our 21st century lives. The author has shown the way for the EEOC to use its regulatory power; for federal district courts to use their authority to appoint special masters; and for employers to use their vastly enlarged field to force issues out of court and into arbitration, in order to make tri-partite medical review not only the signature process in Railway Labor Act industries of railways and airlines, but across the board for direct-threat issues in all sectors of employment. If the author is so fortunate as to thrive over the next two decades, he hopes in another 20 years to be able to report then on real progress towards an ADA in which direct-threat issues are resolved logically, fairly, coherently, and informedly, correctly considering the needs of our disabled population to find and keep employment and to be free from stereotypes, while at the same time protecting everyone within a zone of danger created by a direct-threat from the kind of unhappy end that befell a 144 passengers and crew on a routine flight from Barcelona to Dusseldorf in 2015. For tragedies such as that, we never want to have to say, “*Plus ça change, plus c’est la même chose.*” Nor do we ever want to hear another airline captain again shout the anguished words heard on Germanwings Flight 9525, “*For the love of God! Open this door!*”

294. “The more things change, the more they remain the same.” JOHN BARTLETT, BARTLETT’S FAMILIAR QUOTATIONS, at 514 ¶5 (Emily Morison Beck, ed. 15th ed. 1980) (quote from Alphonse Karr (1808–1890), *Les Guepes* (Janvier 1849)).

APPENDIX

Circuit	Party With Burden	Case Authority
1st	Usually Plaintiff	<i>EEOC v. Amego, Inc.</i> , 110 F.3d 135, 144 (1st Cir. 1997) ²⁹⁵
2nd	Defendant	<i>Lovejoy–Wilson v. NOCO Motor Fuel, Inc.</i> , 263 F.3d 208, 220 (2d Cir.2001) ²⁹⁶
3rd	Undecided	<i>New Directions Treatment Servs. v. Reading</i> , 490 F.3d 293, 306 n.9 (2007) ²⁹⁷
4th	Uncertain	No 4th Circuit Appeals Court opinion decides. ²⁹⁸
5th	Inconclusive	<i>Rizzo v. Children’s World Learning Ctrs.</i> , 213 F.3d 209 (5th Cir. 2000) (en banc); <i>Nall v. BNSF Railroad Company</i> , 917 F.3d 335, 343 n. 5 (5th Cir. 2019) ²⁹⁹
6th	Undecided	<i>Wurzel v. Whirlpool</i> , 482 Fed.Appx. 1, 12 n.14 (6th Cir. 2012) ³⁰⁰
7th	Defendant	<i>Branham v. Snow</i> , 392 F.3d 896, 906 (7th Cir.2004) ³⁰¹
8th	Defendant	<i>EEOC v. Wal–Mart Stores, Inc.</i> , 477 F.3d 561, 571 (8th Cir.2007)
9th	Defendant	<i>Echazabal v. Chevron, U.S.A., Inc.</i> , 336 F.3d 1023, 1027 (9th Cir.2003)
10th	It Depends	<i>Jarvis v. Potter</i> , 500 F.3d 1113, 1122 (10th Cir. 2007) ³⁰²
11th	Plaintiff	<i>Moses v. Am. Nonwovens, Inc.</i> , 97 F.3d 446, 447 (11th Cir.1996) ³⁰³
D.C.	Undecided	<i>Taylor v. Rice</i> , 451 F.3d 898, 905–06 (D.C.Cir.2006) ³⁰⁴

295. *Amego*, 110 F.3d at 144. The *Amego* panel’s statement, however, was qualified – although inscrutably so:

Where those essential job functions necessarily implicate the safety of others, plaintiff must demonstrate that she can perform those functions in a way that does not endanger others. *There may be other cases under Title I where the issue of direct threat is not tied to the issue of essential job functions but is purely a matter of defense, on which the defendant would bear the burden.*

Id. (emphasis added). The court did not elaborate on this cryptic statement. Over a decade later, the First Circuit considered whether a similar “direct threat” concept under the Maine Human Rights Act (MHRA) should be treated as plaintiff’s burden to prove she is not a direct

threat, or defendant's burden to prove that she was, and came to a different conclusion, while not undertaking a re-examination of *Amego's* reasoning:

The district court reasoned that, whatever the interpretation of the federal statute, the Maine Law Court had recently ruled that the MHRA and the ADA were not to be construed identically. Indeed the Maine Act, on some issues, is more protective of those with disabilities.

