# NELI'S TWENTY-FOURTH ANNUAL ADA AND FMLA COMPLIANCE UPDATE

# DIRECT THREAT AND ENFORCING CONDUCT RULES

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SULLIVAN LLP

**Written and Presented By:**


**Mark J. Oberti**
**Oberti Sullivan LLP**
**723 Main Street, Suite 340**
**Houston, Texas 77002**
**(713) 401-3556 (office)**
**(713) 240-1294 (cell)**
**mark@osattorneys.com**


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# I. THE DIRECT THREAT DEFENSE

## A. What Is The Direct Threat Defense?

If a disabled individual is excluded from a job for safety reasons, the employer must demonstrate that the individual poses a "direct threat." "The direct threat defense must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence, and upon an expressly individualized assessment of the individual's present ability to safely perform the essential functions of the job." *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 86 (2002) (internal quotation marks and citation omitted); 29 C.F.R. § 1630.2(r); *Echazabal v. Chevron USA, Inc*., 336 F.3d 1023 (9th Cir. 2003) (rejecting "direct threat" defense and finding that the lack of individualized assessment by doctors familiar with plaintiff's condition under the four direct threat factors was insufficient to conclude that the plaintiff was medically unfit for the job under the ADA); *Lowe v. Ala. Power Co*., 244 F.3d 1305, 1309 (11th Cir. 2001) (the decision must be based upon "particularized facts using the best available objective evidence as required by the regulations."); *Eldredge v. City of St. Paul*, 809 F. Supp. 2d 1011, 1033 (D. Minn. 2011) (denying employer's motion for summary judgment based on the direct threat defense because whether the plaintiff ever received an individualized assessment that complied with the ADA was in dispute).

In determining whether an individual presents 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.

29 C.F.R. § 1630.2(r); *Accord Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 287–88 (1987); *Lovejoy–Wilson v. NOCO Motor Fuel, Inc*., 263 F.3d 208, 220 (2d Cir. 2001).

These factors provide for the evaluation of objective medical evidence while "protecting others from significant health and safety risks, resulting, for instance, from a contagious disease." *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998). *See also Arline*, 480 U.S. at 287 & n. 16, (balancing the rights of disabled individuals while "giving appropriate weight to such legitimate concerns of [public accommodations] as avoiding exposing others to significant health and safety risks" of the disabled individual "communicating an infectious disease to others"). But the ADA does not sanction "deprivations based on prejudice, stereotypes, or unfounded fear." *Arline*, 480 U.S. at 287. The focus is on the objective reasonableness of the employer's assessment of the significance of the risk of transmission.

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### B. What Is The Ultimate Question In Evaluating A Direct Threat Defense?

In making a determination of objective reasonableness, the fact-finder's responsibility does not involve "independently assess[ing] whether it believes that [plaintiff himself] posed a direct threat." *Jarvis v. Potter*, 500 F.3d 1113, 1122 (10th Cir. 2007). Rather, the fact-finder determines the reasonableness of the employer's actions based upon "reasonable medical judgments of public health authorities." *Arline*, 480 U.S. at 288. "[O]f special weight and authority" are "views of public health authorities [ ] such as the U.S. Public Health Service ["PHS"], CDC, and the National Institutes of Health ["NIH"]." *Bragdon*, 524 U.S. at 650. In other words, in the absence of objective medical evidence to the contrary, the fact-finder views the reasonableness of Defendants' actions in light of the views of the CDC/PHS/NIH and similar medical authorities. The factual inquiry looks to available medical evidence, and, in light of this evidence, makes an "individualized determination on the significance of the risk . . ." *Doe v. County of Centre, PA*, 242 F.3d 437, 448 (3d Cir. 2001). "Decisions are not permitted to be based on generalizations about the disability but rather must be based on the facts of an individual case . . . The purpose of creating the 'direct threat' standard is to eliminate exclusions which are not based on objective evidence about the individual involved." *Id*. at 448 (*quoting* H.R.Rep. No. 101–485, pt. 3, at 45, U.S.Code Cong. & Admin.News 1990, pp. 445, 468) (emphasis omitted)).

In *Bragdon v. Abbott*, 524 U.S. 624 (1998), the Supreme Court considered a direct threat defense presented by a dentist concerned about treating an HIV-infected patient. The Court stated that the health care provider had a duty to assess the risk based on "the objective, scientific information available to him and others in his profession." *Id*. at 649. A subjective belief in the existence of a risk, even one made in good faith, will not shield the decisionmaker from liability. *Id*. Moreover, even a "slightly increased risk is not enough to constitute a direct threat, there must be a high probability of substantial harm." *E.E.O.C. v. Hibbing Taconite Co.*, 720 F. Supp. 2d 1073, 1082 (D. Minn. 2010) (citing *Dipol v. N.Y. City Transit Auth*., 999 F. Supp. 309, 316 (E.D.N.Y. 1998)); *see also Wurzel v. Whirlpool Corp.*, No. 10–3629, 2012 WL 1449683, at *9 (6th Cir. Apr. 27, 2012) (there must be "a significant risk, *i.e*. high probability, of substantial harm; a speculative or remote risk is insufficient.") (quoting *Estate of Mauro By and Through Mauro v. Borgess Medical Center*, 137 F.3d 398, 402 (6th Cir. 1998)).

Furthermore, to prevail on the "direct threat" defense, an employer must show that any threat the employee may have posed could not be eliminated by reasonable accommodation. *See, e.g., Hibbing Taconite Co.*, 720 F. Supp. 2d at 1082-83 (employer's failure to make such a demonstration defeated its "direct threat" defense on summary judgment). Once the employee requests an accommodation, the employee and employer share the burden of crafting a reasonable accommodation through a flexible, interactive process. *See id*; *see also* 29 C.F.R. § 1630.9; *EEOC v. Chevron Phillips Chemical Co*., 570 F.3d 606, 621 (5th Cir. 2009). Specifically, as the Fifth Circuit has held, once an employee makes such a request, the employer is obligated by law to engage in an "interactive process": "a meaningful dialogue with the employee to find the best means of accommodating that disability." *Id*. (citation omitted). The process thus requires "communication and good-faith exploration." *Id*. (citation omitted). If the employer does not engage in a good faith interactive process, and this intransigence leads to a failure to reasonably accommodate an employee, the employer violates the ADA. *See Loulseged*

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*v. Akzo Nobel Inc*., 178 F.3d 731, 736 (5th Cir.1999) (citing *Taylor v. Phoenixville School Dist.*, 174 F.3d 142, 165 (3rd Cir.1999)); *see also Chevron Phillips Chemical Co*., 570 F.3d at 621-22 (reversing summary judgment for the employer and holding that a reasonably jury could find that the employer failed to properly engage in the interactive process).

In assessing the direct threat defense, courts focus on the information the employer relied on when it made its decision. *See Bragdon*, 524 U.S. at 649–55 (requiring the direct threat inquiry to take place before the alleged discriminatory act and, therefore, not giving weight to evidence that came to light after the fact); *Nunes v. Wal–Mart Stores, Inc*., 164 F.3d 1243, 1248 (9th Cir. 1999) (finding that the direct threat analysis "necessarily requires the employer to gather substantial information about the employee's work history and medical status, and disallows reliance on subjective evaluations by the employer") (internal quotations omitted). For example, in *Fahey v. Twin City Fan Companies, Ltd*., __ F. Supp. 2d __, NO. CIV. 11-4171-KES, 2014 WL 131196 (D.S.D. Jan. 13, 2014), the employer rescinded a conditional job offer to the plaintiff after learning that he was blind in one eye. *Id*. at *2. At a bench trial, the employer tried to justify its decision through testimony from an alleged expert doctor named Dr. Edinger. But, the employer had not consulted with that doctor before it rescinded the job offer to the plaintiff. The district court found that "[i]t is therefore inappropriate to consider Dr. Edinger's after-the-fact opinions about any threats posed by Fahey when deciding whether Twin City Fan met its obligation to undertake an individualized inquiry that relied on the best current medical or other objective evidence. . . . As a result, the court will only consider the information Twin City Fan had available to it at the time it rescinded Fahey's job offer." *Id*. at *5. (internal citations omitted).

### C. Which Party Has The Burden Of Proof On The Direct Threat Defense?

The courts of appeals decisions addressing which party carries the burden of proof on the "direct threat" defense are not uniform. *Compare EEOC v. Wal–Mart Stores, Inc*., 477 F.3d 561, 571–72 (8th Cir. 2007) and *Branham v. Snow*, 392 F.3d 896, 906 (7th Cir. 2004) (both holding that the employer must prove direct threat) *with LaChance v. Duffy's Draft House, Inc.,* 146 F.3d 832, 835 (11th Cir. 1998) (plaintiff must prove the absence of a direct threat). *See also Borgialli v. Thunder Basin Coal Co*., 235 F.3d 1284, 1291–94 (10th Cir. 2000) (describing cases on both sides); *Rizzo v. Children's World Learning Ctrs*., 213 F.3d 209, 223 (5th Cir. 2000) ("[T]he ADA is not a paragon of legislative drafting. Particularly impenetrable is the statutory allocation of burden of proof regarding an employee's qualifications and the threat that disabled employees might pose to health and safety."). Some courts have taken a middle ground approach, holding that "[t]hough the burden of showing that an employee is a direct threat typically falls on the employer, "where the essential job duties necessarily implicate the safety of others, then the burden may be on the plaintiff to show that [he] can perform those functions without endangering others.'" *McKenzie v. Benton*, 388 F.3d 1342, 1354 (10th Cir. 2004); *see also EEOC v. Amego, Inc*., 110 F.3d 135, 144 (1st Cir. 1997) (plaintiff's "qualification" requirement means that he has the burden to show that he can perform the essential functions of the job and not be a direct threat to others; but 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."). The trend seems to be towards imposing the burden on the employer, or applying the middle ground approach where appropriate. *See, e.g., Jarvis v. Potter,* 500 F.3d 1113, 1122

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(10th Cir. 2007) ("Courts generally have held that the existence of a direct threat is a defense to be proved by the employer."); *Echazabal*, 336 F.3d at 1027 (burden of establishing direct threat is on employer); *Taylor v. Rice*, 451 F.3d 898, 905-06 (D.C. Cir. 2006) (characterizing direct threat as defense); *Grosso v. UPMC*, 857 F. Supp. 2d 517, 535 (W.D. Pa. 2012) ("The employer has the burden of showing that the employee is direct threat.").

### D. Is It Easy For Employers To Win Summary Judgment On The Basis Of The Direct Threat Defense?

Courts have observed that the "direct threat" defense is difficult for an employer to satisfy. As one court stated, "a defendant "asserting a 'direct threat' as a basis for excluding an individual bears a heavy burden of demonstrating that the individual poses a significant risk to the health and safety of others." *Lockett v. Catalina Channel Express, Inc.*, 496 F.3d 1061, 1066 (9th Cir. 2007).

#### 1. Some Cases Where Summary Judgment Was Denied On The Direct Threat Defense

Employers are often unable to get out of ADA cases on summary judgment based on the "direct threat" defense. *See, e.g.*, *Justice v. Crown Cork and Seal Co*., 527 F.3d 1080, 1092 (10th Cir. 2008) (reversing summary judgment because, ". . . while the risk of harm may have been permanent and the severity of the harm great, a reasonable jury could conclude that the likelihood of the harm was extremely small and that Justice therefore did not pose a "direct threat" to the safety of himself or others in the Worland plant."); *Wal–Mart Stores, Inc*., 477 F.3d at 572-73 (reversing summary judgment on "direct threat" grounds where employer's expert's opinion was based on an incorrect factual assumption); *Kapche v. City of San Antonio*, 176 F.3d 840 (5th Cir. 1999) (finding a fact issue over whether insulin-dependent diabetic police officer presented a direct threat); *Rizzo v. Children's World Learning Centers, Inc*., 84 F.3d 758, 764 (5th Cir. 1996) (reversing summary judgment as to a bus driver with a hearing impairment, and stating that, "[w]hether a person who can hear emergency vehicles, but cannot hear a choking child, is a direct threat is question of fact."); *Bender v. Norfolk Southern Corp*., __ F. Supp. 2d __, NO. 1:12-CV-01198, 2014 WL 131638, at *13-15 (M.D. Pa. Jan. 14, 2014) (genuine issue of fact existed as to whether applicant's diabetes presented a significant risk of substantial harm to himself and others, precluding summary judgment on railway's direct threat defense); *E.E.O.C. v. Rexnord Industries, LLC*, __ F. Supp. 2d __, NO. 11-CV-777, 2013 WL 4678626, at *4-9 (E.D. Wis. Aug. 30, 2013) (denying employer's motion for summary judgment asserting that employee who suffered seizures was a direct threat); *Garr v. Union Pacific R.R*., No. 10 C 5407, 2013 WL 68699, at *8-9 (N.D. Ill. Jan. 4, 2013) (whether train engineer with coronary artery disease presented a "direct threat" was for the jury); *Nichols v. City of Mitchell,* No. CIV 11–4016, 2012 WL 5471159, at *9 (D.S.D. Nov. 9, 2012) ("Genuine issues of material fact exist, therefore, with regard to the direct threat defense."); *Shelton v. City of Cincinnati*, NO. 1:11-CV-381, 2012 WL 5385601, at *12 (S.D. Ohio Nov. 1, 2012) (genuine issues of material fact precluded summary judgment on question of whether a firefighter with diabetes who experienced hypoglycemic episodes constituted a direct threat); *McCann v. City of Eugene ex rel. Fire and EMS Dept*., 833 F. Supp. 2d 1250, 1258-59 (D. Or. 2011) (genuine issues of material fact, including whether the possibility of interference or other reasons for pacemaker failure was only

