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ON THE EDGE: THE ADA'S DIRECT THREAT DEFENSE AND THE OBJECTIVE REASONABLENESS STANDARD

JAROD S. GONZALEZ*

One of the most important issues under the Americans with Disabilities Act (ADA) is the appropriate standard for evaluating Title I employment disability discrimination cases where the employer argues that the employee has a medical condition that poses too much of a safety risk for the employee to work in a particular position. This is called the “direct threat” concept. In general, this permits an employer to discriminate against an employee on the basis of disability if the employee poses a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” The federal courts of appeals are split on whether direct threat under Title I of the ADA is an affirmative defense that the employer must prove, or, alternatively, whether a qualified employee with a disability must prove that he or she can safely perform all essential job functions and is not a direct threat.

This Article advocates for the treatment of the direct threat concept as an affirmative defense that the employer must prove. This Article further explains that proof of this defense does not require the employer to prove that its direct threat determination is “correct.” Instead, the law requires the employer to prove that its direct threat determination was “objectively reasonable.” Objective reasonableness often depends on the procedures that the employer uses to come to this conclusion. This Article also explains how the employer should take certain steps to better demonstrate that its direct threat determination was objectively reasonable. Finally, this Article explains how to apply the objective reasonableness standard when the employer is faced with conflicting medical opinions from qualified medical providers about whether an employee poses a direct threat in the workplace. The insights from the Article are applied to the summary judgment procedure and jury instructions

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in direct threat cases. In particular, it is hoped that this Article will help to reshape jury charges in direct threat cases.

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I. INTRODUCTION

Employment discrimination laws generally make it illegal for employers to take adverse employment actions against employees on the basis of certain protected characteristics that have no bearing on an employee’s ability to perform a job. But sometimes employers may lawfully act on the basis of an employee’s protected characteristics. This type of lawful “discrimination”—where the employer is admittedly acting on the basis of the employee’s protected characteristic—finds support in employment discrimination doctrines, such as the bona fide occupational qualification (BFOQ) defense under Title VII of the Civil Rights Act of 1964, as amended; the BFOQ defense under the Age Discrimination in Employment Act of 1967, as amended; the

religious employer exemption to religious discrimination under Title VII; and the ministerial exception to employment discrimination statutes.¹

In addition, a similar type of “lawful” discrimination can sometimes exist in the disability discrimination law context under the Americans with Disabilities Act (ADA). For example, an employer might take a personnel action against a disabled employee because the employee’s impairment prevents them from performing the job and no reasonable accommodation is available to assist the employee to perform the essential job functions.² A unifying justification for these doctrines that permit lawful discrimination is the idea that in limited circumstances an employee’s protected characteristic may actually impact the employee’s ability to perform the job or for the employer to effectively and efficiently operate its business.³ Safety-based concerns are one of the most common suggested justifications for permitting discrimination on the basis of a protected characteristic—once again, in limited circumstances.⁴

The ADA’s direct threat defense is an important example of a space that the law creates for lawful employment discrimination justified by safety-based concerns.⁵ The ADA’s direct threat doctrine traces its roots to the U.S. Supreme Court’s 1987 decision in *School Board of Nassau County v. Arline*,⁶ which interpreted the Rehabilitation Act of 1973,⁷ a predecessor of the ADA.⁸ In

1. 42 U.S.C. § 2000e-2(e) (2012) (Title VII BFOQ defense); 29 U.S.C. § 623(f)(1) (2012) (ADEA BFOQ defense); 42 U.S.C. § 2000e-1(a) (exempting religious entities from Title VII’s prohibition against religious discrimination); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012) (recognizing ministerial exception to federal anti-discrimination statutes).

2. 42 U.S.C. § 12112(a) (2012) (“No covered entity shall discriminate against a qualified individual on the basis of disability in regard to [employment decisions].”). A “qualified individual” is “an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C. § 12111(8) (2012).

3. 42 U.S.C. § 2000e-2(e) (Title VII BFOQ defense) (emphasis added) (“[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification *reasonably necessary to the normal operation of that particular business or enterprise.*”).

4. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 412–17 (1985) (explaining the test for evaluating a BFOQ defense to an age-based qualification based on considerations of safety).

5. 42 U.S.C. § 12113(b) (2012).

6. 480 U.S. 273 (1987).

7. 29 U.S.C. §§ 701–796 (2012).

8. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2012).

Arline, a school teacher alleged disability discrimination against her employer after she was discharged from employment because of her contagious disease that allegedly posed a threat to others in the workplace.⁹ The *Arline* Court provided the contours of the direct threat defense: an individualized inquiry of the safety risks posed by the employee and factual safety determinations based on reasonable medical judgments given the state of knowledge of the nature, duration, and severity of the risks to the health or safety of others.¹⁰

In 1990, Congress enacted the ADA.¹¹ Title I of the ADA, which addresses disability discrimination in employment, incorporated the direct threat concept.¹² The basic principle is that an employer may require that an employee not pose a direct threat to the health or safety of that employee or to others in the workplace.¹³ The direct threat doctrine tries to strike a balance between competing concerns. On the one hand, allowing an unsafe employee to continue to work in the job could lead to tort liability and other problems the employer legitimately wants to avoid.¹⁴ On the other hand, taking an adverse employment action against an employee, where safety concerns are unfounded, may improperly screen out individuals with disabilities.¹⁵ And the law rightly prohibits employers from acting against an employee—because of the employee’s medical condition—on the basis of stereotype and myth and without objective evidence of a significant safety issue.¹⁶ While the

9. *Arline*, 480 U.S. at 276–77.

10. *Id.* at 287–89; *id.* at 287 n.16 (“A person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk.”).

11. 42 U.S.C. §§ 12101–12213.

12. 42 U.S.C. § 12113(b).

13. Although the statutory language does not expressly state a direct threat-to-self defense, the Equal Opportunity Commission regulation on the direct threat defense authorizes a threat-to-self defense, and the U.S. Supreme Court upheld that part of the regulation in *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 77, 87 (2002) (citing 29 C.F.R. § 1630.15(b)(2) (2001)).

14. *Echazabal*, 536 U.S. at 84 (suggesting—moral concerns aside—that avoidance of lost work time “to sickness, excessive turnover from medical retirement or death, litigation under state tort law, and the risk of violating the national Occupational Safety and Health Act of 1970, . . . 29 U.S.C. § 651 *et seq.*” are all reasons for the defense).

15. 42 U.S.C. § 12112(a), (b)(6) (using standards, tests, and criteria that screen out individuals with disabilities may constitute disability discrimination).

16. In discussing the direct threat defense, the ADA’s legislative history provides:

“A person with a disability must not be excluded, or found to be unqualified, based on stereotypes or fear. Nor may a decision be based on speculation about the risk or harm to others. Decisions are not permitted to be based on

fundamentals of direct threat law are solid, case law development reveals a number of unanswered questions concerning the operation of the defense, which this Article elucidates.

Most importantly, there is a lack of clarity in the law concerning the steps employers must take and evidence employers must possess to justify legally acting on the basis of an employee's direct threat to the health and safety of that employee or to others in the workplace. In general, it is seemingly the law that an employer's determination that an employee poses a direct threat for safety reasons is legal if it is objectively reasonable, which is based on objective medical evidence and reasonable medical judgments.

