TASC Training & Advocacy Support Center

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# Fact Sheet
# Safety Qualification Standards and the Direct Threat Defense: Can a Covered Entity Avoid Individualized Determinations?

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Employers have often used "safety" as a justification for policies that facially discriminate against people with disabilities (*e.g.*, barring people who are deaf or insulin-dependent people with diabetes from driving commercial vehicles) or that have a discriminatory impact on people with disabilities (*e.g.*, establishing vision standards for driving commercial vehicles). These across-the-board rules appear to conflict with one of the underlying principles of the Americans with Disabilities Act – that employers must conduct individualized assessments of an applicant's or employee's qualifications rather than making assumptions based on disability. This Fact Sheet reviews the law under the ADA and Section 504 of the Rehabilitation Act and analyzes the interplay between safety qualification standards and the direct threat defense.

## I. The Statutory and Regulatory Background

In Title I of the ADA, Congress expressly defined unlawful "discrimination" to include the use of

> qualification standards ... or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with a disability unless the standard ... or other selection criteria ... is shown to be job-related for the position in question and is consistent with business necessity.

42 U.S.C. § 12112(b)(6). In outlining the potential defenses available to a Title I claim, Congress provided that "[i]n general" it is a defense to a charge that an employer uses a qualification standard or selection criterion that screens out or tends to screen out individuals with disabilities if the standard or criterion "has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation ...." 42 U.S.C. § 12113(a). Congress further allowed that "[t]he term 'qualification standards' may include a requirement that the individual shall not pose a direct threat to the health or safety of other individuals in the workplace," 42 U.S.C. § 12113(b), and it defined "direct threat" to mean "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3).

The ADA's "direct threat" standard codifies the Supreme Court's decision involving Section 504 in *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987). In *Arline*, a school board discharged a teacher who was deemed a safety threat due to her susceptibility to tuberculosis. The Court examined the safety issue in light of whether the teacher was "otherwise qualified." *Id.* at 287-89. In doing so, the Court stressed that, "in most cases," district courts will need to conduct individualized inquiries so as to assure that individuals with disabilities are protected against "deprivations based on prejudice, stereotypes, or unfounded fears while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks." *Id.* at 287. The Court concluded that such an inquiry should result in findings of fact about (a) the nature of the risk; (b) the duration of the risk; (c) the severity of the risk; and (d) the probabilities that the disease will be transmitted and will cause varying degrees of harm. *Id.* at 288.

These factors are codified in ADA Title I regulations, which provide that "[t]he determination that an individual poses a 'direct threat' shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job," and that this assessment must "be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence." 29 C.F.R. § 1630.2(r). The factors to be considered include the four factors laid out in *Arline*. *Id*.

Title III of the ADA also contains an explicit "direct threat" defense, providing that:

> Nothing in this title shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others.

42 U.S.C. § 12182(b)(3). Direct threat is defined as "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services." *Id*. The Justice Department's Title III regulations require an individualized assessment "based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk." 28 C.F.R. § 36.208. Title II of the ADA does not contain a "direct threat" defense in the statute, as most of the Title II requirements are in regulations. The Justice Department's Interpretative Guidance for Title II incorporates the "direct threat" defense of Title III. 28 C.F.R. Pt. 35, App. A, § 35.104 (definition of "qualified individual with a disability").

The ADA's statutory and regulatory provisions thus allow employers to bar from the workplace individuals with disabilities using qualification standards that relate to safety. The question arises, however, as to whether the only type of safety-based qualification standard permitted by the ADA is the "direct threat" standard. This

becomes important because qualification standards are blanket rules that can be applied without individualized inquiries if job-related and consistent with business necessity. In contrast, the direct threat standard, as announced in *Arline*, must be applied using individualized evaluations. *See Arline*, 480 U.S. at 287; *accord* 29 U.S.C. § 1630.2(r)

Both the EEOC and the Department of Justice have concluded that, whenever a covered entity excludes a person based on disability and cites safety concerns, an individualized assessment of whether the person poses a safety risk is required, and the "direct threat" standard must be used. The EEOC's Interpretative Guidance for Title I explains:

> With regard to safety requirements that screen or tend to screen out an individual with a disability or a class of individuals with disabilities, an employer must demonstrate that the requirement, *as applied to the individual*, satisfies the 'direct threat' standard in [29 C.F.R.] § 1630.2(r) in order to show that the requirement is job-related and consistent with business necessity.