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theoretical and not significant enough to require any further testing of a city firefighter for purposes of the ADA's "direct threat" provision, precluded summary judgment for city firefighter on the firefighter's discrimination claim against the city); *Gaus v. Norfolk S. Ry. Co.*, Civil Action No. 09–1698, 2011 WL 4527359, at *27 (W.D. Pa. Sept. 28, 2011) (denying employer's motion for summary judgment because, "[i]n the instant matter, evidence exists in the record from which a reasonable jury could find that NSR failed to conduct an individualized assessment of Gaus' ability to perform the essential functions of the electrician position and into whether Gaus posed a direct threat of harm or safety to others in the workplace."); *Eldredge*, 809 F. Supp. 2d at 1033 (genuine issue of material fact existed as to whether firefighter who suffered from Stargardt's Macular Dystrophy posed a direct threat to health and safety of others); *E.E.O.C. v. Rite Aid Corp*., 750 F. Supp. 2d 564, 571-72 (D. Md. 2010) (genuine issue of material fact existed as to whether employee with epilepsy posed a direct threat of harm to himself and to his coworkers); *Rosado v. American Airlines*, 743 F. Supp. 2d 40, 50-51 (D. Puerto Rico 2010) (denying employer's motion for summary judgment based on direct threat defense because it failed to present any evidence of how the plaintiff's struggles with mental illness and cocaine abuse made him unable to perform the essential functions of his job, and did not deny that the plaintiff "worked at American for 23 years, with an excellent record as to safety in the workplace," although summary judgment for the employer was granted on other grounds); *EEOC* v. *Hibbing Taconite Co.*, 720 F. Supp. 2d 1073, 1082-83 (D. Minn. 2010) (fact issue existed as to whether applicant with a hearing impairment posed a "direct threat" to other workers for purposes of affirmative defense); *EEOC v. Hussey Copper Ltd.*, 696 F. Supp. 2d 505, 520 (W.D. Pa. 2010) (denying employer's motion for summary judgment based on claim that recovered drug addict presented a direct threat); *Doe v. Deer Mountain Day Camp, Inc*., 682 F. Supp. 2d 324 (S.D.N.Y. 2010) (camp failed to establish that its threat evaluation with regard to rejected academy applicant, who was infected with HIV in which they determined that there was danger that applicant could transmit his condition to other campers, was objectively reasonable, as would support its "direct threat" defense to applicant's claims under the ADA); *E.E.O.C. v. Burlington Northern & Santa Fe Ry. Co.*, 621 F. Supp. 2d 587, 602 (W.D. Tenn. 2009) (genuine issue of material fact, as to whether railroad's decision that a train conductor with a prosthetic limb posed direct safety threat was objectively reasonable, precluded summary judgment for employer on ADA claim based on direct threat defense); *Taylor v. Hampton Roads Regional Jail Authority*, 550 F. Supp. 2d 614, 619-20 (E.D. Va. 2008) (denying employer's motion for summary judgment based on direct threat defense where if offered no evidence, but rather on speculation, that hiring plaintiff, who was missing her right hand, as a corrections officer, would cause her to present a danger to herself or others); *E.E.O.C. v. E.I. DuPont de Nemours*, 347 F. Supp. 2d 284, 298 (E.D. La. 2004) (denying employer's motion for summary judgment on the direct threat defense as to an employee who allegedly was unable to evacuate the employer's plant, such that she would be a danger to herself if an emergency occurred), *aff'd*, 480 F.3d 724 (5th Cir. 2007).

### 2. Some Cases Where Summary Judgment Was Granted On The Direct Threat Defense

Difficult, however, does not mean impossible. There are a number of cases in which the employer prevailed on summary judgment based on the direct threat defense. Most of those cases involve fairly obvious situations. For example, in *Moses v. American Nonwovens, Inc.,* 97

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F.3d 446, 447–48 (11th Cir. 1996), *cert. denied*, 519 U.S. 1118 (1997), the Eleventh Circuit explained that an epileptic worker with a significant risk of seizures on the job who worked close to fast-moving and high-temperature machinery was a direct threat. The court rejected the worker's argument that there was no actual risk of harm as long as he followed instructions and worked "downstream" from the equipment. *Id*. at 448. In *Hutton v. Elf Atochem North America, Inc.*, 273 F.3d 884, 886–87 (9th Cir. 2001), the plaintiff, a diabetic who had experienced hypoglycemic episodes where he could not communicate for a period of time and was sometimes lightheaded, operated the equipment that produced, stored, and transferred liquid chlorine. The court acknowledged the plaintiff's arguments that he lost consciousness only once in his lengthy tenure and that the potential for harm was small because of the safety features of the equipment he used. *Id*. at 893–94. However, the court concluded that the plaintiff nevertheless posed a significant risk under the direct-threat framework, noting the plaintiff's history and the fact that "a significant physical or mental lapse by [plaintiff] as a result of a diabetic episode could result in substantial harm to his co-workers and others." *Id*. at 894. In *Darnell v. Thermafiber, Inc.*, 417 F.3d 657, 661 (7th Cir. 2005), the Seventh Circuit concluded that a plaintiff with uncontrolled diabetes and a resulting risk of passing out on the job presented a direct threat where employees were required to climb tall ladders, operate dangerous machinery, and help lift 80–pound pieces of fiberboard in a hot environment. The court reached this conclusion despite plaintiff's arguments that the single doctor who evaluated him was not thorough enough and that he had worked at the plant for ten months without incident. *Id*. at 660, 662. *See also Johnson v. City of Blaine,* __ F. Supp. 2d __, No. 12–443 (MJD/AJB), 2013 WL 4516339, at *11 (D. Minn. Aug. 26, 2013) (depressed police officer with an extensive history of suicide ideation was a direct threat based on individualized psychological assessment and therefore summary judgment in the employer's favor was proper); *Mauro v. Borgess Med. Ctr.*, 886 F. Supp. 1349, 1352-54 (W.D. Mich. 1995), *aff'd*, 137 F.3d 398 (6th Cir. 1998) (granting summary judgment to an employer-hospital where an HIV-infected surgical technician posed a direct threat to patients).

## E. What Can An Employer Do If It Reasonably Fears An Employee Is A Direct Threat Based On Objective Facts, But Does Not Know For Sure?

### 1. In General

#### a. Case Law

Employers should consider requiring a "fitness for duty" test if they reasonably and objectively fear that an employee is a "direct threat," but do not know for sure. 42 U.S.C. § 12112(d)(4)(A), prohibits an employer from requiring a medical examination or inquiring into the disability status of an employee "unless such examination or inquiry is shown to be job-related and consistent with business necessity." This provision applies to all employees, regardless of whether the employee has an actual disability. *See Cossette v. Minn. Power & Light*, 188 F.3d 964, 969 (8th Cir. 1999). To demonstrate compliance with § 12112(d)(4)(A), the employer bears the burden to show the asserted "business necessity" is vital to the business and the request for a medical examination or inquiry is no broader or more intrusive than necessary. *Conroy v. N.Y. State Dep't of Corr. Servs*., 333 F.3d 88, 97-98 (2d Cir. 2003). "[C]ourts will readily find a business necessity if an employer can demonstrate . . . a medical examination or inquiry is necessary to determine . . . whether the employee can perform job-related duties when

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the employer can identify legitimate, non-discriminatory reasons to doubt the employee's capacity to perform his or her duties (such as frequent absences . . .," or "whether an employee's absence or request for an absence is due to legitimate medical reasons, when the employer has reason to suspect abuse of an attendance policy." *Id*. at 98; *see, e.g., Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 811 (6th Cir. 1999) (holding "there must be significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job" to uphold an employer's request for an exam). The examination or inquiry need not be the only way to achieve a business necessity, but it must be a reasonably effective method to achieve the employer's goals. *Conroy*, 333 F.3d at 98 (noting an employer's legitimate business necessity may include safety and reducing severe absenteeism).

In addition, employers are permitted "to use reasonable means to ascertain the cause of troubling behavior without exposing themselves to ADA claims." *Cody v. CIGNA Healthcare of St. Louis, Inc.*, 139 F.3d 595, 599 (8th Cir. 1998). So, where appropriate, employers may make a focused request for a limited portion of medical records from an employee, so long as it is no broader or more intrusive than necessary. *Thomas v. Corwin*, 483 F.3d 516, 528 (8th Cir. 2007). Thus, for example, where a nurse acted erratically on several occasions after taking her medication, and "blacked out" for four hours at work, the hospital was within its rights to require a fitness for duty examination. *Wells v. Cincinnati Children's Hosp. Med. Ctr.*, 860 F. Supp. 2d 469, 478 (S.D. Ohio 2012).

On the other hand, mere convenience to an employer is insufficient to support a viable business necessity defense, and a medical examination or inquiry that furthers a business necessity without playing a vital role in consummating it will transgress the ADA. *See Conroy*, 333 F.3d at 97 (quoting *Cripe v. City of San Jose*, 261 F.3d 877, 890 (9th Cir. 2001)) (observing that "[t]he business necessity standard is quite high[ ] and is not [to be] confused with mere expediency"); *see also El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 242 (3d Cir. 2007) (reiterating that mere "business convenience" is insufficient to qualify as a business necessity). Whether the employer's asserted justification satisfies the business necessity standard under § 12112(d)(4) is a question of fact. *See Ward*, 226 Fed. Appx. at 140; *Schlegel v. Berks Area Reading Transp. Auth.*, No. Civ. A. 01-6055, 2003 WL 21652173, at *4 (E.D. Pa. Jan. 9, 2003) (denying defendants' motion for summary judgment under § 12112(d)(4) because the viability of a business necessity defense presented a disputed issue of fact).

**b. Relevant EEOC Guidance**

The EEOC explains its position on the issue as follows:

> 5. When may a disability-related inquiry or medical examination of an employee be "job-related and consistent with business necessity"?
>
> Generally, a disability-related inquiry or medical examination of an employee may be "job-related and consistent with business necessity" when an employer "has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition." Disability-related inquiries and medical examinations that follow up on a request

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for reasonable accommodation when the disability or need for accommodation is not known or obvious also may be job-related and consistent with business necessity. In addition, periodic medical examinations and other monitoring under specific circumstances may be job-related and consistent with business necessity.

Sometimes this standard may be met when an employer knows about a particular employee's medical condition, has observed performance problems, and reasonably can attribute the problems to the medical condition. An employer also may be given reliable information by a credible third party that an employee has a medical condition, or the employer may observe symptoms indicating that an employee may have a medical condition that will impair his/her ability to perform essential job functions or will pose a direct threat. In these situations, it may be job-related and consistent with business necessity for an employer to make disability-related inquiries or require a medical examination.

* * *

Example B: A crane operator works at construction sites hoisting concrete panels weighing several tons. A rigger on the ground helps him load the panels, and several other workers help him position them. During a break, the crane operator appears to become light-headed, has to sit down abruptly, and seems to have some difficulty catching his breath. In response to a question from his supervisor about whether he is feeling all right, the crane operator says that this has happened to him a few times during the past several months, but he does not know why.

The employer has a reasonable belief, based on objective evidence, that the employee will pose a direct threat and, therefore, may require the crane operator to have a medical examination to ascertain whether the symptoms he is experiencing make him unfit to perform his job. To ensure that it receives sufficient information to make this determination, the employer may want to provide the doctor who does the examination with a description of the employee's duties, including any physical qualification standards, and require that the employee provide documentation of his ability to work following the examination.

* * *

Example D: An employee who works in the produce department of a large grocery store tells her supervisor that she is HIV-positive. The employer is concerned that the employee poses a direct threat to the health and safety of others because she frequently works with sharp knives and might cut herself while preparing produce for display. The store requires any employee working with sharp knives to wear gloves and frequently observes employees to determine whether they are complying with this policy. Available scientific evidence shows that the possibility of transmitting HIV from a produce clerk to other employees or the public, assuming the store's policy is observed, is virtually nonexistent. Moreover, the Department of Health and Human Services (HHS), which has the

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> responsibility under the ADA for preparing a list of infectious and communicable diseases that may be transmitted through food handling, does not include HIV on the list.
>
> In this case, the employer does not have a reasonable belief, based on objective evidence, that this employee's ability to perform the essential functions of her position will be impaired or that she will pose a direct threat due to her medical condition. The employer, therefore, may not make any disability-related inquiries or require the employee to submit to a medical examination.

EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act, at 7 (EEOC Notice 915.002) (EEOC, July 27, 2000), available at http://www.eeoc.gov/policy/docs/guidance-inquiries.Html (endnotes).

The EEOC also states that, unlike the situation with requests for reasonable accommodation, an employer may require an employee, who it reasonably believes will pose a direct threat, be examined by an appropriate health care professional of the employer's choice. Specifically, the EEOC states:

> 12. May an employer require that an employee, who it reasonably believes will pose a direct threat, be examined by an appropriate health care professional of the employer's choice?
>
> Yes. The determination that an employee poses a direct threat must be based on an individualized assessment of the employee's present ability to safely perform the essential functions of the job. This assessment must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or best objective evidence. To meet this burden, an employer may want to have the employee examined by a health care professional of its choice who has expertise in the employee's specific condition and can provide medical information that allows the employer to determine the effects of the condition on the employee's ability to perform his/her job. Any medical examination, however, must be limited to determining whether the employee can perform his/her job without posing a direct threat, with or without reasonable accommodation. An employer also must pay all costs associated with the employee's visit(s) to its health care professional.

EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act, at question 12 (EEOC Notice 915.002) (EEOC, July 27, 2000), available at http://www.eeoc.gov/policy/docs/guidance- inquiries.html (endnotes).

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### 2. A 2013 District Court Case Permitting Medical Testing That Goes Beyond What The EEOC Guidance Would Permit

In *E.E.O.C. v. U.S. Steel Corp.*, NO. CIV.A. 10-1284, 2013 WL 625315 (W.D. Pa. Feb. 20, 2013), the EEOC sue U.S. Steel for violating the ADA's restrictions on medical testing based on the company's decision to randomly test probationary employees for alcohol, regardless of whether or not they had demonstrated any signs of drinking alcohol on the job, or being affected by alcohol. Based primarily on the dangerous, safety-sensitive positions they held, district court held that such testing was "job-related and consistent with business necessity." *Id*. at *16. The court also found "no issue with limiting the scope of the random testing program only to probationary employees." *Id*. at *17.

The district court also refused to give the EEOC's Enforcement Guidance deference, or even accord it any persuasive status. Rather, it mocked the EEOC's Enforcement Guidance, stating that, "[t]o the extent that the Enforcement Guidance purports to impose a bright-line rule requiring objective evidence of intoxication without exception, such a standard defies common sense in circumstances when employers cannot detect evidence of impairment through layers of protective gear." (citing Jarod S. Gonzalez, *A Matter of Life and Death—Why the ADA Permits Mandatory Periodic Medical Examinations of "Remote–Location" Employees*, 66 LA. L. REV. 681, 698 (2006) (describing the EEOC's position set forth in the Enforcement Guidance as an inflexible "*per se* rule to prevent employers from even attempting to prove that their mandatory periodic medical examination policy meets the business necessity standard" and arguing that the "EEOC's position does not comport with the plain language of the statute and should not be followed by the courts")).

### 3. A Title VII Case Strongly Encouraging Employees To Use Fitness For Duty Examinations

An interesting recent Title VII case takes an employer to task for not seeking a fitness for duty examination of an employee they allegedly believed was dangerous, and instead simply firing her. In *Coleman v. Donahoe*, 667 F.3d 835 (7th Cir. 2012), the plaintiff, a long-term African-American employee, made complaints of alleged unlawful discrimination against her new white supervisor at the Postal Service. *Id*. at 842. She then took a leave of absence for psychiatric problems. *Id*. at 843. While on the leave of absence she told a psychiatrist that she had homicidal thoughts towards her white supervisor. *Id*. The psychiatrist then reported the plaintiff's thoughts to the supervisor. *Id*. The supervisor reported the "threat" to the police. *Id*. Around the same time, while still on leave, the plaintiff filed two EEOC complaints against her white supervisor. *Id*. Several months later, while the plaintiff was still suspended from work pending investigation, she was terminated for violating the Postal Services' policy against making threats of violence. *Id*. at 844. The plaintiff then filed a grievance over her termination, and an arbitrator ordered her returned to work. *Id*. After that, the plaintiff filed a lawsuit, alleging race discrimination, sex discrimination, and retaliation under Title VII. The district court granted the Postal Service's motion for summary judgment, and the plaintiff appealed. *Id*. at 844-45.