Cases arising on the edge of objective reasonableness present employers with difficult ADA compliance challenges. Employers must navigate this edge but doing so requires additional clarity in the law concerning how judges (and juries) are to evaluate the objective reasonableness of an employer's direct threat determination. Therefore, this Article has three goals: (1) to confirm the objective reasonableness standard for the direct threat defense; (2) to demonstrate how some courts have either improperly failed to use this standard or applied it incorrectly; and (3) to outline suggested changes to the law in this area that will provide greater clarity to employers and employees regarding how courts (and juries) are to evaluate whether an employer's determination of direct threat is objectively reasonable. To accomplish these three goals, Part II of this Article examines the history and purpose of the direct threat doctrine. Part III explains the complicated burden of proof issue regarding direct threat and the interaction between safety-based qualification standards and direct threat. Part IV explains the suggested changes to the objective reasonableness standard.

In general, an employer proves "objective reasonableness" when it demonstrates that it (1) conducted an individualized assessment of the employee's ability to safely perform the job; (2) exhausted all legal requirements to find a reasonable accommodation for the employee who poses the safety concern; and (3) took action against the employee on the basis of a thorough report from a qualified medical provider opining that the employee is not qualified for continued employment in the position in question due to the safety issues. The report should be based on the medical provider's examination of the employee, the provider's review of the employee's relevant

generalizations about the disability but rather must be based on the facts of an individual case."

H.R. REP. NO. 101-485, pt. 3, at 45 (1990), as reprinted in 1990 U.S.C.C.A.N. 445, 468.

medical records, or both. In addition, the provider's explanatory reasons for their safety determination needs to be based on a reasonable medical judgment that is tied to safe performance of the essential functions of the position. Finally, the employer should demonstrate that the medical provider was properly educated on the essential functions of the position and the actual nature of the working environment as part of the provider's individualized assessment of the employee's ability to safely perform the job.

II. HISTORY OF THE ADA'S TITLE I DIRECT THREAT DEFENSE

42 U.S.C. § 12113 states the ADA's Title I direct threat defense. It is titled "Defenses":

- (a) In general. It may be a defense to a charge of discrimination under this [Act] that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.
- (b) Qualification standards. The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.¹⁷

The definitional section of Subchapter I defines "direct threat" to mean "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."¹⁸

The Act's legislative history indicates that the drafters of the direct threat standard intended to codify the basic analysis in *Arline*.¹⁹ When the ADA was signed into law on July 26, 1990, Section 12205a of the Act required that the Equal Employment Opportunity Commission (EEOC) promulgate substantive regulations implementing Title I of the Act within one year of the date of

17. Americans with Disabilities Act, 42 U.S.C. § 12101–12213 (2012); 42 U.S.C. § 12113(a)–(b).

18. 42 U.S.C. § 12111(3) (2012).

19. H.R. REP. NO. 101-485, pt. 3, at 45 (1990), as reprinted in 1990 U.S.C.C.A.N. 445, 468 ("In order to determine whether an individual poses a direct threat to the health or safety of other individuals in the workplace, the [House Judiciary] Committee intends to use the same standard as articulated by the Supreme Court in *School Board of Nassau County v. Arline*.").

enactment.²⁰ The EEOC did so, and the regulations include further explanation of the direct threat defense.²¹ The regulations state:

Direct threat as a qualification standard. The term “qualification standard” may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace.²²

The regulations qualify the direct threat standard:

Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a “direct threat” shall be based on an individualized assessment of the individual’s present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include: (1) [t]he duration of the risk; (2) [t]he nature and severity of the potential harm; (3) [t]he likelihood that the potential harm will occur; and (4) [t]he imminence of the potential harm.²³

The U.S. Supreme Court has addressed the ADA’s direct threat concept on several occasions. In *Bragdon v. Abbott*, the Supreme Court issued an opinion in an ADA case where a dentist refused to perform a dental procedure on a patient infected with the human immunodeficiency virus (HIV).²⁴ The patient-plaintiff sued the dentist under Title II of the ADA’s public accommodations

20. 42 U.S.C. § 12116 (2012).

21. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 (1996); *id.* §§ 1630.15(b)(2), 1630.2(r). Although the Americans with Disabilities Act was amended in 2009—the Americans with Disabilities Act Amendments Act (ADAAA) and new regulations on that Act went into effect in 2011—none of the updated regulations changed the direct threat defense regulations. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as amended, 76 Fed. Reg. 16,978, 17,003 (Mar. 25, 2011) (to be codified at 29 C.F.R. pt. 1630).

22. 29 C.F.R. § 1630.15(b)(2) (emphasis omitted).

23. *Id.* § 1630.2(r).

24. 524 U.S. 624, 629 (1998).

provisions.²⁵ The dentist defended on the ground that performing the dental procedure on the patient would have posed a direct threat to the health or safety of others due to the patient's HIV-positive status and the risk of infection.²⁶ The ADA's public accommodations law has a direct threat defense similar to the one in Title I of the Act.²⁷ The Court held that under this direct threat defense the evaluation of whether a significant risk existed must be determined from the standpoint of the medical provider (here the dentist), the person who refused to provide the treatment or an accommodation.²⁸ In addition, the medical provider's risk assessment must be based on the objective scientific, medical, or other evidence available to health care professionals in the field.²⁹ In adopting this "objective reasonableness" standard, the Court rejected a subjective good faith standard. In other words, a medical provider's subjective belief that a significant risk existed, even if maintained in good faith, would not relieve them from liability if the belief was not objectively reasonable in light of the available medical evidence.³⁰

In *Albertson's, Inc. v. Kirkingburg*, a Title I of the ADA disability discrimination in employment case, a grocery store chain fired and then refused to rehire a commercial truck driver with monocular vision.³¹ The employer based its decision to fire the employee on the employee's inability to meet a Federal Department of Transportation (DOT) safety standard on visual acuity.³² The employer refused to rehire the employer even after the employee secured a DOT waiver from the federal vision requirement.³³ The Court framed the question in the case as "whether . . . an employer who requires as a job

25. *Id.*; 42 U.S.C. § 12182(a) ("No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who . . . operates a place of public accommodation."). The term "public accommodation" includes the "professional office of a health care provider." 42 U.S.C. § 12181(7)(F).

26. *Bragdon*, 524 U.S. at 630.

27. 42 U.S.C. § 12182(b)(3) ("Nothing in this subchapter 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.").

28. *Bragdon*, 524 U.S. at 649.

29. *Id.*

30. *Id.* at 649–50.

31. 527 U.S. 555, 558–60 (1999).

32. *Id.* at 560.

33. *Id.*

qualification that an employee meet an otherwise applicable federal safety regulation must justify enforcing the regulation solely because [the] standard may be waived in an individual case.”³⁴ In siding with the employer, the Court answered the question in the negative.³⁵ The Court rejected an argument by the employee and the government that the employer had to satisfy the direct threat defense in this particular case.³⁶ The employer was permitted to rely on federal regulations establishing the basic visual acuity standard, and the waiver program in and of itself was not sufficient to require an employer to depart from the basic standard.³⁷

In *Chevron U.S.A. Inc. v. Echazabal*, another Title I disability discrimination in employment case, an oil company refused to hire an applicant for a position in its refinery because a medical examination revealed that the applicant’s liver condition would be exacerbated by exposure to toxins at the refinery.³⁸ The employer justified its decision on the ground that the employee was a direct threat to himself.³⁹ Although the Title I statutory direct threat defense language does not include threat-to-self, the EEOC regulation on point recognized a threat-to-self defense.⁴⁰ The Court upheld the EEOC’s threat-to-self addition as it was a reasonable interpretation of the statute and entitled to deference based on the expansive statutory language regarding safety-based qualification standards and direct threat.⁴¹

III. BURDEN OF PROOF AND SAFETY-BASED QUALIFICATION STANDARDS

A. *Burden of Proof and Direct Threat*

This Article has referred to the direct threat concept as a defense. But that is not necessarily the correct terminology. The federal courts of appeals are split on whether direct threat is an affirmative defense that the employer must prove by a preponderance of the evidence, or, alternatively, that proving the lack of a direct threat is the employee’s obligation—at least if safety is a specific

34. *Id.* at 558.