29 C.F.R. Pt. 1630, App., §§ 1630.15(b) and (c). Like the EEOC's regulations, 29 C.F.R. § 1630.2(q), the Title I TAM acknowledged that an employer may have "qualification standards" that relate to health and safety, but it cautions that blanket exclusions of people with disabilities for health or safety reasons "[i]n most cases ... will not meet ADA requirements." *Title I TAM* § I-4.4. Instead, "the ADA requires an objective assessment of a particular individual's current ability to perform a job safely. Generalized 'blanket' exclusions of an entire group of people with a certain disability prevent such an individual consideration." *Id.*[1] The Justice Department has taken the same approach. *See* 28 C.F.R. Pt. 35, App. A, § 35.104 (in determining whether a person is qualified, "[w]here questions of safety are involved, the principles established in § 36.208 of the Department's regulation implementing Title III of the ADA [the direct threat regulation] . . . will be applicable.").

According to the EEOC and the Justice Department, therefore, a covered entity could not justify an across-the-board safety qualification standard or eligibility requirement that screened out or tended to screen out individuals with disabilities. Rather, it could only bar an individual with a disability due to safety concerns if it could establish that the individual – based on an individualized assessment – was a direct threat to himself (under the EEOC's regulation) or to others.

[1] According to the EEOC, the only type of blanket exclusion that would likely pass ADA muster is an exclusion based on the employer's obligation to comply with certain federal laws that mandate such exclusions in particular occupations. *Title I TAM* § I-4.4; *see also* 29 C.F.R. Pt. 1630, App., § 1630.1(b) and (c) ("The ADA does not automatically preempt medical standards or safety requirements established by Federal law or regulations.").

Section 504, 29 U.S.C. § 794, does not discuss safety issues or qualification standards in the statutory text. Certain regulations provide that "job qualifications" that tend to exclude people with disabilities must be related to the specific job for which the person is considered and must be consistent with business necessity. *See* 29 C.F.R. § 32.14. The regulations do not discuss the direct threat standard or individualized assessment requirement, but Section 504 is supposed to require the same standards as Title I of the ADA with respect to employment, 29 U.S.C. § 794(d), and has been interpreted similarly to the ADA with respect to other applications as well. Indeed, the ADA's direct threat standard was based on the Supreme Court's interpretation of Section 504 in *Arline*.

## II. Case Law: Reconciling Blanket Standards with the Individual Focus of the ADA

Consistent with the interpretations of the EEOC and DOJ, the Supreme Court has repeatedly required individualized assessments when individuals with disabilities are screened out based on purported safety rationales. Subsequent to *Arline*, in a case brought under Title III of the ADA, the Court required an individualized assessment using the direct threat standard when a dentist imposed a blanket rule refusing to treat patients with HIV. *Bragdon v. Abbott*, 524 U.S. 624, 648-49 (1998).

Most recently, in *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002), a case brought under Title I of the ADA, the Court upheld the EEOC's regulation allowing a "direct threat" defense for employers based on an employee's threat to his own health or safety and requiring an individualized assessment using the *Arline* factors. Chevron refused to hire the plaintiff at one of its oil refineries, claiming that the plaintiff's liver condition would be exacerbated by his exposure to toxins in the refinery and, therefore, the job would pose a direct threat to his own health. *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. at 76-77. Title I of the ADA defines "direct threat" as a threat to *others* – not to oneself. 42 U.S.C. §§ 12111(3), 12113(b). The EEOC, however, defined "direct threat" to include threats to oneself or others. 29 C.F.R. §§ 1630.2(r), 1630.15(b)(2). The Court upheld the EEOC's regulation, reasoning that Congress left open the possibility of such a defense as a type of "business necessity" defense, and the "direct threat to others" defense Congress had specifically set forth in the statute was merely one example of the "business necessity" defense. 536 U.S. at 79-87.