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The Seventh Circuit U.S. Court of Appeals reversed the district court's grant of summary judgment. One of the many reasons the court gave for finding fault with the Postal Service's decision to terminate Coleman was the fact that the Postal Service admittedly had options short of termination to gauge the plaintiff's propensity for violence, such as seeking a "fitness for duty" certificate. *Id*. at 856-57. As an aside, another reason the court gave for criticizing the Postal Service was the fact that the plaintiff made the statement to her psychiatrist because, according to the court, "[i]t would be troubling to think that anyone who confides to her psychiatrist that she has fantasized about killing her boss could automatically be subject to termination for cause." *Id*. at 856.

#### 4. Public Safety Positions And Psychological Fitness For Duty

"Especially in the context of police officers, employers do not violate the ADA by ensuring that officers are psychologically fit for duty." *Davis–Durnil v. Vill. of Carpentersville*, 128 F. Supp. 2d 575, 580 (N.D. Ill. 2001). Many cases stand for the proposition that an evaluation of a police officer's fitness for duty does not violate § 12112(d)(4) of the ADA. *See, e.g.*, *Thomas v. Corwin*, 483 F.3d 516, 527 (8th Cir. 2007); *Pennsylvania State Troopers Ass'n v. Miller*, 621 F. Supp. 2d 246, 256 (M.D. Pa. 2008) ("ensuring members' fitness for duty is a business necessity vital to the operation" of police departments). In *Diaz v. City of Philadelphia*, 2012 WL 1657866 *13 (E.D. Pa. 2012), the court agreed that an officer's mental fitness for duty was a unique situation:

> We are satisfied that when dealing with the unique situation of police officers and issues related to their mental health it would be ill-advised to second-guess the personnel decisions of a police department when it is deciding how it can use a police officer who suffers from mental health problems. The police department, not a jury, is uniquely qualified to make such sensitive decisions.

*Id*.

The United States Court of Appeals for the Ninth Circuit considered whether the City could legally require Oscar Brownfield, a police officer, to undergo a fitness-for-duty examination, in the case of *Brownfield v. City of Yakima,* 612 F.3d 1140 (9th Cir. 2010). Years after he returned to duty following a head injury, the City required Brownfield to undergo an examination. The City felt the examination was justified because Brownfield used an expletive and walked out of a meeting with colleagues; felt "himself losing control" after being taunted by a child during a traffic stop; engaged in a disruptive argument with a colleague; allegedly struck his estranged wife during an argument; and made concerning comments such as, "It doesn't matter how this ends."

A doctor diagnosed Brownfield with a "mood disorder" that rendered him unfit for duty. The City fired him after he refused to undergo a follow-up fitness-for-duty examination. Brownfield then filed a lawsuit claiming his termination violated the ADA. The trial court granted summary judgment for the City, and Brownfield appealed.

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The Ninth Circuit held that the City's attempt to compel a fitness-for-duty examination was consistent with the ADA. The court noted that "the business necessity standard is quite high and is not to be confused with mere expediency." Nevertheless, the court reasoned that "prophylactic psychological examinations can sometimes satisfy the business necessity standard, particularly when the employee is engaged in dangerous work." The court further reasoned that the City "had an objective, legitimate basis to doubt Brownfield's ability to perform the duties of a police officer."

### F. <u>A Baker's Dozen Lessons From "Direct Threat" Cases</u>

#### 1. The Direct Threat Defense Applies To Threats To The Employee's Own Health And Safety: *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002)

The ADA provides an affirmative defense to discrimination against a disabled person if the employer can show that the person poses a direct threat to the health or safety of other individuals in the workplace. *See* 42 U.S.C. § 12113(b). The EEOC passed a regulation carrying the defense one step further, and allowing an employer to screen out a potential worker with a disability for risks on the job to his *own* health or safety. *See* 29 C.F.R. § 1630.15(b)(2). The Ninth Circuit U.S. Court of Appeals held that the EEOC's regulation exceeded the scope of permissible rule making under the ADA.

The United States Supreme Court reversed the Ninth Circuit's holding. The Court gave a number of reasons why the EEOC's regulation was a legitimate decision to fill a gap in the statutory text, rather than (as the plaintiff argued) a contradiction of the statute. For example, the Court stated "[w]hen Congress specified threats to others in the workplace, for example, could it possibly have meant that an employer could not defend a refusal to hire when a worker's disability would threaten others outside the workplace? If Typhoid Mary had come under the ADA, would a meat packer have been defenseless if Mary had sued after being turned away?"

The Court also rejected the plaintiff's argument that the EEOC's regulation was "the kind of workplace paternalism the ADA was meant to outlaw." Rather, the Court found, the regulation was a valid balancing of the rights of disabled persons against the risks employers would be legally required to incur if they were forced to employ persons who posed a health and safety risk to themselves. Moreover, the Court observed, the direct threat defense is not available in any context unless it is based upon objective scientific knowledge, rather than mere stereotypes and biases.

#### 2. But, Relying Heavily On The "Threat To Oneself" Defense Is Often A Tough Sell, And Juries May Not Buy It: *E.E.O.C. v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724 (5th Cir. 2007)

DuPont argued that the employee presented a direct threat to herself and other employees because she allegedly was unable to safely evacuate the plant where she worked. The jury rejected this argument, found for the plaintiff, and awarded actual and punitive damages. On appeal, the Fifth Circuit found that the jury's verdict was supported by sufficient evidence. Specifically, despite her medical restrictions on walking, Barrios (the employee on whose behalf

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the EEOC sued) safely ambulated the evacuation route without assistance in 2003, and testimony at trial supported that she could safely evacuate without threatening the safety of herself or others.

Ultimately, the Fifth Circuit upheld a verdict for the EEOC that included a $300,000 award of punitive damages (reduced because of the caps from the jury's $1 million award). The evidence supporting the jury's punitive damages award included that:

> DuPont refused to allow Barrios to demonstrate her ability to evacuate before she was terminated – for inability to evacuate. The company spent years trying to convince Barrios to retire on disability. But the crowning evidentiary blow against DuPont is that after Barrios attempted to get her job back, a DuPont supervisor stated that he no longer wanted to see her "crippled crooked self, going down the hall hugging the walls."

*Id*. at 733.

### 3. Relying On The Direct Threat Defense Often Essentially Concedes That The Employee Was "Regarded As" Disabled Under The ADA: *E.E.O.C. v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724 (5th Cir. 2007), And Many Other Cases

To win on the direct threat defense, the employer usually must demonstrate significant medical problems with the employee. Putting on such evidence usually results in a finding that the employer regarded the employee to be disabled – one of the definitions of "disabled" under the ADA, and one of the required elements of a successful ADA case. For example, in *E.I. Du Pont de Nemours & Co.*, the court found sufficient evidence to support the jury's finding that the employer "regarded" the plaintiff to be disabled, based largely on its repeated assertions that she was so limited in walking that she could not evacuate the plant, and that DuPont admitted in its discovery responses that Barrios was "incapable of walking" and "permanently disabled from walking." *Id*. at 729. DuPont essentially had to make these arguments, in order to try to support its claim that Barrios was so medically limited that she had to be removed from the plant.

Many other ADA cases repeat this same dynamic. For example, in *Garr v. Union Pacific R.R*., No. 10 C 5407, 2013 WL 68699 (N.D. Ill. Jan. 4, 2013), the court found sufficient evidence that the plaintiff, who had heart problems, was "regarded as" disabled to survive summary judgment. *Id*. at *6. It also found fact issues defeated the employer's motion for summary judgment on its direct threat defense. *Id*. at *8-9; *see also Simms v. City of New York*, 160 F. Supp. 2d 398, 405-07 (E.D.N.Y. 2001) (same).

Under the ADAAA, an employer has no duty to accommodate an employee it regards as disabled. 42 U.S.C. § 12201(h); 29 C.F.R. § 1630.9(e). So a "direct threat" case that turns on accommodation should be brought by plaintiffs under an "actual" disability theory. On the flip side, employer's counsel should look to box plaintiffs alleging "direct threat" into a "regarded as" theory only, to take the "reasonable accommodation" issue off the table.

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### 4. When An Employee Makes Threats, And Makes Unwelcome Contact With Coworkers, Courts Are Inclined To Find For The Employer On The Direct Threat Defense: *Jarvis v. Potter,* 500 F.3d 1113 (10th Cir. 2007)

Jarvis was a Vietnam veteran who had worked for the U.S. Postal Service as a mail handler and subsequently as a custodian. He had received a diagnosis of post-traumatic stress disorder in the late 1990s, and in 2002 he began to have difficulties at his workplace due to PTSD. After being startled twice by one co-worker, on two separate occasions he respectively "struck" and kicked her inadvertently; on another occasion he clenched his fist when startled by his supervisor. According to Jarvis, he also asked the supervisor to tell his co-workers that he had PTSD and that they should avoid "scaring" him; they should speak to him in a normal tone of voice and not approach him from behind. Neither his co-worker nor his supervisor reported these incidents.

A third incident led to the investigation that ultimately resulted in Jarvis' termination from the Postal Service. One witness said that Jarvis was obtaining a key to fix a mail truck when a co-worker "goosed or poked" him, whereupon he hit the co-worker's shoulder, and the co-worker reported the incident. During a deposition, Jarvis described his intentions more ominously and dramatically: "I was ready to kill the guy." A witness described the incident as a "so-what deal."

The third incident led to an investigation resulting in Jarvis' being placed on leave with pay and almost immediately thereafter without pay. Jarvis appealed this decision, and the Postal Service held a "due process meeting" at which he reported that "if he hit someone in the right place, he could kill him," that his PTSD was worsening, that he "c[ould] no longer stop the first blow," and that he "could not safely return to the workplace." He also requested that his supervisor pursue disability retirement for him and offered to have his treating nurse practitioner, Sonia Hales, send a letter explaining the significance of his PTSD. As part of her letter, Hales stated that she had reviewed his prior medical providers' records, which noted the severity of his symptoms, and that because of his PTSD, he "may pose some threat in the work place." She stated further that, given that he had identified his work as a "significant stressor in his life, . . . a medical retirement may be beneficial for him." He was then sent a letter of termination based on the incidents with the first and third co-workers, his assertions at his due process hearing, and Hales' letter.

Jarvis sued the USPS in the district court for the District of Utah, alleging that it had violated the Vocational Rehabilitation Act (VRA), 29 U.S.C.S. § 701 et seq. (2006), and had retaliated against him for his complaints to the EEO. The Postal Service moved for summary judgment, which was granted on both the discrimination and retaliation claims. On the discrimination claim, the district court agreed with the USPS that Jarvis posed a direct threat that could not be reasonably accommodated by the Postal Service and that he was therefore not a "qualified individual" under the VRA. Jarvis then appealed the granting of summary judgment.

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The Tenth Circuit found no error in the granting of summary judgment on the discrimination claim and affirmed part of the summary judgment on the retaliation claim. The court of appeals first explained that review of the trial court's ruling entailed evaluating whether the court used appropriate legal standards. The essential part of its decision-making was not a determination of whether Jarvis actually presented a direct threat, but whether the employer's determination that an employee poses a direct threat is "objectively reasonable."

Preliminarily, the court explained that an assessment of whether the VRA has been violated applies the same standards used to determine whether the ADA has been violated. The Tenth Circuit reasoned that the evidence at the due process hearing, the interviews that the USPS conducted, and Hales' letter provided sufficient objective medical evidence and that, given the chronic nature of Jarvis' disease and the likelihood that he would be startled at any time, three of the four factors were satisfied: duration, likelihood, and imminence. It noted that determining the severity was less clear. More importantly, the court concluded that this threat could not be reasonably accommodated, given the evidence that co-workers could startle him inadvertently, as shown by the first co-worker's having done so, resulting in Jarvis' striking and kicking her. It also rejected Jarvis's argument that the employer should have done a more robust medical review before terminating his employment, or have conducted an independent medical evaluation.

The court's decision appears to reflect the courts' and the public's growing concern regarding violence in institutions and by employees, postal workers being a notable example. Given that concern, it seems reasonable to expect the courts to rule on the side of public safety when a plausible threat regarding workplace safety arises.

In *Den Hartog v. Wasatch Acad.*, 129 F.3d 1076, 1091-92 (10th Cir. 1997), the Tenth Circuit took the "direct threat" defense a step further. In that case, the plaintiff's mentally ill son made serious and disturbing threats against students and other persons affiliated with a private boarding school. The plaintiff was a teacher at the school. The plaintiff was terminated based on his son's threats. The court of appeals found that the direct threat defense applied to relatives of employees, even though the statute does not mention the subject.

### 5. On The Other Hand, Pure Speculation That An Employee Is Dangerous Does Not Support A Direct Threat Defense, Even If The Speculation Is Understandable: *Josephs v. Pacific Bell*, 443 F.3d 1050 (9th Cir. 2006)

In *Josephs*, the Court upheld a jury verdict that found an employer violated the ADA for terminating an employee, and refusing to rehire him, after learning that he previously had been found not guilty by reason of insanity for attempted murder.

Josephs was a service technician with Pacific Bell. Service technicians perform unsupervised, in-home telephone installation or repair. On his Pacific Bell employment application, Josephs checked "NO" in answer to the question, "Have you ever been convicted of, or are you awaiting trial for a felony or misdemeanor?"

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Pacific Bell hired Josephs in 1997. After Josephs had been working for approximately three months, Pacific Bell lawfully obtained Josephs' criminal history. The criminal history revealed that Josephs had been arrested in 1982 for attempted murder and was found not guilty by reason of insanity. Pacific Bell also learned that Josephs had been convicted in 1985 for a 1982 misdemeanor battery on a police officer. Pacific Bell suspended Josephs pending further investigation.

In its investigation, Pacific Bell additionally discovered that Josephs had been committed to, and had spent two and one-half years in, a California state mental hospital between 1982 and 1985. Thereafter, he spent six months in a board-and-care mental health facility. Based on these facts, Pacific Bell terminated Josephs "due to fraudulent entries on [his] application." Josephs filed a grievance seeking reinstatement. His grievance seeking reinstatement was denied, and he subsequently filed a federal lawsuit against Pacific Bell for alleged violations under the ADA.