The district court pointed out that the ADA and the MHRA are different and that the MHRA had explicitly assigned safety concerns to the category of a defense. See Me.Rev.Stat. Ann. tit. 5, § 4573-A(1-B). It also noted that (unlike the ADA's "direct threat" provision, which this circuit interpreted in *Amego*) the MHRA explicitly codifies as an affirmative defense the situation in which an individual "pose[s] a direct threat to the health or safety of other individuals in the workplace." Id. § 4573-A(1-A). Further, when the Maine legislature amended the MHRA in 1996, it reenacted the safety defense, which had previously existed under a heading entitled "Not unlawful employment discrimination," under a heading entitled "Defenses." 1996 Me. Legis. Serv. ch. 511, § 1. All of these factors, the district court concluded, indicated that the burden of proving safety risk under Maine law rested solely with the defendant.

The placement of the burden as to any safety risk posed by a disability raises significant public policy concerns about the best way to protect both the public and the disabled. It is entirely reasonable, as the district court said, that Maine law would strike the balance in one direction and federal law the other. Definitive resolution of the direction Maine chooses, however, is most appropriately directed to the Maine courts and the Maine legislature, not the federal courts.

Warren v. United Parcel Serv., Inc., 518 F.3d 93, 99-100 (1st Cir. 2008) (citations omitted).

296. *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 220 (2d Cir. 2001); *accord*, *Hargrave v. Vermont*, 340 F.3d 27, 35 (2d Cir. 2003). The *Lovejoy* court cited to specific legislative history of the ADA. See *Lovejoy-Wilson*, 263 F.3d at 220 (citing H.R.Rep. No. 101-485, pt. 3, at 46 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 469); but see *Sista v. CDC Ixis N. Am., Inc.*, 445 F.3d 161, 170 n.3 (2d Cir. 2006) ("Although the parties disagree as to which party bears the burden of proving or disproving that an employee poses a direct threat and disagree as to whether this Court, in *Lovejoy-Wilson*, held that the 'poses a direct threat defense' is an affirmative defense to be proven by the defendant, we need not address this issue, given our resolution of the this case.").

297. *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 306 n.9 (3rd Cir. 2007). The Third Circuit appears to have developed evasion of this question into a strategic art:

[C]ourts have not come to an agreement . . . as to where the burden [of significant risk] lies. . . . We have previously reserved judgment on this issue when it was 'unnecessary to decide this question,' and do so again in this case as it would not affect our holding."

Id. (citing *Donahue v. Consol. Rail Corp.*, 224 F.3d 226, 230 (3d Cir. 2000)).

298. *Darcangelo v. Verizon Commc'n, Inc.*, 292 F.3d 181, 188 (4th Cir. 2002). However, there is at least one discussion of the issue by the Fourth Circuit in dicta:

Presumably, *Darcangelo* is suggesting that Verizon planned to fire her but feared liability under the Americans with Disabilities Act of 1990(ADA). If that was Verizon's fear, it would have had an affirmative defense against an

ADA discrimination claim if it could have proven that Darcangelo posed a “direct threat,” specifically, “a significant risk to the health or safety of others that [could not] be eliminated by reasonable accommodation,” 42 U.S.C. § 11211(3). *See* 42 U.S.C. § 12113(b).)