35. *Id.*

36. *Id.* at 569–71.

37. *Id.* at 568–78.

38. 536 U.S. 73, 76 (2002).

39. *Id.* at 77.

40. 29 C.F.R. § 1630.15(b)(2) (1996).

41. *Echazabal*, 536 U.S. at 78–87.

part of the essential job function in question.⁴² The problem arises from ambiguous statutory language. Recall that the direct threat statutory language is in a section labeled “Defenses.”⁴³ The “Defenses” title suggests direct threat is the employer’s affirmative defense. Indeed, the § 12113(a) language uses the term “defense” and is connected to the direct threat language in § 12113(b). Overall, the § 12113 language appears to assign the burden to the employer to prove direct threat.⁴⁴ But, if that is so, the § 12113 language essentially requires the employer to prove that the employee cannot perform an essential job function in a safe manner. This appears to conflict with the ADA’s statutory provisions that assign the burden of proof to the employee to prove that they are a qualified individual who can perform all essential job functions with or

42. Compare *Taylor v. Rice*, 451 F.3d 898, 905–06 (D.C. Cir. 2006) (describing direct threat as a defense), and *Branham v. Snow*, 392 F.3d 896, 906 (7th Cir. 2004) (arguing it is the employer’s burden to show that an employee posed a direct threat to workplace safety that cannot be eliminated by a reasonable accommodation), and *Hutton v. Elf Atochem N. Am., Inc.*, 273 F.3d 884, 893 (9th Cir. 2001) (“Because it is an affirmative defense, the employer bears the burden of proving that an employee constitutes a direct threat.”), with *Justice v. Crown Cork & Seal Co.*, 527 F.3d 1080, 1091 (10th Cir. 2008) (“Though 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.’”), and *EEOC v. Amego, Inc.*, 110 F.3d 135, 144 (1st Cir. 1997) (“[I]t is the plaintiff’s burden to show that he or she can perform the essential functions . . . and is therefore ‘qualified.’ Where those essential job functions necessarily implicate the safety of others, plaintiff must demonstrate that she can perform those functions in a way that does not endanger others.”), and *Moses v. Am. Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996) (per curiam) (“The employee retains at all times the burden of persuading the jury . . . that he was not a direct threat . . .”).

Some federal circuit courts have not decided the question. See *Coleman v. Pa. State Police*, 561 F. App’x 138, 144 n.9 (3d Cir. 2014) (declining to decide whether it is the employer’s burden to prove direct threat or the employee’s burden to disprove direct threat); *Wurzel v. Whirlpool Corp.*, 482 F. App’x 1, 12 n.14 (6th Cir. 2012) (raising the issue but noting that Sixth Circuit has not decided the issue and declining to resolve the issue because it was unnecessary to resolve the case); *Sista v. CDC Ixis N. Am., Inc.*, 445 F.3d 161, 170 n.3 (2d Cir. 2006) (“Although the parties disagree as to which party bears the burden of proving or disproving that an employee poses a direct threat . . . , we need not address this issue, given our resolution of this case.”); *Rizzo v. Children’s World Learning Ctrs., Inc.*, 213 F.3d 209, 213 n.14 (5th Cir.) (en banc) (arguing it is “unclear from the statutory scheme who has the burden on this issue”).

43. 42 U.S.C. § 12113 (2012).

44. *Hutton*, 273 F.3d at 892–93 (noting that the direct threat defense to a charge of discrimination is set forth in the “Defenses” section of the ADA and concluding that direct threat is an affirmative defense that the employer must prove).

without a reasonable accommodation.⁴⁵ In fact, the statutory section that includes direct threat also classifies direct threat as a “qualification standard,” which lends further support to the idea that to be a “qualified individual with a disability,” the employee must prove that they can perform essential job functions without a direct threat.⁴⁶

*B. Safety-based Qualification Standards, Business Necessity,
and Direct Threat*

Another direct threat related issue concerns the treatment of safety-based qualification standards. In a typical direct threat case, an employer is conducting an individualized analysis of the safety risk of a particular employee, often with the help of medical examinations of the employee, medical expert review of the employee’s medical records, and reports prepared by medical experts that evaluate the safety risks of the employee performing the position.⁴⁷ Direct threat applies although there may be no applicable safety-based qualification standard upon which the employer relies.⁴⁸ In other circumstances, an employer may have in place an across-the-board safety-based qualification standard that applies to all applicants or employees and may use

45. 42 U.S.C. § 12112(a) (2012) (stating it is unlawful for an employer to “discriminate against a qualified individual on the basis of disability”); 42 U.S.C. § 12111(8) (2012) (defining “qualified individual”); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 399–401 (2002) (stating the plaintiff bears the burden of proving she is a qualified individual who can perform the essential functions of the job with or without reasonable accommodation); *Amego*, 110 F.3d at 142–44 (stating the plaintiff bears the burden to show that she is a “qualified individual”). *See also* *Hennagir v. Utah Dep’t of Corr.*, 587 F.3d 1255, 1261 (10th Cir. 2009) (explaining that plaintiff must show “she is qualified to perform the essential functions of the job with or without reasonable accommodation”).

46. *Amego*, 110 F.3d at 142–44 (arguing that the plaintiff has the burden to show that she is a “qualified individual” and that in doing so she must demonstrate that she is not a direct threat).

47. *Engle v. Physician Landing Zone*, No. 14-1192, 2017 U.S. Dist. LEXIS 35996, at *3, *17–18 (W.D. Pa. March 24, 2017) (independent medical examination of employee who allegedly posed safety risk); *Price v. WG Yates & Sons Constr. Co.*, No. 4:15cv419-MW/CAS, 2017 U.S. Dist. LEXIS 219449, at *3 (N.D. Fla. March 27, 2017) (medical experts wrote detailed reports about safety risk of employee after reviewing employee’s medical records); *Brooks v. Micron Tech., Inc.*, No. 1:09-cv-00679-AJT-IDD, 2010 U.S. Dist. LEXIS 42739, at *7 (E.D. Va. April 30, 2010) (employer’s doctor reviewed employee’s medical records and conducted a strength test).