In *Echazabal*, some of the *amici* argued that across-the-board safety qualification standards were not subject to the direct threat defense. The Court declined to decide this issue. *Id.* at 80 n.3. The Court stated, however, that:

> . . . we assume that some such regulations are implicitly precluded by the Act's specification of a direct-threat defense, such as those allowing "indirect" threats of "insignificant" harm. This is so because the definitional and defense provisions describing the defense in terms of "direct" threats of "significant" harm, 42 U.S.C. §§ 12113(b), 12111(3), are obviously intended to forbid qualifications that screen out by reference to general

> categories pretextually applied. . . . Recognizing the "indirect' and "insignificant" would simply reopen the door to pretext by way of defense.

536 U.S. at 80 n.3 (citations omitted). The Court's statement that Congress's specific inclusion of a "direct threat" defense does preclude some other types of safety-based defenses is instructive. The Court found that defenses based on a direct threat to the health or safety of an employee himself or to others in the workplace are subject to the EEOC's direct threat regulation, which requires an individualized assessment based on the *Arline* factors. It is hard to imagine what other types of safety-based defenses might be available that would be considered separate and not subject to the direct threat analysis. The Court's comments in *Echazabal* suggest that it will be difficult, at best, for defendants to articulate other types of safety-based defenses not covered by the direct threat defense.

Moreover, while Title I has a broader "business necessity" defense under which defendants have attempted to justify other safety-based qualification standards, Titles II and III contain no such broader defense. Furthermore, whether the direct threat analysis applies should not depend on whether defendants choose to invoke the direct threat defense or instead to characterize the exclusion based on safety concerns as something other than a direct threat to safety. The Justice Department has noted that the "direct threat" defense reflects the recognition in *Arline* of the "need to balance the interests of people with disabilities against legitimate concerns for public safety." 28 C.F.R. Pt. 35, App. A, § 35.104. It is doubtful that Congress intended that balance to be struck differently depending on whether a covered entity acted, based on the same asserted threat, against one individual or in an across-the-board rule.

In any event, regardless of whether the "direct threat" defense applies to across-the-board safety rules, the Supreme Court's decisions seem to require an individualized assessment when an individual's disability causes him to be excluded based on safety concerns. *Arline*, *Bragdon*, and *Echazabal* all required an individualized assessment in this situation. All involved the context of safety, and *Bragdon* involved a blanket eligibility rule based on safety concerns. Allowing across-the-board rules would be inconsistent with the requirement of an individualized assessment repeatedly set forth in Supreme Court case law.

In *Alberto's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), the Supreme Court held that an employer could use its need to comply with applicable federal Department of Transportation (DOT) safety regulations to justify its visual acuity job qualification standard for commercial truck drivers, even though DOT had established a "waiver" program that might exempt drivers from those vision standards. In that case, the EEOC had urged the Court to read 42 U.S.C. §§ 12113(a) and (b) "together to mean that when an employer would impose any safety qualification standard, however specific, tending to screen out individuals with disabilities, the application of the requirement must satisfy the ADA's 'direct threat' criterion," which "requires an individualized assessment of the individual's present ability to perform the essential functions of the job." *Id.* at 569. In a footnote, the Court expressed skepticism about the EEC's interpretation because it "might impose a higher burden on employers to justify safety-related qualification

standards than other job requirements ....” *Id.* at 569 n.15. The Court determined, however, that it was not necessary to resolve that issue because the case involved a job qualification standard established by the federal government and not the employer, *id.* at 570, and Congress expected that “federal safety rules would limit application of the ADA as a matter of law.” *Id.* at 573 (citing legislative history of the ADA). Since the Court further concluded that DOT’s waiver program was simply an “experiment” that did not modify its visual acuity standards, *id.* at 576, the Court held that the employer could demand compliance with the DOT’s visual actual standards.

Citing *Kirkingburg*, some courts deciding ADA employment cases have rejected the EEC’s interpretation that an employer can only justify a safety job qualification through an individualized assessment of whether an employee constitutes a direct threat. The analyses used in these cases is widely divergent, however.