Id. (dictum) (cited in *Taylor v. Hampton Rds. Reg’l Jail Auth.*, 550 F.Supp.2d 614, 620 (E.D.Va. 2008) and relied upon in *Cousin v. United States*, 230 F.Supp.3d 475, 492 n. 11 (E.D. Va. 2017)) (“[I]t is ‘unclear on the face of the statute itself which party bears the burden in a ‘direct threat’ analysis. Construing the statute as the Fourth Circuit has in *Darcangelo* . . . , the Court concludes that, [the defendant] has the burden of establishing that [plaintiff] presented a direct threat to himself or others.”); *see also* *Anderson v. Consol. Coal Co.*, 636 F. App’x. 175, 181-183 (4th Cir. 2016)(construing similar provisions of W. Va. Code R. §§ 77-1-4.7, 77-1-4.8) (“Section 77-1-4.8 then provides that [i]n deciding whether an individual poses a direct threat to health and safety, the employer has the burden of demonstrating that a reasonable probability of a materially enhanced risk of substantial harm to the health or safety of the individual or others cannot be eliminated or reduced by reasonable accommodation.’ . . . Although the role of § 77-1-4.8 within the shifting-burden analysis used for employment discrimination claims is not entirely clear, we will assume that the section becomes applicable when, in response to an employee’s prima facie case, the employer asserts that an employee cannot safely perform her job as a legitimate, non-discriminatory reason for termination.”); *Montalvo v. Radcliffe*, 167 F.3d 873 (4th Cir. 1999)(in ADA Title II public accommodations claim, treating “direct threat” as a matter of defense for defendant to establish). District court opinions from within the Fourth Circuit that the author has located and read suggest that the district courts are viewing “direct threat” as an affirmative defense to be pleaded and proved by the employer. For example, in *Searls v. Johns Hopkins Hosp.*, 158 F.Supp.3d 427 (D. Md. 2016), a hearing impaired nurse applicant who required a full-time American Sign Language (ASL) interpreter to perform the nursing job sued the employer under the ADA and Section 504 of the Rehabilitation Act because the employer withdrew an offer of employment to her allegedly in part because her disability posed a “direct threat” to patient care, even with the aid of an ASL interpreter. *Id.* at 430, 431, 433. The employer argued that “that some alarms were only auditory and argues that ‘[i]t would have been a significant patient safety risk to rely on an interpreter, without any nursing training, to engage in nursing judgment by determining which alarm was sounding and to rely on the interpreter’s judgment to determine when a patient emergency was occurring, requiring nursing assistance.’” *Id.* at 439. The court ruled that “[b]ecause JHH did not raise patient safety concerns until after Searls brought the lawsuit, because the issue of patient safety is absent from contemporaneous communications concerning the reason for denying Searls an ASL interpreter, and because the only explanation JHH gave to Searls for revoking her job offer was the cost of providing a full-time interpreter, JHH has not met its burden on its direct threat defense.” *Id.* at 440; *accord* *EEOC v. Kinney Shoe Corp.*, 917 F.Supp. 419, 427-29 (W.D. Va. 1996).

299. Initially, the Fifth Circuit, in a panel decision, saw the “direct threat” inquiry clearly as an employer’s affirmative defense to prove or lose. *See Rizzo v. Children’s World Learning Ctrs.*, 84 F.3d 758, 764 (5th Cir. 1996)(“ An employee who is a direct threat is not a qualified individual with a disability. As with all affirmative defenses, the employer bears the burden of proving that the employee is a direct threat.”). Two years later, following a remand and a fresh appeal, the *Rizzo* case went en banc, and the en banc court backed off the previous panel declaration. The *Rizzo* en banc majority explained this ambivalence as a kind of abstention:

The question of who bears the burden of establishing that an individual’s disability poses a direct health or safety threat to the disabled employee or others is not a simple one. A number of cases either hold or suggest that direct threat is an affirmative defense on which the defendant ordinarily has the burden of proof. Other cases hold to the contrary. Because neither side objected to either of the district court’s instructions described above, we review this challenge for plain error.