48. *EEOC v. Exxon Corp.*, 203 F.3d 871, 875 (5th Cir. 2000) (“The direct threat test applies in cases in which an employer responds to an individual employee’s supposed risk that is not addressed by an existing qualification standard.”).

it as a basis for making personnel decisions.⁴⁹ The question arises as to whether a “business necessity” analysis applies with respect to across-the-board safety-based qualification standards or whether the employer must still independently prove a “direct threat” in this situation.⁵⁰

Section 12113(a) states that employers can defend a “qualification standard[]” on the basis that the standard is “job-related and consistent with business necessity.”⁵¹ Section 12113(b) states that the term “qualification standard” *may* include a direct threat defense, which could be viewed as establishing direct threat as a permissive factor to consider in safety cases.⁵² The generalized § 12113(a) language and the more permissive § 12113(b) language indicate that a pre-existing safety-based qualification standard could be defended on “business necessity” grounds just like any other non-safety job requirements.⁵³ But the EEOC takes the position in its Interpretive Guidance on the ADA that for a safety-based qualification standard to be “job-related and consistent and business necessity,” the employer must in every case still meet the “direct threat” standard articulated § 12113(b) and the EEOC’s Title I direct threat regulation.⁵⁴ The U.S. Supreme Court has questioned whether this

49. *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 558–60 (1999) (employer applied federal visual acuity standard for its commercial truck drivers).

50. *Exxon*, 203 F.3d at 873 (“Safety-based qualification standards are an accepted ground for a defense; the question before us is whether an employer may defend the questioned personnel decision as based on a standard justified as a business necessity or must demonstrate a ‘direct threat’ in each circumstance.”).

51. 42 U.S.C. § 12113(a) (2012).

52. *Verzeni v. Potter*, 109 F. App’x 485, 490–91 (3d Cir. 2004) (arguing that statutory language that includes direct threat as a permissive factor to consider does not require that it always be used when considering safety-related qualification standards).

53. *Exxon*, 203 F.3d at 874 (“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. . . . Physical requirements, for example, such as lifting, walking or seeing, are acceptable defenses as long as the requirements are job-related and consistent with business necessity.”).

54. Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 app. § 1630.15(b) & (c) Disparate Impact Defenses (1996) (“With regard to safety requirements that screen out 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 § 1630.2(r) in order to show that the requirement is job-related and consistent with business necessity.”).

interpretation of the statute is correct.⁵⁵ A few federal courts have specifically rejected the EEOC's position.⁵⁶ Those courts have read the statutory language and the legislative history of the ADA to mean that employer safety-based qualification standards that apply to all employees of a particular class may be defended as a business necessity, and the direct threat test applies when an employer evaluates an employee's safety risk that is not covered by a pre-existing qualification standard.⁵⁷

If a "business necessity" analysis applies to an employer attempt to justify an across-the-board safety-related qualification standard, it is meaningful to discern the difference between that analysis and a direct threat analysis. Presumably, the litigation on this issue itself reveals there is some importance to distinguishing one from the other. A "business necessity" standard could be viewed as setting a lower burden than the "direct threat" standard.⁵⁸ The two standards could be viewed as requiring different proofs.⁵⁹ At the very least, both standards require similar risk-based analyses that focus on weighing risks and harms, avoid stereotypes, and look to objective evidence.⁶⁰ In *Verzeni v.*

55. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 569–70 n.15 (1999) (questioning, but not deciding, whether the EEOC's interpretation, which might impose a higher burden on employers to justify safety-based qualification standards than other job requirements, is correct).

56. The EEOC's Interpretive Guidance on this issue is not subjective to *Chevron* deference because it is not part of the direct threat regulation and only gets due deference to the extent "it is reasonable and harmonizes with the plain language of the statute, its origin and purposes." *Exxon*, 203 F.3d at 873; *Verzeni*, 109 F. App'x at 491; *see also* *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

57. *Exxon*, 203 F.3d at 875 (stating that where safety-based qualifications standards apply to all employees of a given class, "an employer need not proceed under the direct threat provision of § 12113(b) in such cases but rather may defend the standard as a business necessity. The direct threat test applies in cases in which an employer responds to an individual employee's supposed risk that is not addressed by an existing qualification standard."); *Verzeni*, 109 F. App'x at 491 (holding that "a defendant need not satisfy the direct threat defense every time that a safety qualification has an adverse impact on a disabled employee. It may be sufficient for the employer simply to rely on the business necessity defense as laid out in the statute.").

58. *Albertson's*, 527 U.S. at 569–70 n.15 (noting that direct threat analysis might impose a higher burden on employers than business necessity analysis).

59. *Bates v. UPS*, 511 F.3d 974, 993 (9th Cir. 2007) ("Although the specifics of proof in direct threat and business necessity [safety-based ADA] cases may vary, the frameworks are parallel."); *Exxon*, 203 F.3d at 875 ("[D]irect threat and business necessity do not present hurdles that comparatively are inevitably higher or lower but rather require different types of proof.").

60. *Bates*, 511 F.3d at 993, 996 (noting that ADA's business necessity defense analysis for safety-based qualifications standard is parallel to the ADA's direct threat analysis and requires "evaluating whether the risks addressed by the qualification standard constitute a business necessity.");

Potter, the Third Circuit Court of Appeals aptly articulated the business necessity defense of a safety-based qualification standard under the ADA, focusing on the risk-based factors from *Arline*, objective medical evidence, and avoidance of stereotypes and unfounded fears.⁶¹

IV. DIRECT THREAT AND OBJECTIVE REASONABLENESS

A. *Objective Reasonableness Is the Direct Threat Standard Under Title I of the ADA*

In *Bragdon v. Abbott*, the U.S. Supreme Court provided its most detailed analysis of the meaning of direct threat under the ADA.⁶² In *Bragdon*, the dentist refused to perform a dental procedure on a patient infected with the human immunodeficiency virus (HIV).⁶³ The patient-plaintiff sued the dentist under Title II of the ADA's public accommodations provisions.⁶⁴ The dentist defended on the ground that performing the dental procedure on the patient would have posed a direct threat to the health or safety of others due to the patient's HIV-positive status and the risk of infection.⁶⁵ The Court explained that in evaluating the dentist's direct threat defense a court must look to the "objective reasonableness" of the dentist's actions based on the most up-to-date medical evidence.⁶⁶ No special deference was due to the dentist because he was

Exxon, 203 F.3d at 875 ("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.").

61. 109 F. App'x at 491–92 (citation omitted) ("Although the petitioners do not technically have to satisfy the direct threat defense, a factfinder must face the same concerns that the Supreme Court addressed in *Arline* about the nature of the risk, the duration of the risk, the severity of the risk, and the probabilities that the disability will cause harm. For a safety qualification to meet the business necessity defense, it must be based on current medical knowledge about the disability and on the real risks that the disability may present. Any jury considering this defense should be instructed not to base its determination on unfounded fears, but only on medically accurate facts.").

62. 524 U.S. 624, 629 (1998).

63. *Id.* at 628–29.

64. 42 U.S.C. § 12182(a) (2012) ("No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who . . . operates a place of public accommodation."). The term "public accommodation" includes the "professional office of a health care provider." 42 U.S.C. § 12181(7)(F) (2012).

65. *Bragdon*, 524 U.S. at 630.