The litigation surrounding Josephs' termination revealed that Pacific Bell had reinstated other workers who had been terminated for failing to reveal their criminal histories on its application. The litigation also revealed that Pacific Bell refused to reinstate Josephs for reasons other than for fraudulent entries on his employment application. Specifically, as the rationale behind Pacific Bell's decision not to reinstate Josephs, Pacific Bell representatives cited the following concerns relating to Josephs' mental health history:

- The supervisor of Josephs' immediate supervisor "wanted to eliminate the possibility of having someone in the business that had an emotional dysfunction that might cause this type of behavior."

- Josephs' union representative testified that another manager expressed concerns about employing someone with Josephs' background to work in individuals' homes because he might "go off" on a customer. When the union representative proposed a transfer to a different job that did not involve customer service, the manager replied that "people can still walk by," and that "they were not going to bring someone like that back . . .[because] they had an image to uphold."

- A Pacific Bell manager allegedly stated that the company could not afford to have people "out there" who had been released from a mental institution.

Notably, the cited concerns that Josephs' mental health history might interfere with his job performance were contrary to the opinion of Josephs' immediate supervisor, who testified that "Josephs was performing well on the job and would probably be an asset to [Pacific Bell]." Further still, Pacific Bell produced no evidence that Josephs was engaging in misconduct on the job, nor did it ask Josephs to complete a "fitness for duty" medical evaluation to see if he was, in fact, really dangerous.

At trial, a jury ruled that Pacific Bell violated the ADA by refusing to re-hire Josephs. The jury apparently concluded that Pacific Bell was not acting on any specific concerns related to Josephs' job performance when it terminated his employment. Pacific Bell appealed the jury finding and the Ninth Circuit affirmed, holding that Pacific Bell had improperly relied on

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stereotypes of mental illness – thus not proving Josephs was a "direct threat" – while ignoring other evidence that Josephs was safe and otherwise qualified to perform his job.

#### 6. At Least One Court Of Appeals Has Held That Safety-Based Blanket Exclusions Of Employees With Certain Medical Conditions Are Sometimes Allowed Despite The Direct Threat Defense's Language To The Contrary, So Long As The Employer Can Prove "Business Necessity": *E.E.O.C. v. Exxon Corp.*, 203 F.3d 871 (5th Cir. 2000)

In July 1989, Exxon adopted a policy that precludes all employees who currently have substance abuse problems and all employees with a history of substance abuse from working in designated "safety sensitive" position. "Safety sensitive" positions constitute about ten percent of all jobs at Exxon. The EEOC challenged this blanket exclusion of rehabilitated substance abusers under the ADA. The question for the Fifth Circuit was whether Exxon could defend its blanket exclusion based upon "business necessity" or was required to demonstrate that a "direct threat" was presented by each affected employee. The district court concluded that Exxon had to prove that each individual presented a "direct threat." The Fifth Circuit reversed.

The Fifth Circuit concluded that when an employer screens employees based upon a safety-based qualification standard, it is not necessarily required to prove that each individual screened out by the standard poses a "direct threat" to the health or safety of other individuals in the workplace. Rather, the court held, the employer may instead justify the safety-based qualification standard as a "business necessity." *See* 42 U.S.C. 12113(3). The court held that the "direct threat" defense only necessarily applies in cases where an employer responds to an individual employee's supposed risk that is not addressed by the employer's existing qualifications standards.

In its conclusion to the decision, the Fifth Circuit stated:

> In evaluating whether the risks addressed by a "safety-based" qualification standard constitute a business necessity, the court should take into account the magnitude of possible harm as well as the probability of occurrence. The acceptable probability of an incident will vary with the potential hazard posed by the particular position: a probability that might be tolerable in an ordinary job might be intolerable for a position involving atomic reactors, for example. In short, the probability of the occurrence is discounted by the magnitude of its consequences. In Exxon's case, the court should thus consider the magnitude of a failure in accessing whether a rate of recidivism among recovery in substance abusers constitutes a safety risk sufficient for business necessity.

*Id*. at 875.

The EEOC does not agree with this decision. *See E.E.O.C. v. J.B. Hunt Transp., Inc.*, 128 F. Supp. 2d 117, 131 (N.D.N.Y. 2001) ("EEOC avers that *Exxon* was wrongly decided and has yet to be adopted in the Second Circuit.").

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### 7. Changes In The Law And Medical Developments Can Alter The Analysis Of Whether Certain Conditions Constitute A Direct Threat: *Kapche v. City of San Antonio*, 176 F.3d 840 (5th Cir. 1999)

Kapche applied for a position as a police officer for the City of San Antonio. He was rejected because he is an insulin-dependent diabetic. Kapche sued under the ADA, and the district court granted the city's motion for summary judgment on the ground that Kapche posed a "direct threat" as a matter of law.

On appeal, the Fifth Circuit noted that, as a police officer, driving would be an essential function of Kapche's job. It further observed that in two prior cases it had held, as a matter of law, that drivers with insulin-dependent diabetes pose a direct threat. *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993); *Daugherty v. City of El Paso*, 56 F.3d 695 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1263 (1996). The court held that Chandler's and Daugherty's *per se* rule should no longer be applied because after those cases were decided, the Department of Transportation amended its highway safety regulations to abolish its prohibition of insulin-dependent diabetics from the operation of noncommercial motor vehicles. In addition, the court observed that since its earlier decisions there have been technological improvements that have significantly increased the ability of diabetics to monitor blood sugar levels and thereby prevent hypoglycemic reactions. As a result, the court reversed summary judgment for the City of San Antonio, to allow for an individualized assessment of whether or not Kapche's condition posed a "direct threat" to himself or others.

### 8. When Patient Or Public Safety Is Involved, Courts Are Somewhat More Likely To Find A Direct Threat Exists: *Robertson v. The Neuromedical Ctr.*, 161 F.3d 292 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1575 (1999)

#### a. Patient Safety

Robertson was a neurologist with Attention Deficit Hyperactivity Disorder ("ADHD"). His ADHD caused short-term memory loss. Robertson admitted that these problems caused him to pose a threat to his patients' safety, stating that "it was only a matter of time before he seriously hurt someone." *Id*. at 296. The Fifth Circuit found that this evidence demonstrated that Robertson was a "direct threat" to his patients' "basic medical safety," and thus affirmed summary judgment for the employer.

The *Robertson* case is not alone. Other courts have come to the same conclusion in similar cases. For example, in *Haas v. Wyoming Valley Health Care System*, 553 F. Supp. 2d 390, 402 (M.D. Pa. 2008), the district court concluded that an orthopedic surgeon with bipolar disorder was a direct threat to patient safety under the ADA and having a general surgeon supervise during the plaintiff's surgeries did not amount to a reasonable accommodation. During surgery, the plaintiff became confused due to his mental disorder and could not complete the surgery without instruction from others. *Id*. at 393. The success of the surgery was irrelevant to the court. *Id*. at 400–01.

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> The fact that this particular incident did not result in harm to the patient does not establish that [the plaintiff] did not pose a direct threat to his patients. Rather, the question is whether an occurrence of such an episode could result in harm to a patient. There are numerous facts in evidence that show that such an episode could potentially occur again.

*Id*. at 401. *See also Grosso v. UPMC*, 857 F. Supp. 2d 517, 538-40 (W.D. Pa. 2012) (employee with diabetes and hypoglycemic unawareness syndrome was a direct threat to the safety of others that could not be eliminated with reasonable accommodations provided by university hospital employer, and thus employer was not required to provide such accommodations to employee under ADA; employee had no way of determining beforehand when she might become unconscious and unable to self treat, and risks in allowing employee to perform her responsibilities as staff perfusionist to run cardiopulmonary bypass machine which sustained life of patient during surgery, and to monitor medications given during course of an operation, were high considering that if employee were to become unconscious while running machine, patient could suffer irreparable injury or even die); *Adams v. Rochester Gen. Hosp*., 977 F. Supp. 226, 234-35 (W.D.N.Y. 1997) (employee with mental health problems posed a direct threat to the safety of hospital patients; essential function of employee's job was to maintain and repair equipment which the hospital used daily to sustain, save, or improve patient's lives, and employee was cited for three incidents of incorrectly repairing equipment used to care for hospital patients).

**b. Public Safety**

The job of a police officer is uniquely demanding. As explained by the United States Supreme Court, "police officers are often forced to make split second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386, 396–97, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). *Accord Watson v. City of Miami Beach*, 177 F.3d 932, 935 (11th Cir. 1999) ("[P]olice departments place armed officers in positions where they can do tremendous harm if they act irrationally."). Perhaps for these reasons, the direct threat defense tends to apply somewhat more robustly when the case concerns a police officer, or other public safety position that involves a special risk to others, co-workers and the public, who are exposed to the danger of a firearm in the control of the plaintiff. For example, in *McKenzie v. Benton*, 388 F.3d 1342 (10th Cir. 2004), the court of appeals upheld a jury verdict finding that a deputy sheriff with history of psychological problems, including self-mutilation, overdosing on medication, and being committed to a mental hospital, was a direct threat. The court emphasized the sensitive position the sheriff held that involved carrying a gun and working with the public. *Id*. at 1354-55; *see also City of Blaine*, 2013 WL 4516339, at *11 (depressed police officer with an extensive history of suicide ideation was a direct threat based on individualized psychological assessment and therefore summary judgment in the employer's favor was proper).

In *Burroughs v. City of Springfield*, 163 F.3d 505 (8th Cir. 1998), the plaintiff was a diabetic police recruit who, while serving as a recruit, had two diabetic hypoglycemic episodes during which he became disoriented and could not perform his duties. An evaluating physician concluded he could be danger to the public if another episode occurred, and that the episodes

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could be avoided if the plaintiff would more appropriately monitor his diet. Although the Eighth Circuit determined the plaintiff was not terminated because of his disability, it also discussed the direct threat defense. The plaintiff argued the doctor's opinion was speculative but the court noted the doctor's opinion relied on two undisputed episodes that created a risk "of an armed patrol officer being unable to function in an emergency situation." *Id*. at 508. Accordingly, the court held "[t]he City's decision to remove [plaintiff] from duty was appropriately based on objective evidence and reasonable medical judgment." *Id*.

In *Fussell v. Georgia Ports Authority*, 906 F. Supp. 1561 (S.D. Ga. 1995), a Georgia Ports Authority (GPA) police officer was discharged for failing a firearms proficiency test. He claimed the failure was caused by his "benign essential tremor" disability. The district court dismissed his ADA claim, stating as follows:

> A police force consists of members who must rely upon each other for back-up in life and death situations. A fellow officer's ability to draw his or her gun and accurately shoot it is a self-evident requirement in protecting fellow officers in a large variety of situations (*e.g.*, assisting an officer who encounters a group of armed criminals, or who is caught in a cross-fire, etc.). A GPA policeman who cannot shoot straight poses an unacceptable risk to others. Plaintiff has not shown how his deficiency, and the direct threat to the health of others that it represents, can be reasonably accommodated. His ADA claim also fails on these grounds. *See Champ*, 884 F. Supp. at 998 ("an individual is not otherwise qualified if he poses a direct threat to the health or safety of others because of his disability that reasonable accommodation cannot eliminate"); 42 U.S.C. § 12113(b). Nothing in the ADA, nor in the way the GPA runs its police force, where all but two administrative personnel members must be firearms proficient, Collins Aff. ¶ 9, requires the GPA to water down its testing requirements.

*Id*. at 1574.

On the other hand, there are limits. To illustrate, in *Krocka v. Bransfield*, 969 F. Supp. 1073 (N.D. Ill. 1997), the Chicago police department put the plaintiff police officer into its disciplinary program, called the Personnel Concerns Program, solely because he was taking Prozac. When the police officer sued, the Chicago police department tried to rely on the direct threat defense. The district court rejected the defense as a matter of law, because: (a) there was no evidence that the plaintiff posed a threat to anyone's safety; (b) there was no evidence to support the defendant's assumption that people taking Prozac are more dangerous than others; (c) the decision to place the plaintiff into the Personnel Concerns Program was not made on an individualized basis, but rather simply because the plaintiff was taking Prozac; and (d) the individuals in charge of managing the Personnel Concerns Program had no training in monitoring of officers' behavior and that the Program was not designed with a safety-based purpose in mind.

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In *Hoback v. City of Chattanooga*, NO. 1:10-CV-74, 2012 WL 3834828 (E.D. Tenn. Sept. 4, 2012), the plaintiff police officer, an Army veteran, suffered from PTSD. Plaintiff met with with a VA doctor, who became concerned that he was suicidal and dangerous. The doctor filled out a Certificate of Need for Involuntary Commitment, which stated plaintiff was "depressed and despondent and states that he is feeling suicidal," and further said "[Plaintiff] indicated using a gun although he stated he does not own a gun." Plaintiff was not involuntarily committed, however; apparently he slipped out the back door of the clinic while the doctor was making arrangements for his committal.

After leaving the VA clinic, plaintiff drove himself to the VA hospital in Murfreesboro, Tennessee and checked himself in. He was kept overnight, and released the next day. The police department became aware of the attempted involuntary commitment of plaintiff, and the Chief of Police, wrote a letter relieving plaintiff from duty, and placing him on administrative leave. The letter further stated plaintiff would be required to complete a "fitness for duty" psychological examination.

A psychologist met with plaintiff several times to conduct the fitness for duty psychological examination, and concluded plaintiff was "not psychologically fit to safely perform the duties as a police officer." Following this evaluation, plaintiff was told he needed to either apply for another position with the City, or file for FMLA benefits. Plaintiff did neither. Rather, plaintiff requested a second evaluation be performed by another psychologist. Plaintiff was then evaluated by a different psychologist, who concluded plaintiff was now fit for duty as a police officer. However, the report advised that "adequately monitoring Mr. Hoback's behavior and mental health status will be essential but difficult," and recommended he be placed in "a position that provides acceptable levels of monitoring at the beginning of his re-engagement," and continue receiving intensive counseling and psychological monitoring for at least 90 days.

The police department then terminated plaintiff's employment based on the first psychologist's determination plaintiff was not fit for duty. The police chief testified that he did not significantly rely upon the second psychologist's report, because he viewed its conditions regarding the need to continue actively monitoring plaintiff as belying the formal conclusion that plaintiff was now fit for duty. The plaintiff sued, and at trial the jury returned a verdict in favor of plaintiff, awarding him $130,000 in back pay, $300,000 in front pay, and $250,000 for emotional distress for a total award of $680,000. *Id*. at *2.