In *EEOC v. Exxon Corporation*, 203 F.3d 871 (5th Cir. 2000), the EEOC challenged the defendant’s policy of permanently barring from certain “safety-sensitive, little-supervised positions” any person who has undergone substance abuse treatment. *Id.* at 872. The EEOC argued that the only defense available under the ADA when an employer imposes a safety qualification standard is for the employer to show that the individual constitutes a direct threat. *Id.* The Fifth Circuit disagreed. It reasoned that the language of 42 U.S.C. § 12113 suggests that safety requirements “are not exclusively cabined into the direct threat test.” *Id.* at 873. The court noted that 42 U.S.C. § 12113(a) refers to standards that “screen out or tend to screen out an individual,” which “suggests a general standard applicable to all employees” while, in contrast, 42 U.S.C. § 12113(b), the direct threat provision, “allows a requirement that the *individual* not pose a threat to health or safety. The different approaches suggest that business necessity applies to across-the-board rules while direct threat addresses a standard imposed on a particular individual.” *Id.* (emphasis in original). The court also noted that the direct threat language referred only to threats to “others in the workplace” and, if safety qualifications were required to satisfy the direct threat criteria, it would preclude employers from imposing safety qualifications to assure the safety of persons outside the workplace (e.g., drivers who may pose a threat to the public). *Id.*

The Fifth Circuit adopted a bright-line rule that distinguishes between employment decisions based on application of across-the-board rules and those not based on application of across-the-board rules. *EEOC v. Exxon Corp.*, 203 F.3d at 874-85. “In cases where an employer has developed a general safety requirement for a position, safety is a qualification standard no different from other requirements defended under the ADA’s business necessity provision.” *Id.* at 874. The direct threat test, in contrast, applies in those “cases in which an employer responds to an individual employee’s supposed risk that is not addressed by an existing qualification standard.” *Id.* at 875.

Two years after *Exxon*, the Fifth Circuit decided that a police department could not apply a blanket rule to exclude insulin-dependent persons with diabetes from positions as police officers and, instead, must conduct an individual assessment of the applicants to determine their present ability to perform essential functions of the job

safely. *Kapche v. City of San Antonio*, 304 F.3d 493, 500 (5th Cir. 2002) (per curiam). While not mentioning *Exxon* or the business necessity defense, the court reasoned that the Supreme Court has consistently reiterated that the ADA mandates individualized assessments. *Id.* at 499; *accord Millage v. City of Sioux City*, 258 F. Supp. 2d 976, 990-92 (N.D. Iowa 2003) (city's blanket exclusion of insulin-dependent persons with diabetes from bus driving positions not valid; must conduct individualized assessments); *cf. Stillwell v. Kansas City, Bd. of Police Comm'rs*, 872 F. Supp. 682, 686-88 (W.D. Mo. 1995) (holding state licensing scheme that barred one-handed man from receiving permit to work as armed security guard violated the ADA because blanket rules are not permissible and the rule was not necessary). The only difference between *Kapche* and *Exxon* is that, unlike *Exxon*, in which the employer expressly defended its policy under the business necessity framework, the employer in *Kapche* asserted that the plaintiff was a direct threat and sought to argue that it was appropriate to adopt a blanket rule under the direct threat framework. *See Kapche v. City of San Antonio*, 176 F.3d 840, 844 (5th Cir. 1999), *app. after remand*, 304 F.3d 493 (5th Cir. 2002).

The Ninth Circuit also rejected the EEC's interpretation that safety-related qualification standards must be defended under the direct threat framework, but it disagreed with the Fifth Circuit's analysis and required some type of individualized assessment of risk. In *Morton v. United Parcel Service*, 272 F.3d 1249 (9th Cir. 2001), *cert. denied*, 535 U.S. 1054 (2002), UPS refused to promote an employee with a severe hearing impairment to a position as a driver based on its policy of hiring as drivers only individuals who have obtained certification from DOT to drive vehicles in excess of 10,000 pounds. *Id.* at 1251. DOT will not certify individuals with severe hearing impairments. *Id.* UPS applies its policy even to drivers who drive vehicles under 10,000 pounds (for which the DOT does not mandate certification). *Id.*

UPS contended that its policy was a safety-based qualification standard supported by business necessity. *Morton*, 272 F.3d at 1257. The plaintiff asserted that safety-based qualification standards must be defended under the direct threat standard rather than the business necessity framework. *Id.* at 1258. The court rejected the plaintiff's argument. *Id.* at 1258-59. The court identified several reasons for its conclusion. First, the court (like the Fifth Circuit) noted that the direct threat defense is applicable only to threats "to other individuals in the workplace," which does not apply when – as in the case of drivers – the threat extends to the general public outside the workplace. *Id.* at 1258. Second, the direct threat defense does not require any showing of job-relatedness. *Id.* at 1259.