66. *Id.* at 649–50.

a health care professional.⁶⁷ As the *Bragdon* Court’s opinion explained, “[C]ourts should assess the objective reasonableness of the views of health care professionals without deferring to their individual judgments,” and the risk assessment must be determined from the standpoint of the person who refuses the treatment or accommodation.⁶⁸ *Bragdon* serves as a starting point for the direct threat analysis under Title I, and it makes sense to incorporate the objective reasonableness concept into Title I direct threat defense law.⁶⁹

1. Objective Reasonableness and Employer Determinations of Direct Threat

Bragdon serves as both a guide and a point of departure for understanding the operation of the Title I direct threat defense for employers. Like the *Bragdon* risk assessment under Title II, the Title I direct threat risk assessment must be determined from the standpoint of the individual or entity who took the allegedly discriminatory action and must be evaluated on the basis of an objective medical judgment or other objective evidence. In a Title II direct threat case, the employer is the entity that takes the adverse employment action, and the risk assessment should be viewed from the standpoint of the employer. The current EEOC regulation largely tracks these concepts of risk assessment.⁷⁰

In *Bragdon*, the direct threat decisionmaker also happened to be a doctor who had a duty to be up to date on objective medical evidence. But that is unlike most Title I direct threat cases where the defendant-employer is not a doctor and typically not as well suited as a doctor to assess the safety risk.⁷¹ In Title I cases, the employer—the direct threat decisionmaker—and the medical evaluator are typically split.⁷² It is common for employers to seek out a health care professional to use their medical expertise to help determine whether an

67. *Id.*

68. *Id.*

69. *See id.*

70. 29 C.F.R. § 1630.2(r) (1996) (“The determination that an individual poses a ‘direct threat’ shall be based on an individualized assessment of the individual’s present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.”).

71. *Jarvis v. Potter*, 500 F.3d 1113, 1123 (10th Cir. 2007) (distinguishing the Title II *Bragdon* case where the defendant was a health care professional from a case where an employer is making a direct threat determination under Title I and noting that a health care professional is generally “better trained to assess dangerousness than a typical employer”).

72. *See Nall v. BNSF Ry Co.*, 917 F.3d 335, 338–39 (5th Cir. 2019); *Stragapede v. City of Evanston*, 865 F.3d 861, 865–66 (7th Cir. 2017).

employee poses a direct threat.⁷³ Indeed, in many cases, it could be negligent on its face for an employer to fail to seek the guidance of a medical professional. Employers are not themselves necessarily medical experts. It would seem to be an open question whether an employer should be given some level of deference when it makes a direct threat determination based on an expert medical provider's conclusion that an employee cannot safely perform the job. Indeed, *Arline* reserved "the question whether courts should also defer to the reasonable medical judgments of private physicians on which an employer has relied."⁷⁴ Neither the Supreme Court's *Bragdon* opinion, nor the Supreme Court's *Echazabal* opinion, nor the EEOC regulation directly speak to the question.⁷⁵

73. See *Nall*, 917 F.3d at 338–40; *Stragapede*, 865 F.3d at 864–65; *Anderson v. Consolidation Coal Co.*, 636 F. App'x 175, 178–79 (4th Cir. 2016); *Coleman v. Pa. State Police*, 561 Fed. App'x 138, 140–42 (3d Cir. 2014); *Wurzel v. Whirlpool Corp.*, 482 F. App'x 1, 2–8 (6th Cir. 2012); Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630, App'x § 1630.2(r) Direct Threat (1996) (stating that in making a direct threat determination, the employer may consider relevant evidence such as "opinions of medical doctors, rehabilitation counselors, or physical therapists who have expertise in the disability involved and/or direct knowledge of the individual with the disability"); U.S. EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER AMERICANS WITH DISABILITIES ACT (ADA), Question 12 (July 27, 2000), [hereinafter ENFORCEMENT GUIDANCE ON DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES], <https://www.eeoc.gov/policy/docs/guidance-inquiries.html> [<https://perma.cc/2Q3A-94BC>] ("To meet th[e direct threat] 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.").

74. *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 288 n.18 (1987).

75. The *Bragdon* Court noted that the question about deference to the reasonable medical judgments of doctors on which employers rely merely "reserved the possibility that employers could consult with individual physicians as objective third-party experts." *Bragdon v. Abbott*, 524 U.S. 624, 650 (1998). *Echazabal* and the relevant EEOC regulation do make clear that a reasonable medical judgment needs to rely on "the most current medical knowledge and/or the best available objective evidence." *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 86 (2002); 29 C.F.R. § 1630.2(r) (1996). EEOC Enforcement Guidance states that an employer should be cautious about relying on its own doctor's determination of direct threat if that opinion is contradicted by the opinion of the employee's treating physician. See ENFORCEMENT GUIDANCE ON DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES, *supra* note 73.

2. Case Law Recognition of Objective Reasonableness as the Direct Threat Standard

The public accommodations provisions of Title II are similar to the employment provisions of Title I and so, some federal courts are following *Bragdon* and conceptualizing the direct threat provision in Title I as stating an “objectively reasonable” standard.⁷⁶ The employer complies with the ADA if its determination that an employee poses a direct threat to the health or safety of that individual or others in the workplace is “objectively reasonable.”⁷⁷ And “objective reasonableness” may be satisfied when the employer’s direct threat determination is based on a reasonable medical judgment of a qualified doctor when that doctor has conducted an individualized assessment of the employee and has drawn a reasonable conclusion regarding the safety risks, even if another reasonable qualified doctor or a court would disagree.⁷⁸ Courts, however, are not uniform in this conceptualization and—despite a solid EEOC regulation on point—it is not always clear whether an employer direct threat

76. *Nall*, 917 F.3d at 342; *Jarvis*, 500 F.3d at 1122 (“We recognize that *Bragdon* was not an employment case. . . . But the Court explicitly pointed out that the ADA contains parallel language in its employment provisions . . . and we see no reason not to apply *Bragdon*’s analysis to employment cases.”).

77. *Michael v. Troy Police Dep’t*, 808 F.3d 304, 307 (6th Cir. 2015).

78. *Id.* at 309 (“Reasonable doctors of course can disagree . . . as to whether a particular employee can safely perform the functions of his job. That is why the law requires only that the employer rely on an ‘objectively reasonable’ opinion, rather than an opinion that is correct.”); *Class v. Towson Univ.*, 806 F.3d 236, 251 (4th Cir. 2015) (explaining that objective reasonableness standard in a Title II ADA case is not about whether the court shares the doctor’s medical judgment or whether another doctor has a better judgment but whether the doctor’s judgment in question is “reasonable—i.e., whether it was individualized to [the plaintiff], was reasonably made, and was based on competent medical evidence”); *Jarvis*, 500 F.3d at 1122–23 (explaining that the fact finder’s role is to determine whether the employer’s direct threat determination is “objectively reasonable” and not to independently assess whether it believes that the employee posed a direct threat); *Brooks v. Micron Tech., Inc.*, No. 1:09-cv-00679-AJT-IDD, 2010 U.S. Dist. LEXIS 42739, at *17–18 (E.D. Va. April 30, 2010) (arguing that the court does not independently assess whether the employee poses a direct threat, but instead evaluates whether the employer’s decision was objectively reasonable); *see also Gillen v. Fallon Ambulance Serv., Inc.*, 283 F.3d 11, 31 (1st Cir. 2002) (stating that “the mere obtaining of [a medical] opinion does not automatically absolve the employer from liability under the ADA. . . . [A]n employer cannot slavishly defer to a physician’s opinion without first pausing to assess the objective reasonableness of the physician’s conclusions.”).

determination is “objectively reasonable” if the employer acts on the basis of a medical expert’s judgment that is disputed by another medical expert.⁷⁹

B. Employer’s Procedural Steps in Analyzing Direct Threat Help to Prove Objective Reasonableness

The procedural steps an employer takes to make a direct threat determination go a long way toward deciding whether the employer’s direct threat determination is objectively reasonable. The direct threat concept requires both an individualized assessment of the employee’s ability to safely perform job functions and fully committed attempts to provide reasonable accommodation to the employee to reduce or eliminate the safety risk.⁸⁰ If the employer does not satisfy its obligations on these points, any arguments the employer makes regarding objective reasonableness should fail.⁸¹ Beyond that, objective reasonableness often requires employers to consult with medical professionals to help the employer make a direct threat determination. When an employer uses medical experts, what actions (or inactions) does the law require the employer to take to help demonstrate objective reasonableness? This is an open question.