In allocating the burden of proof to the defendant to establish its defense, the district judge carefully followed the marching orders we gave him in *Rizzo I*. In this circumstance we are therefore unable to say the district court committed error at all. But, if we assume that the district court somehow committed error, it certainly was not plain or “obvious” error and we need not resolve the burden of proof issue raised for the first time on appeal.

Id. at 212-213. The *en banc* majority elaborated on its view in a footnote:

It is unclear from the statutory scheme who has the burden on this issue. It may depend on the facts of the particular case. The EEOC suggested at argument that where the essential job duties necessarily implicate the safety of others, the burden may be on the plaintiff to show that she can perform those functions without endangering others; but, where the alleged threat is not so closely tied to the employee’s core job duties, the employer may bear the burden. None of these issues were raised in the district court and all we decide today is that the district court did not commit plain error in its charge.

Id. at 213 n.4 (citations omitted). In a three-judge dissent, Judge Edith Hollan Jones vigorously argued for the burden to be placed squarely on the plaintiff. *See id.* at 215–23 (Jones, J. dissenting). The *en banc* court’s “punt” in 2000 appears to remain the current state of affairs in the Fifth Circuit. *See, e.g.,* *Cleveland v. Mueller Copper Tube Co., Inc.*, No.1:10CV307–SA–SAA, 2012 WL 1192125, at *7 n.5 (N.D. Miss. Apr. 10, 2012). Professor Stephen Befort has pointed out the oddity of the approach left behind by the *Rizzo* *en banc* majority’s views:

The Fifth Circuit, meanwhile, appears to slice the burden of proof from the opposite direction. In *Rizzo v. Children’s World Learning Center*, the Fifth Circuit ruled that the employee generally bears the burden to prove that she is a qualified individual who does not pose a direct threat to herself or others.¹⁴⁸ But, the Fifth Circuit went on to state that “when a court finds that the safety requirements imposed [by an employer] tend to screen out the disabled, then the burden of proof shifts to the employer, to prove that the employee is, in fact, a direct threat.”

See Befort, *supra* note 74, at 28-29. Recently, the Fifth Circuit was presented with another opportunity to clarify its position, but studiously declined to do so. *Nall v. BNSF Railroad Company*, 917 F.3d 335, 343 n. 5 (5th Cir. 2019)(In *Rizzo*, “we declined to reach the question of which party bears the burden of establishing that an individual’s disability poses a direct health or safety threat to the disabled employee or others. We do so again here. Even assuming *arguendo* that the burden is Nall’s, at this stage, he has satisfied it.”). Pondering the Fifth Circuit’s puzzling confirmation of nearly two decades of avoidance, one is reminded of the famous observation attributed to Justice Kennedy that “[l]iberty finds no refuge in a jurisprudence of doubt.” *Planned Parenthood Ass’n of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 844 (1992) (joint opinion of O’Connor, Kennedy, & Souter, JJ.)). Neither do the policies of the ADA. *See* 42 U.S.C. § 12101(a) &(b).

300. The Sixth Circuit squarely confronted the issue and then punted, refusing to decide it:

However, we need not resolve the issue of whether the burden is Wurzel’s as part of his obligation to show that he is a “qualified” individual with a disability (by showing that he is not a direct threat to safety in the workplace), or whether the burden is Whirlpool’s as part of an asserted affirmative defense (that the plaintiff was a direct threat to safety). Regardless of which party possesses the

burden of proof on this point, as explained below, the district court's conclusion that Wurzel presented a direct threat is correct as a matter of law.