The district court denied the city's motion for judgment notwithstanding the verdict, stating that, "there was sufficient evidence for a reasonable jury to conclude the City's evaluation of Plaintiff was not based on the best objective medical evidence." *Id*. at *8. The court stated that "a reasonable jury could have considered Dr. Brookshire's [the first psychologist] report to lack the type of individualized inquiry or reasonable medical judgment required by the ADA." *Id*. at *9. The court went on to state that, "[t]he jury could have determined Chief Cooper's nearly sole reliance on Dr. Brookshire's report, and failure to consider Dr. McDaniel's [the second psychologist] conclusions, to indicate his determination was not based on "the best available objective evidence," and that the jury could have determined Plaintiff was not a direct threat under the four-factor test provided by C.F.R. § 1620.29(r)." *Id*. (citing *Justice v. Crown Cork and Seal Co.*, 527 F.3d 1080 (10th Cir. 2008) (finding a material issue of fact existed

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regarding a "direct threat" defense in part because the employer relied on one medical opinion and ignored subsequent conflicting opinions)).

**9. If An Employee Has Been Doing Their Job Safely For Twelve Years, And Nothing Has Changed In Their Medical Condition, Then They Probably Are Not A Direct Threat: *Rizzo v. Children's World Learning Centers, Inc*., 84 F.3d 758 (5th Cir. 1996)**

Rizzo was a teacher's aide for Children's World Learning Centers, which operates a daycare center. Her duties included driving children in the Children's World van. In 1993, after working for the company approximately twelve years, a parent complained to Rizzo's boss about her being left alone with children. Because of Rizzo's hearing impairment, the parent was concerned about whether she would be able to hear a choking child in the back of the van. Rizzo's supervisor confronted her with this concern and asked her to bring a report from her audiologist stating that it was safe for her to drive the van. Shortly thereafter, Rizzo brought a report from her audiologist which said she could hear emergency vehicles. However, the report did not discuss whether Rizzo could hear a child choking at the back of the van. Since it did not, Children's World removed Rizzo from her driving duties and assigned her to work in the kitchen on a split shift (early mornings and late afternoons), which resulted in a significant reduction in her hours of work. Ultimately, Rizzo resigned and filed an ADA lawsuit.

The district court granted Children's World's motion for summary judgment on the grounds that Rizzo posed a direct threat to the children, in that she may not be able to hear a choking child due to her disability. The Fifth Circuit reversed the summary judgment, concluding that, "[w]hether a person who can hear emergency vehicles, but cannot hear a choking child, is a direct threat is question of fact." *Id*. at 764.

**10. Customer Concerns Cannot Support A Direct Threat Defense: *Rizzo v. Children's World Learning Centers, Inc*., 84 F.3d 758 (5th Cir. 1996)**

Another lesson from *Rizzo* is that employers cannot rely on their customers' unfounded speculation to support a direct threat defense. In that case, several concerned parents were behind the company's decision to have Rizzo tested, and then ultimately removed from her bus-driving position. While it is certainly understandable that the company would want to be responsive to its customers' concerns about their children's safety, those concerns alone could not support a direct threat defense. This puts businesses in a difficult positions some times, but protects disabled employees against pure market based cost/benefit business decisions.

**11. In Assessing Whether An Employee Is A Direct Threat, Employers Should Not "Slavishly Defer To A Physician's Opinion Without First Pausing To Assess The Objective Reasonableness Of The Physician's Conclusions": *Rodriguez v. ConAgra Grocery Products Co*., 436 F.3d 468 (5th Cir. 2006)**

The plaintiff alleged that ConAgra refused to hire him after a doctor wrongly declared him "unfit for duty." The district court determined there was no disability discrimination

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because ConAgra withdrew the job offer based on the physician's assessment that plaintiff had "uncontrolled diabetes" that prevented him from performing the job safely. The Fifth Circuit reversed, and rendered judgment for the plaintiff, because: (1) the physician did not have enough information to find that the plaintiff's diabetes was uncontrolled; and (2) ConAgra did not have enough information to conclude he was unable to perform the job.

The Fifth Circuit explained that the physician's finding was based on one urinalysis and the plaintiff's inability to remember the name of his diabetes medication. Essentially, the physician leapt to the conclusion that the plaintiff was not taking his medication because he could not remember its name. Neither the physician nor ConAgra had any evidence that the plaintiff did not take his medication, and the plaintiff had no history of complications from diabetes.

ConAgra's decision not to hire the plaintiff ignored the ADA's mandate that an employer must consider an impaired applicant on the basis of actual abilities. The plaintiff's one month of temp work with ConAgra showed that he could do the job (and do it well). ConAgra should have considered that fact, rather than deferring to the physician's thinly supported assessment. In short, ConAgra's decision amounted to improper speculation about the hypothetical risks posed by an uncontrolled diabetic. As a result, the Fifth Circuit reversed the summary judgment for the employer and entered judgment for the plaintiff. *ConAgra* teaches that:

- An employer may not blindly rely on the results of medical examinations to exclude persons from jobs. Instead, each situation must be carefully considered. As the court held, "[a]n employer cannot slavishly defer to a physician's opinion without first pausing to assess the objective reasonableness of the physician's conclusions." *Id*. at 484.

- There is an obligation on the employer's part to resolve any conflict between the physician's assessment and what the company knows about the applicant's ability to do the job based on prior experience.

Other courts have largely echoed *ConAgra's* teachings. *See, e.g*., *Keith v. County of Oakland*, 703 F.3d 918 (6th Cir. 2013) (reversing district court's summary judgment ruling that a deaf person could not be a lifeguard, and reasoning that employers cannot escape liability under the ADA merely by mechanically relying on the medical opinions and advice of third parties); *Holiday v. City of Chattanooga*, 206 F.3d 637, 645 (6th Cir. 2000) (in ADA action, courts need not defer to doctor's opinion as to ability of applicant to perform a job, where opinion not based on individualized inquiry nor supported by objective scientific and medical evidence); *Rexnord Industries, LLC*, 2013 WL 4678626, at *5 ("Regarding direct threat, there are genuine disputes of material fact regarding the reasonableness of Rexnord's reliance on the medical opinion of its fitness for duty doctor, Dr. Seter, as well as on whether Sullivan's risk was significant."); *Garr*, 2013 WL 68699, at *8 (whether doctor who employer relied on to conclude that the plaintiff presented a direct threat conducted an individualized assessment of the plaintiff that was based on objective medical evidence was in dispute, thereby precluding summary judgment for the employer); *Hoback*, 2012 WL 3834828, at *8-9 (affirming jury verdict for plaintiff despite employer's direct threat defense, because the jury could have rationally found that the

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employer's reliance on one doctor's opinion to conclude the plaintiff posed a direct threat was not objectively reasonable).

The *Keith* case from January 2013 is particularly interesting. There, the county of Oakland extended an offer of employment as a lifeguard to Nicholas Keith, who has been deaf since birth, conditioned on passing a pre-employment physical. Keith had passed the county's lifeguard training course and program with the assistance of an American Sign Language ("ASL") interpreter for verbal instructions. The interpreter did not assist Keith in executing lifesaving tasks. *Keith*, 703 F.3d at 919.

The doctor who examined Keith for his pre-employment physical stated that Keith could not function independently as a lifeguard, but that he could be a part of the lifeguard team if his deafness was "constantly" accommodated and, even then, expressed doubt as to whether the accommodation would always be adequate. *Id*. at 920.

Two representatives of the county's aquatic safety and risk management consultant group also expressed doubt and concern over Keith's fitness as a lifeguard. Like the county's doctor, neither consultant had knowledge, education, nor experience regarding the abilities of deaf people to work as lifeguards. The consultants did not personally meet with or observe Keith. The county's recreation specialist suggested possible accommodations that she believed would integrate Keith, but the consultants remained hesitant. The county subsequently revoked Keith's offer of employment. *Id*. at 912.

Keith sued the county for disability discrimination under the ADA and the Rehabilitation Act. The trial court ruled in favor of the county and Keith appealed this decision to the Sixth Circuit.

The Sixth Circuit reversed the district court's grant of summary judgment to the county, holding that a genuine issue of material fact existed as to whether Keith was "otherwise qualified" to be a lifeguard, with or without reasonable accommodation. *Id*. at 930. The ADA makes it unlawful to discriminate against "a qualified individual on the basis of disability" and defines "discriminate" to include failure to provide reasonable accommodation to an otherwise qualified individual with disability unless doing so would impose an undue hardship on the employer's business. 42 U.S.C. § 12112(a), (b)(5). "Otherwise qualified" is defined as being able to perform the "essential functions" of the job with or without reasonable accommodation.

The Court held that whether a job function is "essential" is usually a question of fact for the jury, not summary judgment. *Id*. at 926. Relying extensively on the expert testimony of individuals with knowledge, education, and experience regarding deaf lifeguards, as offered by Keith and seemingly unrebutted by the county, the Court found a genuine issue of fact as to whether Keith was "otherwise qualified" to be a lifeguard. *Id*. at 927.

For instance, the evidence showed that lifeguards adhere to a purely visual scanning methodology to identify distressed swimmers. Keith also presented evidence that he could enforce safety rules around the pool because most lifeguards depend on the use of whistles combined with simple visual gestures. Keith further argued he could effectively communicate in emergencies if a hand signal instead of a whistle were used to activate an emergency action plan,

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a modification that was proposed by the county's recreational specialist as an improvement for everyone. Keith also proposed that he could respond to patrons, at least to a level considered "essential" for a lifeguard, by keeping a few laminated note cards in his pocket for basic phrases, such as "I am deaf. I will get someone to assist you. Wait here."

The Court also held that, even if Keith needed accommodations to perform the essential functions of the job, he had presented evidence that those accommodations were reasonable. *Id*. at 929. Proposed accommodations included, for example, the use of note cards, hand signals instead of whistles, and the provision of an ASL interpreter during staff meetings or classroom instruction. The Court recognized the county's valid concern that employees would have to shoulder extra duties because of Keith's disability, but held that this alone was not a sufficient reason to grant summary judgment. *Id*. at 927-28.

The Court also directed the lower court to examine the issue of whether the county conducted an "individualized inquiry" in determining whether Keith's disability disqualified him from the lifeguard position. The Court did "not disagree" that the county had made an individualized inquiry, as mandated by the ADA, by observing Keith during training, proposing accommodations to integrate him into the lifeguard team, and planning to hire Keith. However, the Court questioned "what changed" afterward. *Id*. at 924.

The *Keith* case illustrates that disability discrimination statutes require employers to "counter mistaken assumptions [about disabilities], no matter how dramatic or widespread." Employers should consider, particularly in difficult situations, the benefits of consulting not only with medical experts or experts in an employer's field of work (in this case, aquatic safety), but also with experts who have knowledge, education, and/or experience with the particular disability in question and its application and relevance to the job at issue.

Likewise, the EEOC states:

> An employer should be cautious about relying solely on the opinion of its own health care professional that an employee poses a direct threat where that opinion is contradicted by documentation from the employee's own treating physician, who is knowledgeable about the employee's medical condition and job functions, and/or other objective evidence. In evaluating conflicting medical information, the employer may find it helpful to consider: (1) the area of expertise of each medical professional who has provided information; (2) the kind of information each person providing documentation has about the job's essential functions and the work environment in which they are performed; (3) whether a particular opinion is based on speculation or on current, objectively verifiable information about the risks associated with a particular condition; and, (4) whether the medical opinion is contradicted by information known to or observed by the employer (*e.g*., information about the employee's actual experience in the job in question or in previous similar jobs).

EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act, at question 12 (EEOC Notice 915.002)

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(EEOC, July 27, 2000), available at http://www. eeoc.gov/policy/docs/guidance-inquiries.html (endnotes).

### 12. Sometimes, You Know Direct Threat When You See It: *Turco v. Hoechst Celanese Chemical Group, Inc.*, 101 F.3d 1090 (5th Cir. 1996)

Turco was a chemical operator for Hoechst Celanese at its Clear Lake, Texas plant for 13 years. He was also diabetic. In 1994, his diabetic condition became exacerbated, causing him to become extremely fatigued while on the job and suffer wild variations in blood sugar levels.

After several safety infractions, Turco was terminated. In affirming the district court's summary judgment, the Fifth Circuit held that Turco was not a qualified individual with a disability because he posed a "direct threat to the health or safety of other individuals in the workplace." The court stated:

> Turco's position at Hoechst Celanese required him to work with complicated machinery and dangerous chemicals. Any diabetic episode or loss of concentration occurring while operating any of this machinery or chemicals had the potential to harm not only himself, but also others. This would be a walking time bomb and woe unto the employer who places an employee in that position.

*Id*. at 1094.

### 13. Baker's Dozen Bonus Case: Following The Process Leads To Winning Cases: *Wurzel v. Whirlpool Corp.*, No. 10–3629, 2012 WL 1449683 (6th Cir. Apr. 27, 2012)

Simply jumping to conclusions that because of a medical problem, an applicant or employee must pose a direct threat is an ill-advised, and very risky thing for employers to do. *See, e.g*., *Fahey*, 2014 WL 131196, at *5-6 (holding employer liable in such circumstances). On the other hand, when employers follow a logical process that is consistent with the ADA's mandates, then good results for employers tend to follow. An example of such a situations is the *Wurzel* case.

Wurzel was an Ohio factory worker who joined Whirlpool Corp. in 1983 as a materials handler. He had no significant health issues until 2003, when he began complaining of chest pains. In 2007, Wurzel was diagnosed with Prinzmetal's angina, a condition characterized by coronary artery spasms that cause chest tightness, shortness of breath, dizziness, and fatigue. Though Wurzel was medically cleared to return to his job as a forklift driver, he began having angina spasms at work in March 2008. By February 2009, he had experienced at least 11 spasm incidents at work, most of which required treatment at the plant's emergency room. In one incident, according to court records, Wurzel was found doubled-over and "ready to pass out."

When the first heart spasm occurred, the plant physician expressed concerns for the safety of Wurzel and others if Wurzel ever became incapacitated. Despite a clean driving record and assurances from Wurzel's cardiologists that Wurzel posed no greater threat of sudden incapacitation than any other angina patient, the plant physician prohibited Wurzel from driving

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a forklift. Wurzel subsequently was reassigned to a temporary position in the plant's gatekeeper/tollkeeper unit.

In October 2008, Wurzel took a permanent job in the plant's paint department. While free of forklift driving, the job called for rotating through a series of tasks that included working with or around a "low-hanging" overhead conveyor line. When Wurzel experienced another angina spasm, the plant physician referred him for an independent medical examination, which was performed in November 2008. Court records show that, as with his cardiologists, Wurzel was not entirely forthcoming with the independent medical examiner regarding the extent of his condition. Although Wurzel was permitted to return to the paint department in December 2008, he experienced three angina spasms at work in January 2009. Based on these incidents, information from the plant physician, and the fact that Wurzel worked around heavy machinery and occasionally was out of the sight of other employees, the independent medical examiner reversed his opinion and concluded that Wurzel should not be permitted to work either alone or near moving machinery.