The Fifth Circuit’s decision in *Nall v. BNSF Railway Co.* is one of the best recent examples of the challenges of trying to determine how to evaluate the

79. *Nall*, 917 F.3d at 338–40 (finding a genuine issue of material fact on whether the employer’s direct threat determination was objectively reasonable although employer’s medical doctors conducted an assessment of the employee and concluded that the employee could not safely perform job functions, while plaintiff’s doctors opined that the employee could safely perform job functions); *Stragapede v. City of Evanston*, 865 F.3d 861, 865–67 (7th Cir. 2017) (finding a genuine issue of material fact on whether employee posed a direct threat even though employer had a doctor’s opinion stating that the employee could not perform the essential functions of the job safely); *Pollard v. Drummond Co.*, No. 2:12-CV-03948-MHH, 2015 U.S. Dist. LEXIS 120279, at *18–23 (N.D. Ala. Sept. 10, 2015) (medical experts disagreed on whether the employee posed a direct threat and so direct threat is a question for the jury); *Nelson v. City of New York*, No. 11 Civ. 2732 (JPO), 2013 U.S. Dist. LEXIS 117742, at *33–42 (S.D.N.Y. Aug. 19, 2013) (finding a genuine issue of material fact on employer’s direct threat determination even after two medical doctors conducted an individualized assessment of the employee and concluded that the employee should not be rehired for safety reasons, while plaintiff’s personal therapist opined that the employee could safely perform the job).

80. 42 U.S.C. § 12113(a), (b) (2012); 29 C.F.R. § 1630.2(r).

81. *Monroe v. Cty. of Orange*, No. 14-CV-1957 (KMK), 2016 U.S. Dist. LEXIS 132408, at *2, *68–71 (S.D.N.Y. Sept. 27, 2016) (finding issue of fact on direct threat for corrections officer with panic disorder because evidence could lead the fact finder to conclude that the employer did not conduct enough of an individualized assessment or attempt to find a reasonable accommodation for the employee).

objective reasonableness of an employer's actions when the employer is utilizing medical experts to evaluate the potential direct threat of an employee.⁸² In *Nall*, a railroad refused to allow an employee who suffered from Parkinson's disease to return to his job as a trainman because of concerns related to his ability to safely perform job duties.⁸³ The employer believed that the plaintiff's physical abilities, related to balance and quick reaction times, precluded safe job performance.⁸⁴ The plaintiff-employee sued for disability discrimination under the ADA, and the employer defended with the direct threat defense.⁸⁵ In its initial opinion, the majority of the appellate court ruled that genuine issues of material fact existed for the jury to determine whether it was objectively reasonable for the employer to conclude that the employee posed a direct threat to others in the workplace.⁸⁶ The summary judgment evidence indicated that (1) the employer's doctors and plaintiff's doctors disagreed as to whether the plaintiff could safely perform job duties; (2) the plaintiff had passed a field test administered by the employer; (3) the employer gave shifting job descriptions over time as to what the essential job duties were; and (4) certain comments made by BNSF employees could be viewed as evidence of discrimination against the employee because he had Parkinson's disease.⁸⁷ Most notably, the majority appeared to state that the employer was liable under the ADA because of procedural irregularities in its evaluation of the employee's safety risk for the job.⁸⁸ The allegation was that the employer was manipulating the evaluation process to try and achieve its desired result of disqualifying the employee from the job.⁸⁹

82. 917 F.3d at 335.

83. *Id.* at 338–39.

84. *Id.*

85. *Id.* at 340.

86. *Nall v. BNSF Ry. Co.*, 912 F.3d 263, 274–76 (5th Cir. 2018), *withdrawn*, 917 F.3d 335, 338 (5th Cir. 2019).

87. *Id.* at 268–73.

88. *Id.* at 271–72.

89. *Id.* (emphasis omitted) (“[T]he question on appeal is not whether it was reasonable for BNSF to conclude that Parkinson's disease symptoms prevented Nall from safely performing his job duties; the question is whether BNSF came to that conclusion via a reasonable process that was not, as Nall alleges, manipulated midstream to achieve BNSF's desired result of disqualifying him. More precisely, the question is whether there is any evidence in the record which, if believed, would be sufficient to support a jury finding that BNSF's procedures for evaluating Nall's disability were unreasonable.”).

The dissenting opinion made clear that the question on the table was whether the employer's direct threat determination was objectively reasonable.⁹⁰ And, according to the dissent, there was no fact question as to whether the employer's decision was objectively reasonable.⁹¹ After the employer learned about the employee's Parkinson's diagnosis, co-workers who observed the plaintiff-employee performing job duties unsafely in the field brought safety concerns of the employee to the employer.⁹² The employer then had independent doctors evaluate the employee, and the doctors verified the safety concerns.⁹³ The employer then conducted a field test to see whether those safety concerns came to pass in the context of actual job duties.⁹⁴ Although the employee technically passed the test, the safety concerns were still exhibited.⁹⁵ It was only after all this that the employer reasonably concluded that the employee posed too great a safety risk to work in the position.⁹⁶ The dissent characterized the plaintiff's evidence as nothing more than experts disagreeing with each other about "bottom-line conclusions" and "merely a good faith dispute between experts after an orderly process."⁹⁷ The dissent also disagreed with the majority's assertion of a "process-based" theory under the ADA.⁹⁸ The dissent argued that the "ADA does not impose liability based on perceived procedural irregularities" by itself.⁹⁹ The question is whether the employer lacked a reasonable medical basis for concluding that the employee presented a direct threat to health of safety and not based on process problems alone. Procedural irregularities would only matter if they made the employer's medical conclusion unreasonable, which was not the case here.¹⁰⁰

90. *Id.* at 279–80 (Ho, J., dissenting). The majority opinion also accepted "objective reasonableness" as the standard to evaluate the employer's direct threat determination. *Id.* at 270 n.5, 274 n.9.

91. *Id.* at 281–83.

92. *Id.* at 282.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 283.

99. *Id.* at 284.

100. *Id.* at 283–84.

Ultimately, the panel withdrew its original opinion and issued a new opinion.¹⁰¹ In the new opinion, the panel reached the same end result with the majority concluding a genuine issue of material fact existed on direct threat¹⁰² and the dissent disagreeing for the same evidentiary reasons.¹⁰³ However, the new majority opinion withdrew its “process-based” theory of liability language and specifically disclaimed any reliance on that theory as support for its decision.¹⁰⁴

The disagreement between the majority and dissent in *Nall* through two rounds of opinions demonstrates the complexity in deciding how to apply the objective reasonableness standard in the direct threat context. Both majority and dissent in *Nall* appear to be correct in concluding that there is no independent requirement under the ADA for the employer to follow a certain set of procedures in every case in making a “direct threat” assessment.¹⁰⁵ But the pragmatic reality is that procedure should still matter in determining the objective reasonableness of an employer’s actions. And following certain procedures should make it easier for the employer to prove its direct threat assessment was reasonable.