Wurzel v. Whirlpool Corp., 482 F. App'x 1, 12 n.14 (6th Cir. 2012). This is a particularly surprising rationale for avoidance. The kind of determinations required for the direct-threat issue hardly seemed well-suited to be decided "as matters of law," and it is hard to see how a standard that includes at its heart a soft, multi-factored balancing test can ever be appropriately decided "as a matter of law" – unless either one party had an evidentiary burden that it did not meet, or the plaintiff worked in a safety-sensitive industry subject to government regulation that required a government-issued certification (such as an Airman's Certificate for a commercial airline pilot) that the plaintiff either lacked or had possessed but then lost through revocation. At least one district court within the 6th Circuit had held some years before that the employer bore the burden to prove "direct threat" as an affirmative defense to a plaintiff's claim of discrimination. *EEOC v. Chrysler Corp.*, 917 F. Supp. 1164, 1171, 1172-1173 (E.D. Mich. 1996) (enjoining "Chrysler's policy of not authorizing employment for an individual with a blood sugar level of greater than 140 mg/dl" because it "is a blanket exclusion" not based on the individualized assessments required by the ADA), *rev'd mem. on other grounds*, 172 F.3d 48 (6th Cir. 1998). More recent district court decisions, citing the unpublished decision in *Wurzel*, recognize that the issue is an undecided one in the 6th Circuit – one that a district court recently described as "puzzling". *Jennings v. Dow Corning Corp.*, No. 12-12227, 2013 WL 1962333, at *11 n. 9, (E.D. Mich. May 10, 2013).

301. *Accord Dadian v. Vill. of Wilmette*, 269 F.3d 831, 841 (7th Cir. 2001); *but see Bekker v. Humana Health Plan, Inc.*, 229 F.3d 662, 668 (7th Cir. 2000) (apparently approving of district court's analysis, which included statement that physician plaintiff bore burden of proving she was not a direct threat to health or safety of patients).

302. The *Jarvis* court elaborated:

Courts generally have held that the existence of a direct threat is a defense to be proved by the employer. We have recognized an exception to the general rule: "[W]here the essential job duties necessarily implicate the safety of others, then the burden may be on the plaintiff to show that she can perform those functions without endangering others." *McKenzie v. Benton*, 388 F.3d 1342, 1354 (10th Cir.2004) . . . (plaintiff was police officer) . . . That exception is inappropriate in this case because the essential duties of a Postal Service custodian do not "necessarily implicate the safety of others."

Jarvis v. Potter, 500 F.3d 113, 1122 (10th Cir. 2007) (citations omitted).

303. *Accord LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832, 835 (11th Cir. 1998).

304. The case was brought by a prospective employee who claimed that State Department violated Rehabilitation Act when it refused to hire him as Foreign Service Officer because he was HIV-positive. *Taylor v. Rice*, 451 F.3d 898, 899 (D.C. Cir. 2006). The case has at least some predictive relevance to the ADA because "[t]he statute instructs courts to use the 'standards' of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213, to evaluate a complaint like Taylor's 'alleging nonaffirmative action employment discrimination.' 29 U.S.C. § 791(g); *see* 29 C.F.R. § 1614.203(b) (applying the regulations set forth in 29 C.F.R. pt. 1630 to claims under § 501)." *Id.* at 905. The panel, however, ultimately dodged the issue by saying both that "[i]n light of our disposition, we need not decide who bears the burden of proving that the plaintiff poses a direct threat to his health or safety" and that "[t]he parties did not argue the issue." *Id.* at 905 n.14. Shortly after the D.C. Circuit issued its *Taylor* opinion, Judge Rosemary Collyer of the District Court for the District of Columbia cited her previous *district court* decision in *Taylor* favorably for the proposition that an employer bears the burden of proving that a disabled individual was properly excluded from employment under the Rehabilitation Act of 1973 for posing a "direct threat." *Clayborne v. Potter*, 448 F.Supp.2d 485, (D.D.C. 2006) ("*see also Taylor v. Rice*, No. 03-1832, 2005 WL

913221, at *11 (D.D.C. April 20, 2005) (“An employer may escape liability under the Rehabilitation Act if it can establish that the employee poses a direct threat to himself or others in the workplace”), *rev'd on other grounds*, 451 F.3d 898 (D.C. Cir. 2006”).