Wurzel subsequently went on sick leave. In August 2009, the company conducted a "restriction review" regarding Wurzel's job in the paint department and concluded he was not qualified for it because he could not work alone or near moving machinery, both of which were requirements of the job. Wurzel was told he could bid on any other job in the plant that conformed with his work restrictions. Wurzel remained on leave, exhausting 26 weeks of paid leave and taking unpaid time thereafter. He eventually returned to work in March 2010, claiming he had been spasm-free for the previous six months.

The appellate court noted that the employer's plant has 2,500 employees and six operating assembly lines, all of which use moving machinery. Workers operate presses, drills, cutting machinery, and numerous vehicles (including forklifts). Forklifts and pedestrians travel the plant's shared space, with only painted lines to separate them. In addition to a work environment that calls for extreme care, the Court noted Wurzel's acknowledgement, in a deposition, that there was no way of knowing when his medical condition might flare up, whether it would cause an angina spasm, or how long it would last.

Based on all of the evidence, the Court affirmed summary judgment for the employer. The Court concluded the employer had utilized the most current medical knowledge to reach a reasonable medical judgment that Wurzel posed a direct threat to workplace safety. While the employer was not required to reasonably accommodate Wurzel (since his claims of "being regarded" as disabled did not carry such an obligation), the Court concluded that the employer had engaged in a non-discriminatory process to determine the threat that Wurzel posed and, based on the best data available, had made an objective decision regarding Wurzel's job-related abilities. The Court found no reasonable juror could disagree with the defendant's determination that its employee posed a direct threat to his own safety and that of others in the plant. The Court found the defendant's determination was based on a reasonable medical judgment, it relied on the most current medical judgment and best available objective evidence, and it reflected an individualized assessment of the plaintiff's abilities. The Court further determined that a reasonable juror could not find there was evidence of a reasonably based medical judgment supporting the opposite view that the plaintiff did not pose a direct threat.

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## G. Advice For Employers.

- Employers should be very cautious before taking any adverse employment action against an employee because of their belief that the employee poses a direct threat to the health and safety of themselves or others. As *Rizzo* and numerous other cases teach, unless the direct threat posed by the plaintiff is obvious, courts tend to look at the defense with an extremely jaundiced eye. Also, as the Supreme Court held in *Bragdon*, a good faith belief that the plaintiff poses a direct threat is not enough to sustain the defense. Rather, objective proof of a significant risk is necessary. *See also Fahey*, 2014 WL 131196, at *5 ("The only information Twin City Fan had at the time it made its decision to rescind the offer was the fact that Fahey was blind in his right eye. Because of its failure to make the requisite individualized inquiry, Twin City Fan's ultimate decision to rescind the offer could have only been based on prejudices, stereotypes, or unfounded generalizations.").

- Employers should think through their safety requirements, to determine whether they tend to screen out an individual with a disability or class of individuals with disabilities. If they do, such as the safety requirement in *Rizzo*, the employer must be prepared in advance to shoulder the burden of proving in court that an individual screened out by the safety requirement in fact poses a direct threat to the health or safety of themselves or others.

- After an employer makes a job offer, the ADA allows an employer to make inquiries to determine whether an individual would pose a "direct threat" to the health and safety of themselves or others. Consequently, before taking adverse employment action against an employee because of a perceived "direct threat," an employer should take advantage of its right to make reasonable and limited medical inquiries, so that it will be prepared to defend an ADA claim. *See, e.g., Krocka v. City of Chicago,* 203 F.3d 507, 515 (7th Cir. 2000) (no violation of the ADA where a chronically depressed police officer was required to undergo a fitness for duty examination); *Metzenbaum v. John Carroll Univ*., 987 F. Supp. 610, 615-16 (N.D. Ohio 1997) (no violation of the ADA to request mental health records of a campus police officer that displayed bizarre behavior). It should carefully document the process whereby it obtained those medical opinions, and be sure to select qualified and objective doctors, including specialists, where appropriate.

- For example, if an employee falls asleep on the job, has excessive absenteeism, or exhibits other performance problems that reasonably appear linked to a medical problem, an employer may require a medical examination to determine if the problem is caused by an underlying medical condition. If the examination reveals an impairment that is a disability under the ADA, the employer must consider possible reasonable

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accommodations. If the impairment is not a disability – which is probably unlikely under the ADAAA – the employer is not required to make an accommodation.

- Focus on employee conduct—not labels or stereotypes—when evaluating an individual who may have a mental illness.

- If you suspect an employee of having a mental illness that may pose a threat to others in the workplace, direct the employee to complete a medical examination. Ensure that the medical examination is job related and consistent with business necessity.

- Train managers and supervisors on the anti-discrimination requirements of the ADA and state laws governing persons with physical and mental disabilities.

- Before rejecting an applicant, or displacing a current employee because of the "direct threat" risk, employers should be prepared to prove: (1) what the specific risk is; (2) a significant current risk of substantial harm; (3) that the risk is documented by objective medical or other factual evidence regarding the particular individual; and (4) that the risk cannot be eliminated or reduced below the level of a "direct threat" by reasonable accommodation. *Rizzo*, 84 F.3d at 763. It is most probable that, had Children's World made such an analysis in *Rizzo*, it would have concluded that it could not successfully defend its action against Rizzo under the "direct threat" defense and avoided the adverse jury verdict it ultimately suffered as well as the substantial attorneys' fees it surely incurred in defending the case.

- Unless mandated by law, employers should be very careful before imposing a blanket policy that discriminates against disabled employees because of an alleged "direct threat."

- In a related vein, the ADA also provides that employers may only use "qualification standards . . . that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability, if such standards are job-related and consistent with business necessity, and . . . performance cannot be accomplished by reasonable accommodation . . . ." 42 U.S.C. § 12113(a). Thus, employers should review their qualification standards, to ensure that they are, in fact, job-related and consistent with business necessity.

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## II. ENFORCING CONDUCT RULES

### A. Drug And Alcohol Policies

The text of the ADA makes only one specific reference to "disability-caused misconduct," where an employer is authorized to disregard the fact that the misconduct or prior performance may be caused by a disability and where the employer can hold the disabled person to exactly the same conduct as a non-disabled person. Specifically, the ADA provides that an employer:

> may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the alcoholism or drug use of such employee.

42 U.S.C. § 12114(c)(4) (1994); *see also* 42 U.S.C. § 12114(a) (1994) (providing that the term "qualified individual with a disability" under the ADA shall not include illegal drug users when the covered entity acts on that basis).

Therefore, "unsatisfactory conduct caused by alcoholism and illegal drug use does not receive protection under the ADA or Rehabilitation Act." *Mauerhan v. Wagner Corp*., 649 F.3d 1180 (10th Cir. 2011) (quoting *Nielsen v. Moroni Feed Co.*, 162 F.3d 604, 609 (10th Cir. 1998); *Salley v. Circuit City Stores, Inc.*, 160 F.3d 977, 981 (3d Cir. 1998) (holding that "drug-related misconduct is a legitimate, non-discriminatory reason for termination"). Employers need not tolerate employees under the influence of alcohol in the workplace, 42 U.S.C. § 12114(c)(1),(2), and may hold an employee who is an alcoholic to the same standards of performance and behavior as non-alcoholics. 42 U.S.C. § 12114(c)(4). *Miners v. Cargill Communications, Inc.*, 113 F.3d 820, 823 n. 5 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 441 (1997).

For example, in *Burch v. Coca-Cola Co.*, 119 F.3d 305 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 871 (1998), the plaintiff, Burch, was a Coca-Cola manager and a recovering alcoholic. After some inappropriate behavior at a company-sponsored dinner, Burch checked himself into Charter Hospital to undergo treatment for alcohol abuse. After his release, Burch requested that he be returned to his job. Instead, Coca-Cola terminated Burch for his behavior at the dinner.

Burch sued under the ADA, and the jury awarded him more than seven million dollars in punitive and compensatory damages. On appeal, the Fifth Circuit reversed the award and rendered judgment against Burch. One of Burch's claims was that Coca-Cola violated the ADA's reasonable accommodation requirement by refusing his request to return to work after his treatment at Charter Hospital. The Fifth Circuit held that this was not a proper reasonable accommodation claim because a "second chance" or a plea for grace is not an accommodation as contemplated by the ADA. *Id*. at 319-20. As part of its decision, the *Burch* court noted that:

> Coca-Cola cites a number of cases for the proposition that employers are under no obligation to accommodate misconduct that is the product of an employee's alcoholism. These cases are a correct interpretation of section 12114(c)(4), which

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> permits employers to hold alcoholic employees to the same standard of conduct as nonalcoholic employees. Section 12114(c)(4), unlike the pre-1992 Rehabilitation Act, does not require employers to excuse violations of uniformly-applied standards of conduct by offering an alcoholic employee a "firm choice" between treatment and discipline. *Id*. at 319 n.14 (citing *Maddox v. University of Tenn*., 62 F.3d 843, 848 (6th Cir. 1995) (granting employer's summary judgment motion where alcoholic football coach failed to rebut employer's evidence that it terminated him for misconduct); *Little v. FBI*, 1 F.3d 255, 259 (4th Cir. 1993) (affirming dismissal of alcoholic FBI agent's ADA claim where "it plainly appears that the appellant was fired because of his misconduct [being drunk on duty], not because of his alcoholism"); *Rodgers v. County of Yolo Sheriff's Dep't*, 889 F.Supp. 1284, 1291 (E.D. Ca. 1995) (granting employer's summary judgment motion in Rehabilitation Act case involving an alcoholic police officer where evidence was "unrefuted and demonstrates that plaintiff['s] termination was based on poor performance"); *see also Collings v. Longview Fibre Co*., 63 F.3d 828, 831-32 (9th Cir. 1995) (affirming grant of summary judgment for employer of drug abusing employees where employees failed to rebut employer's contention that they were terminated for drug-related misconduct; specifically, no showing that other employees had been treated differently for engaging in similar conduct and no showing that employer knew employees were former drug abusers), *cert. denied*, 516 U.S. 1048 (1996)).

*See also Brown v. Lucky Stores, Inc*., 246 F.3d 1182 (9th Cir. 2001) (ADA did not prevent employer from discharging employee who drove under the influence of alcohol, despite the fact that employee was an alcoholic); *Pernice v. City of Chicago*, 237 F.3d 783, 785 (7th Cir. 2001) (ADA did not prevent employer from dismissing drug-addicted employee who was arrested for possession of drugs).

### B. Policies Prohibiting Violence

The ADA covers physical and mental disabilities. Sometimes, a mental disability can cause an employee to act violently or emotionally unstable. The question then follows: if the employer terminates an employee because of misconduct caused by their mental disability, has the employer terminated the employee "because of a disability," and thus violated the ADA? The EEOC says "no":

> 30. May an employer discipline an individual with a disability for violating a workplace conduct standard if the misconduct resulted from a disability?
>
> Yes, provided that the workplace conduct standard is job-related for the position in question and is consistent with business necessity. For example, nothing in the ADA prevents an employer from maintaining a workplace free of violence or threats of violence, or from disciplining an employee who steals or destroys property. Thus, an employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability. Other conduct standards, however, may not be

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> job-related for the position in question and consistent with business necessity. If they are not, imposing discipline under them could violate the ADA.

EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, at question 30, 8 FEP Manual (BNA) 405:7461, 7476 (March 25, 1997), available at http:// www.eeoc.gov/ policy/guidance.html (endnotes omitted).

The courts have agreed with the EEOC. Below are a few cases that illustrate this point.

#### 1. ***Hamilton v. Southwestern Bell Telephone Co.*****, 136 F.3d 1047 (5th Cir. 1998)**

Hamilton worked for Southwestern Bell for approximately 20 years. Approximately four months before he was fired, he rescued a drowning woman. As a result of the experience, he began to suffer mental disturbances and extreme fatigue. After he struck a co-worker, he was referred to a social worker and psychiatrist, both of whom diagnosed him with post-traumatic stress disorder ("PTSD"). Several weeks later, Hamilton slapped a physically smaller female manager, and loudly called her a "f_ _ _ing bitch!" Southwestern Bell terminated Hamilton for this misconduct.

Hamilton sued Southwestern Bell under the ADA. The court concluded that even if Hamilton was disabled as a result of PTSD, he was terminated not because of his disability, but "rather because he violated Bell's policy on workplace violence." The court concluded by stating:

> The cause of Hamilton's discharge was not discrimination based on PTSD but was rather his failure to recognize the acceptable limits of behavior in a workplace environment. The nature of the incident, shown by the record, presents a clear case in which Hamilton was fired for his misconduct in the workplace. We adopt for an ADA claim the well-expressed reasoning applied in the context of a protected activity-retaliatory discharge claim: the rights afforded to the employee are a shield against employer retaliation, not a sword with which one may threaten or curse supervisors. Hamilton cannot hide behind the ADA and avoid accountability for his actions.

*Id*. at 1052 (footnote omitted).

#### 2. ***Seaman v. CSPH, Inc.*****, 179 F.3d 297 (5th Cir. 1999)**

Seaman was employed as a store manager by CSPH, which owns and operates numerous Domino's pizza stores in the Dallas-Fort Worth area. Over a several month period in 1996, he frequently left the pizza store he managed unattended, and he had numerous other performance problems. Seaman told his boss that he believed his problems were caused by bipolar disorder and sleep apnea, although he had been diagnosed with neither condition.

In March 1996, he gave his boss a doctor's note stating that he was "emotionally and physically exhausted" and demonstrated "clinical criteria for a Major Depressive Reaction." The

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following month, he was counseled for disruptive comments on the job, and in response Seaman filed a charge of discrimination with the EEOC. Two days later, he repeatedly yelled at his boss during a heated argument and was fired.

In the ensuing lawsuit, Seaman claimed, among other things, that he was fired in retaliation for filing his EEOC claim. The district court granted summary judgment against all of Seaman's claims, and the Fifth Circuit affirmed. Specifically regarding his retaliation claim under the ADA, the Fifth Circuit concluded, "[t]hat Seaman mentioned his EEOC complaint to [his boss] moments before the termination does not, absent other evidence, constitute sufficient proof that the termination was retaliatory. Seaman may not use the ADA as an aegis and thus avoid accountability for his own actions." *Id*. at 301 (footnote omitted).

### 3. *Palmer v. Circuit Court of Cook County*, 117 F.3d 351 (7th Cir. 1997)

Palmer was a social service case worker for the Circuit Court of Cook County. She was diagnosed as having major depression and delusional (paranoid) disorder. As a result of her paranoia, Palmer became convinced that her supervisor was harassing her and was trying to orchestrate a case against her.

Palmer called one of her co-workers and said, "I'm ready to kill her [the supervisor]. I don't know what I'll do. Her ass is mine. She needs her ass kicked and I'm going to do it . . . I want [the supervisor] bad and I want her dead." In another call to the supervisor herself, Palmer said, "your ass is mine, bitch." Palmer was terminated for her threats.