Compliance with the following reasonable procedural protocols should place the employer in a better position to argue the objective reasonableness of

101. *Nall v. BNSF Ry. Co.*, 917 F.3d 335, 338 (5th Cir. 2019) (withdrawing prior opinion and substituting new opinion).

102. *Id.* at 343–48.

103. *Id.* at 352 (Ho, J., dissenting) (citations omitted) (“I applaud the majority for withdrawing its earlier opinion in this matter, for the reasons stated in footnote 6 of its revised opinion. Although I would still affirm the district court for the case-specific evidentiary reasons specified in my original dissent (but which are not independently worthy of en banc review), the panel majority has now wisely obviated the need for en banc rehearing in this case, by removing the process-based theory of liability that animated its earlier opinion. There is no basis for such a legal theory under the ADA, for reasons that need not be repeated here—but are well articulated in the petition for en banc rehearing and the persuasive amicus briefs filed by the Association of American Railroads, the Center for Workplace Compliance, and the National Federation of Independent Business.”).

104. *Id.* at 344 n.6 (“The dissent from [the] original opinion, as well as the petition for rehearing en banc and two *amicus curiae* submissions in support of it, expressed concern that the panel majority had imposed a new requirement for assertion of the direct-threat defense, *to-wit*: that in addition to showing that the employment decision was objectively reasonable, the employer must also establish that the process itself that was utilized in reaching that decision, considered separately, was objectively reasonable. Without commenting further on the efficacy of such an approach or on whether the panel majority actually adopted it, we emphasize that nothing in this substitute opinion should be understood as employing that reasoning.”).

105. *Id.* at 347, 352.

their actions. First, as previously indicated, individualized assessment and reasonable accommodation are required.¹⁰⁶ Second, in many cases, the employer should consult with an independent medical provider to evaluate the employee.¹⁰⁷ The medical provider should be qualified to review the medical matters in the medical area that relates to the employee's condition.¹⁰⁸ Third, the medical providers should be educated on the essential job functions of the position and the safety requirements for the position so that they can better understand how the employee's medical condition impacts health and safety in the employee's actual workplace.¹⁰⁹ As the *Nall* case indicates, changes to the essential functions of the job during the course of an independent medical evaluation or field testing in the workplace may lead to a concern of improper manipulation of a result.¹¹⁰ So that type of employer action is to be avoided. Fourth, the medical provider's individualized assessment of the employee should include steps such as examination of the employee, interview of the employee, review of the employee's relevant medical records, and a report on the medical provider's finding and conclusions regarding the employee's safety risk.¹¹¹ The medical provider will need to evaluate the employee's condition and ability to safely perform the job in light of current medical knowledge in

106. 42 U.S.C. § 12113(a), (b) (2012); 29 C.F.R. § 1630.2(r) (1996).

107. See *supra* note 73.

108. See ENFORCEMENT GUIDANCE ON DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES, *supra* note 73 ("To meet th[e direct threat] 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 . . ."). See also *supra* note 73 and accompanying text; *Anderson v. Consolidation Coal Co.*, 636 F. App'x 175, 183 (4th Cir. 2016) (finding that under West Virginia's direct threat provision, reviewing doctors who had the ability to conduct medical testing and were experienced in providing occupational medical evaluations were qualified to give opinion on direct threat issue even though they were not specialists in treating the medical condition of the employee); *Engle v. Physician Landing Zone*, No.14-1192, 2017 U.S. Dist. LEXIS 35996, at *3-4 (W.D. Pa. March 14, 2017) (psychiatrist chosen to conduct independent medical examination of employee who had post-traumatic stress disorder).

109. *Wurzel v. Whirlpool Corp.*, 482 F. App'x 1, 15-16 (6th Cir. 2012) (noting that the doctor had knowledge of employee's job duties and working environment and educated other reviewing physicians about the employee's working environment, and that employee's condition was evaluated with regard to his specific job duties).

110. *Nall*, 917 F.3d at 343-44.

111. *Michael v. Troy Police Dep't.*, 808 F.3d 304, 307-08 (6th Cir. 2015) (noting the employer relied on opinions of medical doctors who personally examined the employee, spent extensive time reviewing test data, and wrote very detailed and thorough reports outlining the reasons why the employee was unable to safely perform job functions).

that field of medicine.¹¹² Fifth, if the medical provider reaches a conclusion that the employee is not safe to perform the job functions, the employer should independently review the medical provider's reasoning for the conclusion to make sure it is not inherently flawed or obviously inadequate.¹¹³ Finally, if the employer is presented with competing conclusions from various experts, it may be helpful for the evidence to demonstrate the reasons why a medical expert who has determined that an employee is unsafe for a specific position disagrees with another expert who has come to the contrary conclusion.¹¹⁴

C. Objective Reasonableness and Civil Procedure

This Article has demonstrated the following: (1) an open question exists as to the burden of proof in a Title I direct threat case; (2) objective reasonableness is the standard for evaluating an employer's direct threat determination; and (3) procedural protocols—even if not required—matter in evaluating the objective reasonableness of an employer's action with respect to direct threat. The remainder of this Article suggests modifications to the civil procedure aspects of Title I direct threat law to improve the law in this area. The focus is on incorporating objective reasonableness and medical evaluation procedural protocols into the direct threat defense and then conveying how these changes should impact summary judgment and jury instructions in direct threat cases.¹¹⁵ Finally, the Article addresses possible objections to these modifications.

112. 29 C.F.R. § 1630.2(r) (1996).

113. *Holiday v. City of Chattanooga*, 206 F.3d 637, 646 (6th Cir. 2000) (finding a doctor's opinion that was only "two scribbled lines at the bottom of a boilerplate evaluation form" was inadequate).

114. *Engle v. Physician Landing Zone*, No. 14-1192, 2017 U.S. Dist. LEXIS 35996, at *22–23 (W.D. Pa. Mar. 14, 2017) (describing employer's doctor who determined that it was unsafe for the employee to work in the position and who explained the reasons why he maintained his same opinion even after the employee's psychiatrist cleared the employee to return to work); see also ENFORCEMENT GUIDANCE ON DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES, *supra* note 73 ("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).").

115. This Article also presented the issue of whether an employer's across-the-board safety-based qualification standard must meet "direct threat" requirements to satisfy the "business necessity"

1. Direct Threat Is an Affirmative Defense

There is clearly ambiguity in the statute concerning burden of proof on direct threat. Given the ambiguity, the best approach is to evaluate the issue on the basis of considerations such as fairness, convenience of the parties, and the ease or difficulty of making proof.¹¹⁶ Because the employer is in a better position than the employee to have all the information that factored into its direct threat determination, it makes sense to put the burden of proof on the defendant-employer to prove the direct threat defense by a preponderance of the evidence.¹¹⁷ For example, the employer should have all the information concerning the medical evaluations of the employee, medical provider reports assessing the employee's safety risk, essential job functions, and other tests or objective information the employer considered in making its determination. Therefore, direct threat should be characterized as a true affirmative defense.