> Combined with the focus on danger to other individuals in the workplace, the absence of any job-related requirement suggests that the direct threat defense was meant as a very narrow permission to employer to exclude individuals with disabilities *not* for reasons related to their performance of jobs, but because their mere presence could endanger others with whom they work and whom they serve.

*Id.* (emphasis in original).

*Morton* disagreed with the *Exxon* Court's bright-line distinction between across-the-board safety standards (which the Fifth Circuit held are subject to the business necessity defense) and adverse employment actions against individuals based on health or safety concerns that are not addressed by across-the-board safety standards (which the Fifth Circuit held would be subject to the direct threat defense). *Morton*, 272 F.3d at 1259. The court expressed doubt "that Congress intended the *Arline* situation to come out differently under the ADA depending upon whether the employer in question had a pronounced, across-the-board policy excluding employees with latent communicable diseases from the workplace, or not." Instead, the Ninth Circuit adopted a different bright-line test, holding:

> [Whatever the scope or timing of the employer's policy or decision, where the only danger was to co-workers or others present at the workplace, and where the danger is not one that involved actual job performance, the narrower direct threat defense would apply.

*Id.* Since UPS's decision was based on alleged danger to the public in general (not persons in the workplace), and the concern about safe driving involved the performance of the driving job that the plaintiff sought, the court concluded that the decision must be justified under the business necessity rubric and that "the direct threat defense has no application to this case." *Id.*[2]

Significantly, the Ninth Circuit noted that the business necessity defense is subject to the reasonable accommodation requirement, and thus some type of individualized assessment would be needed to determine whether accommodation is required.[3] The court went on to conclude that an employer can use across-the-board qualification standards "only if those standards 'provide an accurate measure of an applicant's actual ability to perform the job ....'" *Id.* at 1263. A safety-based qualification standard will not be an accurate measure of actual ability, the court suggested, unless the employer can demonstrate that "all persons who fail to meet the [standard] present an unacceptable risk of danger" or "that it is highly impractical to determine which disabled employees present such an unacceptable risk . . . ." *Id.*

The court evaluated the "nature of the risk, the adequacy of the connection shown between the employer's qualification standard and alleviation of the risk, and the showing of the *necessity* of across-the-board rather than individualized determinations"

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[2] The court's conclusion that the direct threat defense is distinct from the business necessity defense, because the former does not concern job relatedness while the latter does, seems to be inconsistent with the Supreme Court's recognition in *Echazabal* that the direct threat defense falls within the larger business necessity defense. 536 U.S. at 79-80.

[3] The court declined to resolve whether an individualized assessment is required to determine whether each person meets the qualification standard or to determine whether each person can do the essential job functions, as it found that UPS's rule did not meet the business necessity defense for summary judgment purposes in any event. 272 F.3d at 1263.

to determine whether UPS met its burden of proving that use of the DOT certification standard for driving vehicles for which the DOT does not require certification constitutes a "business necessity." In holding that UPS had not met its burden to sustain the entry of summary judgment in its favor, the court noted that (1) UPS had never undertaken any independent study to determine the appropriateness of applying the DOT hearing standard for driving vehicles not subject to DOT requirements; and (2) the evidence presented negated any conclusion that all or substantially all deaf drivers present a heightened risk of accidents, and there was conflicting evidence about whether non-DOT vehicles pose a sufficient safety threat to warrant application of the DOT standards. *Id.* at 1263-64.

The Third Circuit adopted yet another approach to this issue in a case under the Rehabilitation Act. In *Verzeni v. Potter*, 109 Fed. Appx. 485 (3d Cir. 2004), the Postal Service dismissed an employee whose reports to his supervisor indicated that he had severe mental illness but whose work was otherwise satisfactory. *Id.* at 486. The Postal Service placed him on administrative leave and required him to undergo a fitness-for-duty exam by a psychiatrist. *Id.* at 487. The psychiatrist concluded that the plaintiff had chronic paranoid schizophrenia and should not return to duty; a second psychiatrist confirmed this recommendation. *Id.* Both psychiatrists were concerned that the plaintiff might become violent, although he had no history of violence. *Id.* The Postal Service fired the plaintiff on the basis that he was not fit for duty. *Id.* The plaintiff sued, alleging that the general "mental fitness" requirement used by the Postal Service is an unlawful qualification standard that screens out or tends to screen out people with disabilities. *Id.* at 490. At trial, the judge instructed the jury that the Postal Service is not liable if it acted reasonably and responsibly. *Id.* at 487. The jury determined that the postal service had not discriminated against the plaintiff. *Id.*