Writing for the Seventh Circuit, Judge Richard Posner affirmed summary judgment against Palmer, stating "if an employer fires an employee because of the employee's unacceptable behavior, the fact that the behavior was precipitated by mental illness does not present an issue under the Americans with Disabilities Act." *Id*. at 352 (citations omitted); *see also Bodenstab v. County of Cook*, 569 F.3d 651, 659 (7th Cir. 2009) (anesthesiologist fired for making threats had no ADA claim, even if a mental disability caused him to make the threats); *Sista v. CDC Ixis North America, Inc.*, 445 F.3d 161, 172 (2d Cir. 2006) ("[t]his approach ensures that this Court, like every other court to have taken up the issue, does not read the ADA to require that employers countenance dangerous misconduct, even if that misconduct is the result of a disability"); *Jones v. Am. Postal Workers Union*, 192 F.3d 417, 429 (4th Cir. 1999) (stating in similar case that, "[t]he law is well settled that the ADA is not violated when an employer discharges an individual based upon the employee's misconduct [in this case threats], even if the misconduct is related to a disability."); *Carrozza v. Howard County, Maryland*, 847 F. Supp. 365, 367-68 (D. Md. 1994) (ADA plaintiff's loud, abusive and insubordinate behavior in workplace justified termination, even if it was caused by her bi-polar mental disorder). Simply put, "the ADA does not insulate emotional or violent outbursts," *Hamilton*, 136 F.3d at 1052, and is not "a license for insubordination at the workplace," *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 262 (1st Cir. 2001).

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### C. Policies Against Lying, Dishonesty, Theft, Or Other Intentional Gross Misconduct

In *Spath v. Hayes Wheels Intern.-Indiana, Inc*., 211 F.3d 392 (7th Cir. 2000), the employer fired the plaintiff after he was injured while engaging in horseplay, and then when confronted with the facts, lied about the incident. The plaintiff sued his employer and argued with respect to his failure to accommodate claim, "that his organic brain syndrome, mild mental retardation, and dependent personality disorder . . . caused him to deny involvement in the horseplay incident because he sometimes does not remember what he was doing or what he might have said in the past." *Id*. at 395 n. 5. The Seventh Circuit rejected the plaintiff's argument, explaining that, "[i]n essence, *Spath* is asking this Court to extend the ADA . . . to prevent an employer from terminating an employee who lies, just because the lying is allegedly connected to a disability." *Id*.; *see also Fullman v. Henderson*, 146 F. Supp. 2d 688, 698–99 (E.D. Pa. 2001) (employee lawfully fired for filing a false workers' compensation claim, notwithstanding his alleged disability).

The EEOC gives examples of employees who claim they stole or intentionally tampered with equipment because of their disabilities:

> Example A: An employee steals money from his employer. Even if he asserts that his misconduct was caused by a disability, the employer may discipline him consistent with its uniform disciplinary policies because the individual violated a conduct standard -- a prohibition against employee theft -- that is job-related for the position in question and consistent with business necessity.
>
> Example B: An employee at a clinic tampers with and incapacitates medical equipment. Even if the employee explains that she did this because of her disability, the employer may discipline her consistent with its uniform disciplinary policies because she violated a conduct standard -- a rule prohibiting intentional damage to equipment -- that is job-related for the position in question and consistent with business necessity. However, if the employer disciplines her even though it has not disciplined people without disabilities for the same misconduct, the employer would be treating her differently because of disability in violation of the ADA.

EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, at question 30, 8 FEP Manual (BNA) 405:7461, 7476 (March 25, 1997), available at http:// www.eeoc.gov/ policy/guidance.html.

### D. Policies Or Work Rules Requiring Courtesy Towards Coworkers, Neat Dress, Or Completely "Normal" Or Non-Frightening Behavior

The clear lines regarding an employer's right to discipline employees for acts of violence, threats of violence, intentional destruction of property, and lying – even if the conduct is caused by a disability – start to break down somewhat when it comes to other, less egregious situations, such as policies requiring courtesy towards coworkers or customers, neat dress, or completely

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"normal" behavior. In the case of *Den Hartog v. Wasatch Acad.*, 129 F.3d 1076 (10th Cir. 1997), the Tenth Circuit probed this issue, and stated that:

> [T]he language of the ADA, its statutory structure, and the pertinent case law, suggest that an employer should normally consider whether a mentally disabled employee's purported misconduct could be remedied through a reasonable accommodation. If so, then the employer should attempt the accommodation. If not, the employer may discipline the disabled employee only if one of the affirmative defenses articulated in 42 U.S.C. §§ 12113, 12114 (1994) applies. **Otherwise, the employer must tolerate eccentric or unusual conduct caused by the employee's mental disability, so long as the employee can satisfactorily perform the essential functions of his job**.

*Id*. at 1088 (bold added).

A handful of other courts have followed this logic, including the statement that unless an affirmative defense applies, or the employee cannot satisfactorily perform the essential functions of their job, the employer must tolerate eccentric or unusual conduct caused by the employee's mental disability. *See, e.g., Chandler v. Specialty Tires of America (Tennessee), Inc.,* 134 Fed. Appx. 921, 929 (6th Cir. 2005) (applying language from *Den Hartog* to mean that suicide attempt by mentally disabled employee could not alone be basis for employee's termination without running afoul of the ADA); *Walsted v. Woodbury County*, 113 F. Supp. 2d 1318, 1340-42 (N.D. Iowa 2000) (following *Den Hartog* and denying employer's motion for summary judgment). The EEOC also agrees with this logic, giving the following example:

> Example C: An employee with a psychiatric disability works in a warehouse loading boxes onto pallets for shipment. He has no customer contact and does not come into regular contact with other employees. Over the course of several weeks, he has come to work appearing increasingly disheveled. His clothes are ill-fitting and often have tears in them. He also has become increasingly anti-social. Coworkers have complained that when they try to engage him in casual conversation, he walks away or gives a curt reply. When he has to talk to a coworker, he is abrupt and rude. His work, however, has not suffered. The employer's company handbook states that employees should have a neat appearance at all times. The handbook also states that employees should be courteous to each other. When told that he is being disciplined for his appearance and treatment of coworkers, the employee explains that his appearance and demeanor have deteriorated because of his disability which was exacerbated during this time period.
>
> The dress code and coworker courtesy rules are not job-related for the position in question and consistent with business necessity because this employee has no customer contact and does not come into regular contact with other employees. Therefore, rigid application of these rules to this employee would violate the ADA.

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EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, at question 30, 8 FEP Manual (BNA) 405:7461, 7476 (March 25, 1997), available at http:// www.eeoc.gov/ policy/guidance.html.

In more recent guidance, the EEOC amplified on this topic in great detail. For example, it stated:

> 9. If an employee's disability causes violation of a conduct rule, may the employer discipline the individual?
>
> Yes, if the conduct rule is job-related and consistent with business necessity and other employees are held to the same standard. The ADA does not protect employees from the consequences of violating conduct requirements even where the conduct is caused by the disability.
>
> The ADA generally gives employers wide latitude to develop and enforce conduct rules. The only requirement imposed by the ADA is that a conduct rule be job-related and consistent with business necessity when it is applied to an employee whose disability caused her to violate the rule. Certain conduct standards that exist in all workplaces and cover all types of jobs will always meet this standard, such as prohibitions on violence, threats of violence, stealing, or destruction of property. Similarly, employers may prohibit insubordination towards supervisors and managers and also require that employees show respect for, and deal appropriately with, clients and customers. Employers also may:
>
> - prohibit inappropriate behavior between coworkers (*e.g.*, employees may not yell, curse, shove, or make obscene gestures at each other at work);
>
> - prohibit employees from sending inappropriate or offensive e-mails (*e.g.*, those containing profanity or messages that harass or threaten coworkers); using the Internet to access inappropriate websites (*e.g.*, pornographic sites, sites exhibiting crude messages, etc.); and making excessive use of the employer's computers and other equipment for purposes unrelated to work;
>
> - require that employees observe safety and operational rules enacted to protect workers from dangers inherent in certain workplaces (*e.g.*, factories with machinery with accessible moving parts); and
>
> - prohibit drinking or illegal use of drugs in the workplace. [*See* Question 26.]
>
> Whether an employer's application of a conduct rule to an employee with a disability is job-related and consistent with business necessity may rest on several factors, including the manifestation or symptom of a disability affecting an employee's conduct, the frequency of occurrences, the nature of the job, the specific conduct at issue, and the working environment. These factors may be

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especially critical when the violation concerns "disruptive" behavior which, unlike prohibitions on stealing or violence, is more ambiguous concerning exactly what type of conduct is viewed as unacceptable. The following examples illustrate how different results may follow from application of these factors in specific contexts.

Example 14: Steve, a new bank teller, barks, shouts, utters nonsensical phrases, and makes other noises that are so loud and frequent that they distract other tellers and cause them to make errors in their work. Customers also hear Steve's vocal tics, and several of them speak to Donna, the bank manager. Donna discusses the issue with Steve and he explains that he has Tourette Syndrome, a neurological disorder characterized by involuntary, rapid, sudden movements or vocalizations that occur repeatedly. Steve explains that while he could control the tics sufficiently during the job interview, he cannot control them throughout the work day; nor can he modulate his voice to speak more softly when these tics occur. Donna lets Steve continue working for another two weeks, but she receives more complaints from customers and other tellers who, working in close proximity to Steve, continue to have difficulty processing transactions. Although Steve is able to perform his basic bank teller accounting duties, Donna terminates Steve because his behavior is not compatible with performing the essential function of serving customers and his vocal tics are unduly disruptive to coworkers. Steve's termination is permissible because it is job-related and consistent with business necessity to require that bank tellers be able to (1) conduct themselves in an appropriate manner when serving customers and (2) refrain from interfering with the ability of coworkers to perform their jobs. Further, because Steve never performed the essential functions of his job satisfactorily, the bank did not have to consider reassigning him as a reasonable accommodation.

Example 15: Steve works as a bank teller but his Tourette Syndrome now causes only infrequent throat clearing and eye blinks. These behaviors are not disruptive to other tellers or incompatible with serving customers. Firing Steve for these behaviors would violate the ADA because it would not be job-related and consistent with business necessity to require that Steve refrain from minor tics which do not interfere with the ability of his coworkers to do their jobs or with the delivery of appropriate customer service.

Example 16: Assume that Steve has all the severe tics mentioned in Example 14, but he now works in a noisy environment, does not come into contact with customers, and does not work close to coworkers. The environment is so noisy that Steve's vocalizations do not distract other workers. Steve's condition would not necessarily make him unqualified for a job in this environment.

Example 17: A telephone company employee's job requires her to spend 90% of her time on the telephone with coworkers in remote locations, discussing installation of equipment. The company's code of conduct requires workers to be respectful towards coworkers. Due to her psychiatric disability, the employee

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walks out of meetings, hangs up on coworkers on several occasions, and uses derogatory nicknames for coworkers when talking with other employees. The employer first warns the employee to stop her unacceptable conduct, and when she persists, issues a reprimand. After receiving the reprimand, the employee requests a reasonable accommodation. The employee's antagonistic behavior violated a conduct rule that is job-related and consistent with business necessity and therefore the employer's actions are consistent with the ADA. However, having received a request for reasonable accommodation, the employer should discuss with the employee whether an accommodation would assist her in complying with the code of conduct in the future.

Example 18: Darren is a long-time employee who performs his job well. Over the past few months, he is frequently observed talking to himself, though he does not speak loudly, make threats, or use inappropriate language. However, some coworkers who are uncomfortable around him complain to the division manager about Darren's behavior. Darren's job does not involve customer contact or working in close proximity to coworkers, and his conversations do not affect his job performance. The manager tells Darren to stop talking to himself but Darren explains that he does so as a result of his psychiatric disability. He does not mean to upset anyone, but he cannot control this behavior. Medical documentation supports Darren's explanation. The manager does not believe that Darren poses a threat to anyone, but he transfers Darren to the night shift where he will work in relative isolation and have less opportunity for advancement, saying that his behavior is disruptive.

Although the coworkers may feel some discomfort, under these circumstances it is not job-related and consistent with business necessity to discipline Darren for disruptive behavior. It also would violate the ADA to transfer Darren to the night shift based on this conduct. While it is possible that the symptoms or manifestations of an employee's disability could, in some instances, disrupt the ability of others to do their jobs that is not the case here. Employees have not complained that Darren's voice is too loud, that the content of what he says is inappropriate, or that he is preventing them from doing their jobs. They simply do not like being around someone who talks to himself.

EEOC Enforcement Guidance on The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities, at question 9 (Sept. 3, 2008), available at http://www.eeoc.gov/facts/performance-conduct.html (endnotes omitted).

An interesting case that demonstrates the struggle to fit the plaintiff's conduct into the right analytical framework is *Gambini v. Total Renal Care, Inc*., 486 F.3d 1087 (9th Cir. 2007). The plaintiff in Gambini suffered from bipolar disorder, which affected her job performance and behavior at work. Her supervisors knew of her bipolar disorder. *Id*. at 1091. Her supervisors developed an improvement plan and discussed it with the plaintiff. After reading the plan, the plaintiff threw it back across her supervisor's desk, and used "a flourish of several profanities [to] express[ ] her opinion [the plan] was both unfair and unwarranted." *Id*. at 1091. The plaintiff

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then stormed out of the office and returned to her cubicle where she kicked and threw various items. The defendant later terminated the plaintiff's employment, rather than give her FMLA leave that she had requested. *Id*. at 1092.

The plaintiff sued, alleging disability discrimination and wrongful termination. A jury returned a verdict in the employer's favor on both claims. The *Gambini* court reversed on the discrimination claim, finding the trial court improperly refused to instruct the jury that conduct caused by a disability is part of the disability and not a separate basis for termination. *Id*. at 1093–1095. It is important to note that the evidence showed the defendant terminated the plaintiff because her outburst generally frightened her coworkers (in fact one coworkers asked that she not be allowed to return to work), not because she made any threat against her supervisors or any other coworker. *Id*. at 1094. Indeed, the *Gambini* court did not characterize the misconduct as threats or violence against coworkers, but as behavior that frightened coworkers. *Id*. at 1094–1095. That said, *Gambini* seems to represent either an outlier case, or the furthest a court has gone in concluding that inappropriate behavior cased by a disability cannot be the basis for termination. It seems very likely that more conservative courts of appeals would have decided the case differently.