On appeal, the Third Circuit examined the Postal Service's defense to the plaintiff's challenge to the "mental fitness" qualification standard. *Verzeni*, 109 Fed. Appx. at 490-92. The plaintiff argued that, when business necessity concerning an employee posing a safety risk is at issue, the direct threat defense must be met. *Id.* at 490. Following the Fifth and Ninth Circuits, the court rejected that assertion, concluding:

> [A]lthough the direct threat defense is mentioned in the applicable amendments to the ADA, it is fairly clear that the statute does not require that the direct threat defense be used across-the-board when considering a safety qualification. ... Clearly, by the use of the word "may" [in 42 U.S.C. § 12113(b)], Congress intended to include the direct threat defense as a permissive factor to consider. That permissive inclusion does not, however, require that it always be invoked when considering safety-related qualification standards.

*Id.* at 490-91. The court further stated that the EEC's interpretative guidance to the contrary was at odds with the statutory language. *Id.* at 491. Unlike the Fifth Circuit in *EEOC v. Exxon Corp.*, though, the Third Circuit did not adopt a bright-line distinction

between across-the-board safety standards (which are subject to a business necessity defense) and determinations that a particular individual is a safety risk (which is subject to the direct threat defense).[4] Nor did the Third Circuit follow the Ninth Circuit's approach in *Morton v. United Parcel Service*, which suggested that threats to persons within the workplace that are not job-related (such as the alleged threat posed by Mr. Verzeni) should be subject to the direct threat defense. The court noted that the business necessity defense had to be based on "objective medical facts" and take into consideration the *Arline* factors. *Id*. at 492. It remanded because the jury instructions were inconsistent with the business necessity defense. *Id*. at 492-93.

Several district courts also have weighed in on the matter. In *Siederbaum v. City of New York*, 309 F. Supp. 2d 618 (S.D.N.Y. 2004), *aff'd mem.*, 121 Fed. Appx. 435 (2005),the court considered the New York City Transit Authority's Medical Standards, which barred people with bipolar disorders from bus driver positions. The court followed the Fifth Circuit's analysis, holding that "an employer's safety-related qualification standard when applied across-the-board rather than on an individual basis, need not meet the ADA's 'direct threat' standard of individualized assessment," and thus the defendant (since it was using an across-the-board standard) "is not required to engage in an individualized assessment of the plaintiff's ability to perform safely as a bus driver." *Id.* at 629 n.4. The court upheld the defendant's qualification standard, finding that "[t]he risks associated with bipolar disorder, whether treated or untreated, however slight the risks might be, support the [defendant's] conclusion that the absence of bipolar disorder is an essential function of being a bus driver." *Id.* at 630.

In *Bosket v. Long Island Railroad*, No. 00-7352-RJDJMA, 2004 WL 1305746 (E.D.N.Y. June 4, 2004), the plaintiff challenged the defendant's denial of his application for a job as a signalman based on guidelines published by the Medical Section of the Transportation Division of the Association of American Railroads, which require signalmen to "have better than 50% hearing in the speech range without the use of a hearing aid." *Id.* at *1. In *Bosket*, the employer offered defenses based on both business necessity and direct threat, but the court – following the Fifth Circuit – suggested that the direct threat defense was not available to the employer because it was using a generally applicable qualification standard. *Id.* at *11 n.9.

As in *Bosket*, the employer in *EEOC v. Murray, Inc.*, 175 F. Supp. 2d 1053 (M.D. Tenn. 2001), unsuccessfully attempted to raise alternative defenses of business necessity and direct threat in a case involving a challenge to the employer's general policy that barred insulin-dependent persons with diabetes (and persons with other

[4] *Verzeni* is a particularly odd case in which to apply a business necessity defense. While the employer's "mental fitness" requirement is an across-the-board requirement, it differs from general safety requirements (such as hearing or vision standards) because it must be assessed individually. It is difficult to fathom how "mental fitness" can be justified across-the-board as a business necessity because the risks vary so widely depending on the nature of the disability and the work involved. Yet, the court did not seem troubled by this problem. Under the Fifth Circuit's approach, *Verzeni* appears to present the type of individual threat determination that should be analyzed under the direct threat framework rather than an objective, across-the-board standard that is subject to the business necessity defense.

specified disabilities) from operating forklifts. The court held that the employer could not rely on the direct threat defense. *Id.* at 1065 n.13. Following the Fifth Circuit, the court concluded that the direct threat defense is inapplicable because the defendant did not engage in an individualized assessment of employees' medical conditions before precluding them from operating forklifts, but, rather, employed a general safety standard that must be assessed under the business necessity defense. *Id.*

The cases justifying blanket safety rules under the business necessity defense have been limited to the employment context. Outside of the context of employment, defendants have typically raised safety concerns under the direct threat rubric, and courts have required individualized assessments of safety risks. *See, e.g.*, *Hargrave v. Vermont*, 340 F.3d 27, 36 (2d Cir. 2003) (rejecting direct threat defense asserted by state to justify law allowing forced medication to trump advance directives of individuals with mental illness who were civilly committed; state failed to show that "each and every patient subject to Act 114 necessarily posed 'a direct threat to the health and safety of others'" at the time that the state abrogated the advance directive).

## III. Justifying Safety Qualification Standards Under the Business Necessity Defense Is A Difficult Burden.

The interpretation of some courts that an employer can adopt blanket safety job qualifications that exclude people with disabilities without conducting individual assessments is disconcerting. But even if courts adopt this approach, both the statute and case law suggest that such blanket exclusions will difficult to justify in most cases.

First, it must be remembered that the statutory defense requires that the employer show more than job-relatedness and business necessity. It requires that the employer also to show that "such [job] performance cannot be accomplished by reasonable accommodation ...." 42 U.S.C. § 12113(a). By incorporating a reasonable accommodation requirement into the defense, Congress made it extremely difficult to justify safety-based job qualification standards.

For example, in rejecting UPS's business necessity defense to its requirement that all drivers meet the DOT's hearing requirements (even when driving vehicles that are not subject to the DOT's requirements), the court in *Bates v. United Parcel Service*, No. C99-2216 THE, 2004 WL 2370633 (N.D. Cal. Oct. 21, 2004), *app. pending*, observed that UPS had not shown that adapting modified driving techniques or using compensatory devices (such as backing cameras or additional mirrors) would not work to address any increased risk of accident posed by deaf drivers. *Id.* at *29. *Strathie v. Dep't of Transp.*, 716 F.2d 227 (3d Cir. 1983), also is analogous. The plaintiff in *Strathie* was hired as a school bus driver, but the defendant suspended the license that allowed him to drive a school bus when it learned that he wore a hearing aid in violation of one of the defendant's regulations. *Id.* at 228. Although the business necessity defense was not at issue (because the plaintiff challenged the state defendant's licensing scheme), the court determined that general safety standards must yield if accommodations are possible that address those concerns. *Id.* at 232-34.

Second, most courts that have rejected the EEC's position still have subjected blanket exclusions to a rigorous review incorporating many of the features of the direct threat standard. Thus, the case law suggests that generally courts will not be pushovers on the business necessity defense, even when public safety is involved. None of the appellate decisions on the issue – *EEOC v. Exxon Corp.*, *Morton v. United Parcel Service*, and *Verzeni v. Potter* – reached the merits of whether the challenged safety qualification standards were consistent with business necessity. Moreover, these courts incorporate many of the risk factors identified in both *Arline* and the EEC's definition of direct threat.

The Fifth Circuit in *Exxon* suggested that in evaluating the business necessity of a safety-based qualification standard, courts "should take into account the magnitude of the possible harm as well as the probability of occurrence (which will vary with the potential hazard of the particular position)." *EEOC v. Exxon Corp.*, 203 F.3d at 875. Those factors are analogous to those used to assess whether a person is a direct threat. 29 C.F.R. § 1630.2(r) (factors to be used in assessing a direct threat defense include: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm).