### E. Policies Regarding Tardiness Or Absenteeism

Tardiness or absenteeism caused by a disability is not subject to the same sort of treatment under the ADA as acts of violence, threats, or lies that are caused by a disability. While an employer may ordinarily safely terminate an employee who commits an act of violence, makes threats of violence, tells material lies, or commits other similar acts of misconduct in violation of workplace rules without concern about ADA liability, the same cannot be said when it comes to terminating an employee who suffers from tardiness or absenteeism that is caused by a disability. As the EEOC states:

> 19. Does the ADA require employers to modify attendance policies as a reasonable accommodation, absent undue hardship?
>
> Yes. If requested, employers may have to modify attendance policies as a reasonable accommodation, absent undue hardship. Modifications may include allowing an employee to use accrued paid leave or unpaid leave, adjusting arrival or departure times (*e.g*., allowing an employee to work from 10 a.m. to 6 p.m. rather than the usual 9 a.m. to 5 p.m. schedule required of all other employees), and providing periodic breaks.

EEOC Enforcement Guidance on The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities, at question 19 (Sept. 3, 2008), available at http://www.eeoc.gov/facts/performance-conduct.html (endnotes omitted).

For example, in *EEOC v. Convergys Customer Management Group, Inc.*, 491 F.3d 790 (8th Cir. 2007), the employer terminated the employee for tardiness. The employee was confined to a wheelchair due to a rare condition commonly known as brittle bone disease. He answered telephone calls from customers of Convergys's clients. Because of his condition, and the lay out of the Convergys facility, he was often tardy when returning from lunch. When he

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was confronted about this, he asked for an extra few minutes than normal to return from lunch. Convergys denied that request, and then fired him when he continued to return tardy from lunch. The employee sued under the ADA and won. The company appealed, arguing that allowing the plaintiff to return late from lunch was not legally required. In rejecting that argument, and affirming the jury's verdict for the plaintiff, the court stated:

> Convergys avers that any accommodation that provided Demirelli with extra time was unreasonable because it required Convergys to eliminate the essential punctuality requirement. We disagree. There is no precise test for what constitutes a reasonable accommodation, but an accommodation is unreasonable if it requires the employer to eliminate an essential function of the job. *Buckles v. First Data Res., Inc.*, 176 F.3d 1098, 1102 (8th Cir. 1999); *Dropinski v. Douglas County, Neb.*, 298 F.3d 704, 709 (8th Cir. 2002). Whether an accommodation is reasonable is a question of fact to be decided by a jury. *Fjellestad*, 188 F.3d at 957; *Jankowski Lee & Assoc. v. Cisneros*, 91 F.3d 891, 896 (7th Cir. 1996).
>
> The district court determined that punctuality is an essential job function. In order to fulfill this essential job function, the record evidence is clear that Demirelli requested an extra 15 minutes to return from his lunch break. Viewing the evidence in a light most favorable to the jury verdict, we believe that an extra 15 minutes is a reasonable accommodation. First, Convergys puts forth no evidence showing that extending Demirelli's lunch break by 15 minutes would eliminate its punctuality requirement. An additional 15 minutes would merely create a different time for Demirelli to return from his lunch break. Contrary to Convergys's assertion, this modified work schedule would not create an open-ended schedule where Demirelli would be free to return from lunch at his pleasure or at unpredictable times. Second, the record evidence also shows that by granting Demirelli an extra 15 minutes, 62 of Demirelli's 65 lunch tardies would have been eliminated. Lastly, the ADA itself recognizes extra time as a reasonable accommodation. "[R]easonable accommodation may include . . . job restructuring; part-time or modified work schedules." 42 U.S.C. § 12111(9)(B) (emphasis added); *see also* 29 C.F.R. § 1630.2.
>
> Accordingly, we believe that there is sufficient evidence to support the jury's conclusion that the accommodations proposed by Demirelli were reasonable.

*Id*. at 796-97 (footnote omitted).

In *Humphrey v. Memorial Hospital Assoc.*, 239 F.3d 1128 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 1592 (2002), the plaintiff was a medical transcriptionist. Her performance was always very highly rated. However, in 1989 she began engaging in a series of obsessive rituals in the morning (such as washing her hair repeatedly for three hours) that caused her to be tardy or absent very frequently. The company wrote Ms. Humphrey up for her tardiness many times, which only caused her morning rituals to become worse.

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In 1995, Humphrey was watching an episode of the *Oprah Winfrey Show* on obsessive compulsive disorder (OCD). Humphrey concluded she suffered from OCD and soon received medical confirmation of that fact from her doctor. Her doctor wrote a letter to the company specifically stating that Humphrey suffered from OCD and that her tardiness and absenteeism was caused by OCD. The doctor also explained in the letter that the OCD was a "disability" under the ADA and that a short leave of absence might help him treat Humphrey's OCD and "get the symptoms better under control."

Humphrey met with her supervisor about her doctor's letter. The two arranged for Humphrey to have a flexible starting time as an accommodation. Nonetheless, Humphrey continued to miss work and also to be late even under a flex time arrangement. Her supervisor warned her about her continuing absenteeism and tardiness. In response, Humphrey sent her supervisor an e-mail asking for a new accommodation: that she be allowed to work at home. In reply, her supervisor summarily denied her request on the grounds that "work at home" is only permitted for employees who, unlike Humphrey, had clean disciplinary records. Shortly thereafter, Humphrey was absent two more times, and was fired.

Humphrey sued under the ADA. In reversing a summary judgment that had been entered for the company – and rendering judgment in Humphrey's favor – the Ninth Circuit held that as a matter of law the company violated its duty to engage in the interactive process once Humphrey asked for the "work at home" accommodation. *Id*. at 1139. The court also found that since Humphrey's termination was linked to absenteeism and tardiness that was caused by her disability (her OCD) that she was entitled to a jury trial on the question of whether she was terminated "because of her disability," and, thus, in violation of the ADA.

Finally, in rejecting the company's rationale for denying Humphrey's request to work at home – that she had prior discipline on her record – the court held, "[i]t would be inconsistent with the purposes of the ADA to permit an employer to deny an otherwise reasonable accommodation because of past disciplinary action taken due to the disability sought to be accommodated. Thus, Humphrey's disciplinary record does not constitute an appropriate basis for denying her a work-at-home accommodation." *Id*. at 1137.

More recently, in 2011, telecommunications giant Verizon Communications agreed to pay $20 million and provide significant equitable relief to resolve a nationwide class disability discrimination lawsuit filed by the EEOC. The suit, filed against 24 named subsidiaries of Verizon Communications in the U.S. District Court for the District of Maryland, said the company unlawfully denied reasonable accommodations to hundreds of employees and disciplined and/or fired them pursuant to Verizon's "no fault" attendance plans. The consent decree settling the suit represents the largest disability discrimination settlement in a single lawsuit in EEOC history. The EEOC charged that Verizon violated the ADA by refusing to make exceptions to its "no fault" attendance plans to accommodate employees with disabilities. Under the challenged attendance plans, if an employee accumulated a designated number of "chargeable absences," Verizon placed the employee on a disciplinary step which could ultimately result in more serious disciplinary consequences, including termination.

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The EEOC asserted that Verizon failed to provide reasonable accommodations for people with disabilities, such as making an exception to its attendance plans for individuals whose "chargeable absences" were caused by their disabilities. Instead, the EEOC said, the company disciplined or terminated employees who needed such accommodations.

In addition to the $20 million in monetary relief, the three-year decree includes injunctions against engaging in any discrimination or retaliation based on disability, and requires the company to revise its attendance plans, policies and ADA policy to include reasonable accommodations for persons with disabilities, including excusing certain absences. Verizon must provide mandatory periodic training on the ADA to employees primarily responsible for administering Verizon's attendance plans. The company must report to the EEOC about all employee complaints of disability discrimination relating to the attendance policy and about Verizon's compliance with the consent decree. The company also agreed to post a notice about the settlement. Finally, Verizon will appoint an internal consent decree monitor to ensure its compliance. The settlement applies to certain Verizon wireline operations nationwide that employ union-represented employees.

### F. Must Discipline Be Rescinded if An Employee Breaks A Conduct Rule Because Of A Disability?

Sometimes, employees only disclose their alleged disability after they have been given discipline for the alleged effects of the disability. For example, consider an employee with sleep apnea who is fired for sleeping on the job, but then discloses for the first time in their termination meeting that they have sleep apnea, and blame their condition for the fact that they fell asleep on the job. Does the employer have to rescind the termination, or may it proceed with termination? The court decisions addressing this question have concluded that the employer may proceed with termination. *See Jones v. Nationwide Life Ins. Co.,* 696 F.3d 78, 90 (1st Cir. 2012) ("When an employee requests an accommodation for the first time only after it becomes clear that an adverse employment action is imminent, such a request can be "too little, too late.'"); *Buie v. Quad/Graphics, Inc*., 366 F.3d 496 (7th Cir. 2004) (eleventh-hour declaration of disability does not insulate an unruly employee from the consequences of his prior misdeeds); *Davila v. Qwest Corp*., 113 Fed. Appx. 849, 854 (10th Cir. 2004) ("[A]s many cases have recognized in various contexts, excusing workplace misconduct to provide a fresh start/second chance to an employee whose disability could be offered as an after-the-fact excuse is not a required accommodation under the ADA."); *Conneen v. MBNA Am. Bank N.A*., 334 F.3d 318, 331-33 (3d Cir. 2003) (affirming summary judgment against employee who, despite repeated warnings about tardiness and the threat of termination, failed to request a modified schedule until after she was terminated); *Hill v. Kansas City Area Transp. Auth.*, 181 F.3d 891, 894 (8th Cir. 1999) (finding accommodation request untimely when employee made request only after committing two rule violations that "she knew would mandate her discharge"); *Soileau v. Guilford of Me., Inc.,* 105 F.3d 12, 17 n. 4 (1st Cir. 1997) (noting, in context of ADA retaliation claim, the "danger" of "permit[ting] an employee already on notice of performance problems to seek shelter in a belated claim of disability"); *cf. Halpern v. Wake Forest Univ. Health Scis*., 669 F.3d 454, 465 (4th Cir. 2012) (rejecting medical student's claim that school failed to reasonably accommodate his mental illness, in part because student did not allege that his behavioral problems were "manifestations of a disability" until after disciplinary board had recommended his dismissal); *Green v. Medco*

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*Health Solutions of Texas, LLC*, 947 F. Supp. 2d 712, 729 (N.D. Tex. 2013) (granting summary judgment against plaintiff who requested reasonable accommodation after her termination was in progress, and stating, "[i]n situations where an employee's termination based on a legitimate, nondiscriminatory reason has been made effective but has not yet been processed, courts must not permit the employee to use the ADA as a shield from being fired by suddenly requesting an accommodation before the ink on her valid termination papers is dry.") (citing *Brookins v. Indianapolis Power & Light Co*., 90 F. Supp. 2d 993, 1006–08 (S.D. Ind. 2000) (citing *Siefken v. Village of Arlington Heights*, 65 F.3d 664, 666–67 (7th Cir. 1995)).

The EEOC agrees with these court decisions. In 2008, it issued guidance with this relevant language from a question and answer:

> 10. What should an employer do if an employee mentions a disability and/or the need for an accommodation for the first time in response to counseling or discipline for unacceptable conduct?
>
> If an employee states that her disability is the cause of the conduct problem or requests accommodation, the employer may still discipline the employee for the misconduct. If the appropriate disciplinary action is termination, the ADA would not require further discussion about the employee's disability or request for reasonable accommodation.

EEOC Enforcement Guidance on The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities, at question 10 (Sept. 3, 2008), available at http://www.eeoc.gov/facts/performance-conduct.html (endnotes omitted).

The EEOC also explained in earlier guidance:

> Must an employer make reasonable accommodation for an individual with a disability who violated a conduct rule that is job-related for the position in question and consistent with business necessity?
>
> An employer must make reasonable accommodation to enable an otherwise qualified individual with a disability to meet such a conduct standard in the future, barring undue hardship. Because reasonable accommodation is always prospective, however, an employer is not required to excuse past misconduct.

EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, at question 31, 8 FEP Manual (BNA) 405:7461, 7476 (March 25, 1997), available at http:// www.eeoc.gov/ policy/guidance.html.

The EEOC also gives examples, such as:

> Example A: A reference librarian frequently loses her temper at work, disrupting the library atmosphere by shouting at patrons and coworkers. After receiving a suspension as the second step in uniform, progressive discipline, she discloses her disability, states that it causes her behavior, and requests a leave of absence for

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treatment. The employer may discipline her because she violated a conduct standard – a rule prohibiting disruptive behavior towards patrons and coworkers – that is job-related for the position in question and consistent with business necessity. The employer, however, must grant her request for a leave of absence as a reasonable accommodation, barring undue hardship, to enable her to meet this conduct standard in the future.

Example B: An employee with major depression is often late for work because of medication side-effects that make him extremely groggy in the morning. His scheduled hours are 9:00 AM to 5:30 PM, but he arrives at 9:00, 9:30, 10:00 or even 10:30 on any given day. His job responsibilities involve telephone contact with the company's traveling sales representatives, who depend on him to answer urgent marketing questions and expedite special orders. The employer disciplines him for tardiness, stating that continued failure to arrive promptly during the next month will result in termination of his employment. The individual then explains that he was late because of a disability and needs to work on a later schedule. In this situation, the employer may discipline the employee because he violated a conduct standard addressing tardiness that is job-related for the position in question and consistent with business necessity. The employer, however, must consider reasonable accommodation, barring undue hardship, to enable this individual to meet this standard in the future. For example, if this individual can serve the company's sales representatives by regularly working a schedule of 10:00 AM to 6:30 PM, a reasonable accommodation would be to modify his schedule so that he is not required to report for work until 10:00 AM.

Example C: An employee has a hostile altercation with his supervisor and threatens the supervisor with physical harm. The employer immediately terminates the individual's employment, consistent with its policy of immediately terminating the employment of anyone who threatens a supervisor. When he learns that his employment has been terminated, the employee asks the employer to put the termination on hold and to give him a month off for treatment instead. This is the employee's first request for accommodation and also the first time the employer learns about the employee's disability. The employer is not required to rescind the discharge under these circumstances, because the employee violated a conduct standard – a rule prohibiting threats of physical harm against supervisors – that is job-related for the position in question and consistent with business necessity. The employer also is not required to offer reasonable accommodation for the future because this individual is no longer a qualified individual with a disability. His employment was terminated under a uniformly applied conduct standard that is job-related for the position in question and consistent with business necessity.

EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, at question 31, 8 FEP Manual (BNA) 405:7461, 7476 (March 25, 1997), available at http:// www.eeoc.gov/ policy/guidance.html (endnotes omitted).

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Because of this rule, the EEOC advises employees that, "it may be in the employee's interest to request a reasonable accommodation before performance suffers or conduct problems occur." *Id*. at fn. 70.

## III. CONCLUSION

Case law continues to develop under the ADA's "direct threat" defense, and in relation to employer's conduct rules. Employers must stay abreast of the latest developments to avoid engaging in conduct – no matter how well meaning – that leads to liability.

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