The Ninth Circuit in *Morton*, as noted above, indicated that even the business necessity defense may require an individualized assessment. 272 F.2d at 1263. At a minimum, the court required across-the-board safety standards to be justified by a showing that everyone who meets the standard presents an unacceptable risk of danger or "that it is highly impractical to determine which disabled employees present such an unacceptable risk[.]" *Id.* In concluding that the employer failed to make out a business necessity defense for summary judgment purposes, the court noted, among other things, that the record failed to address "whether it would be possible to determine which deaf drivers present a higher risk of accidents and which – if any – do not." *Id*. at 1265. The court suggested "obvious considerations" affecting the level of risk that should be considered, including:

> the drivers' personal driving record, the precise nature of the hearing loss (Morton, for example, says that she can hear car horns), and whether they have had or could have in the future special training concerning particular safety precautions that can mitigate loss of hearing as a driving risk.

*Id*. An analysis of such factors clearly requires an individualized inquiry of the safety risk posed by the particular individual at issue, even if only to establish that there is no difference among individuals who meet the blanket rule.

The Third Circuit held that the concerns delineated in *Arline* relating to the direct threat defense should be considered as well in a business necessity defense. *Verzeni v. Potter*, 109 Fed. Appx. at 491. "[T]he business necessity defense cannot be based on unfounded fears or uninformed attitudes about disability." *Id.* Further, the fact finder

should consider in assessing a business necessity defense the factors identified in *Arline* relating to the direct threat defense – "the nature of the risk, the duration of the risk, the severity of the risk, and the probabilities that the disability will cause harm" – and any conclusions "must be based on current medical knowledge about the disability and on the real risks that the disability may present." *Id.*

The lower courts (with the exception of the *Siederbaum* case discussed above) also have stringently applied the business necessity criteria, demanding that the employers introduce statistically sound evidence that supports an across-the-board exclusion. *See Bates v. United Parcel Service*, 2004 WL 2370633 at *24-*38 (holding, after extensive analysis, that UPS did not prove its business necessity defense to its use of the DOT's hearing standards for drivers of vehicles not subject to the DOT requirements); *Bosket v. Long Island Railroad* , 2004 WL 1305746 at * 10 (with respect to the business necessity defense, the court held that summary judgment was inappropriate because the defendant had offered no evidence relating to the methodology behind the standard, the reason for choosing the rule, or the risks requiring prohibition on use of hearing aids); *EEOC v. Houston Area Sheet Metal Joint Apprenticeship Comm.*, No. 00-3390, 2002 WL 1263893 at *8-*9 (S.D. Tex. May 31, 2002) (declining to grant summary judgment for defendant based on business necessity defense where the defendant adopted a purported safety rule that refused to allow persons unable to speak or hear into its program but did not demonstrate that the standard was justifiable); *EEOC v. Murray, Inc.*, 175 F. Supp. 2d at 1065-66 (in denying the employer's motion for summary judgment based on the business necessity defense, the court noted that it "appear[s], on it face, to be based on improper stereotypes and generalizations about individuals with the specified medical conditions" and found the defendant's evidence relating to the risks posed by insulin-dependent persons with diabetes to be completely inadequate). As the court in *EEOC v. Murray, Inc.* wrote:

> Where, as in this case, the defendant screens for specific medical conditions rather than actual physical or mental abilities, it can only meet this burden by establishing that all individuals with the specified conditions necessarily will have the accompanying physical or mental limitations that prevent them from being able to perform the essential functions of their job.

*Id.*

## IV. Conclusion

There are strong arguments to be made that the ADA does not permit the use of blanket safety-based rules to exclude individuals with disabilities. Despite the repeated statements by the Supreme Court that the ADA requires individualized assessments of safety risks, however, as well as the interpretations of both the EEOC and the Justice Department requiring the direct threat defense to be used when safety concerns are asserted, a number of courts have read the ADA's business necessity defense to permit employers to use blanket safety-based rules. To the extent that these decisions stand,

advocates should note that they apply only in the employment context, and even in that context, most of these decisions impose stringent requirements for meeting the business necessity defense, may still require an individualized assessment even if it is not the “direct threat” context, and may require application of the *Arline* factors delineated in the “direct threat” test.