The question then becomes: What are the elements of the direct threat defense that the employer has to prove? Here, I advocate for what could be viewed as a change in the conceptualization and articulation of this defense. The starting point is the definition of direct threat, which is taken directly from the statute and EEOC regulations.¹¹⁸ But, after that, the direct threat defense should be understood to require that the employer prove by a preponderance of the evidence that its determination that the plaintiff-employee posed a direct threat to the health or safety of the individual or others was objectively reasonable. As argued in this Article, that is the appropriate standard.¹¹⁹ The employer must prove objective reasonableness by proving by a preponderance of the evidence that (1) it conducted an individualized assessment of the employee's ability to safely perform the essential functions of the job; (2) it could not eliminate the direct threat by providing the employee a reasonable accommodation; and (3) its direct threat determination was based on a reasonable medical judgment of the employee's ability to safely perform job

defense. *See supra* Section III.B. There may be a way to frame the business necessity defense in a way that incorporates objective reasonableness concepts as well, but that idea is beyond the scope of this Article.

116. *Firefighters Inc. for Racial Equal. v. Bach*, 611 F. Supp. 166, 171 (D. Colo. 1985) (“Considerations of fairness . . . require that the defendant[, in a Title VII case,] have the burden of proving its seniority system is bona fide.”).

117. *Id.* (“Presumptions shifting the burden of proof are often created to conform with a party's superior access to the proof.”).

118. 42 U.S.C. § 12113(a), (b) (2012); 29 C.F.R. § 1630.2(r) (1996).

119. *See supra* Sections IV.A–B.

functions or on the best available objective evidence of the employee's ability to safely perform the essential functions of the job.¹²⁰

Employers should generally be able to rely on reasonable medical expert determinations that an employee poses too much of a safety risk to allow the employee to work in the position even when other medical expert determinations differ. Within a spectrum of reasonableness, one employer may evaluate the objective medical evidence and decide to be more risk-averse than another and to not violate the law. To this end, the "individualized assessment" and "reasonable medical judgment" elements would generally be satisfied when the employer acted on the basis of a reasonable medical judgment from a qualified medical provider opining that the employee is not qualified for continued employment in the position in question due to the safety issues.

The objective reasonableness of the employer's direct threat determination, which may be based on the medical opinion of a qualified medical provider, should consider factors such as the medical provider's examination of the employee, the medical provider's review of the employee's relevant medical records, and the medical provider's evaluations of other relevant tests.¹²¹ In addition, the medical provider's explanatory reasons for their safety determination and medical judgment would need to meet some standard of thoroughness and be tied to safe performance of the essential functions of the position.¹²² Finally, the employer would have to demonstrate that the medical provider was properly educated on the essential functions of the position and the actual nature of the working environment so that there would be assurance that the risk assessment is based on the safe performance of actual job duties.¹²³

2. Objective Reasonableness and Its Impact on Summary Judgment and Jury Instructions

With direct threat as an affirmative defense based on objective reasonableness and, with employer procedures playing a role in proving objective reasonableness, it becomes clearer how to best evaluate direct threat cases at the summary judgment stage and through jury instructions, if trial is reached. Because direct threat is an affirmative defense, the employer will have to conclusively prove each and every element of the defense to be entitled to

120. 29 C.F.R. § 1630.2(r).

121. *See supra* Section IV.B.

122. *Id.*

123. *Id.*

summary judgment.¹²⁴ But, under the objective reasonableness standard, this will basically boil down to the employer proving that no reasonable juror could view the employer's direct threat determination of direct threat as *objectively unreasonable*.¹²⁵ Under this standard, when there are competing medical judgments by different medical providers, the employer should often be able to win on summary judgment because medical experts disagreeing among themselves is not enough to show the employer's objective unreasonableness and create a fact question to go to the jury.¹²⁶ If the employer is acting in reliance on a medical judgment made after the procedural safeguards previously articulated, there would generally have to be summary judgment evidence that the medical judgment is still somehow unworthy of credence, discredited, and not to be relied on to create a fact question for the jury.¹²⁷

If a direct threat case goes to the jury, the foundation of the jury instructions should be the objectively reasonable standard. That is a different approach than is found in many model jury instructions on direct threat.¹²⁸ The model jury

124. FED. R. CIV. P. 56(a) ("A party may move for summary judgment, identifying each . . . defense . . . on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

125. *Nall v. BNSF Ry. Co.*, 912 F.3d 263, 281 (5th Cir. 2018) (Ho, J., dissenting), *withdrawn*, 917 F.3d 335, 338 (5th Cir. 2019) (explaining that for the creation of a genuine issue of material fact "it is not enough that experts disagree over the whether or not the [employee] presents a direct threat to the health . . . of others. Rather, there must be evidence that it was *objectively unreasonable* for [the employer] to reach that conclusion.").

126. *Price v. WG Yates & Sons Constr. Co.*, No. 4:15cv419-MW/CAS, 2017 U.S. Dist. LEXIS 219449, at *3–5, *5 n.2 (N.D. Fla. March 27, 2017) (finding no genuine issue of material fact where employee's physician and defendant's medical experts disagreed on whether employee posed a direct threat to the health and safety of others; treating physician's testimony does not create a "battle of the experts" to be decided by a jury).

127. *Nall v. BNSF Ry. Co.*, 917 F.3d 335, 347 (5th Cir. 2019) ("[A]lthough there is no requirement under the ADA for the employer to follow certain procedures in making a 'direct threat' assessment, the language in *Echazabal* and the related EEOC regulation establishes that intentional disregard for the best available objective evidence, in whatever form it takes, undermines an employer's credibility and renders [the] direct threat conclusion objectively unreasonable." (citing *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002))); *Michael v. Troy Police Dep't*, 808 F.3d 304, 316 (6th Cir. 2015) (Gilman, J., dissenting) (citation omitted) ("Drawing the line between a reasonable versus an unreasonable medical opinion might at times prove difficult, but . . . at the very least, a medical opinion ceases to be objectively reasonable when the 'record is replete with factual evidence available to the [employer] at the time that flatly contradicts [a doctor's] unsubstantiated conclusion.'").

128. NINTH CIRCUIT JURY INSTRUCTIONS COMM., MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT § 12.11 (2019) ("It is a defense to

instructions on the direct threat defense in the circuit courts and from the ABA appear to present the defense to the jury as a *de novo* jury review of whether a direct threat actually existed, according to its view of the evidence.¹²⁹ These model instructions do not use the objective reasonableness term, nor do they seemingly present the concept of objective reasonableness at all.¹³⁰ The model instructions actually encourage the opposite of an objective reasonableness standard. They permit the jury to find in the plaintiff's favor if there is *some evidence* from a medical professional that the employee could safely perform job duties and was not a direct threat.¹³¹ With the changed approach, the mere inclusion of the objective reasonableness concept in some form or fashion would properly reset the jury's focus away from whether the employer made a "correct" direct threat determination to whether it made an objectively reasonable one.¹³² And as part of the objective reasonableness language, jury

the plaintiff's ADA claim if the plaintiff posed a direct threat to the health and safety of others The defendant claiming the direct threat defense must prove by a preponderance of the evidence that the plaintiff posed a direct threat to the health or safety of [others]"); MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE THIRD CIRCUIT § 9.3.1 (2019) ("Your verdict must be for [defendant] if [defendant] has proved both of the following by a preponderance of the evidence: First: [Defendant] [specify actions taken with respect to plaintiff] because [plaintiff] posed a direct threat to the health or safety of [plaintiff] [others in the workplace]"); EMP'T & LABOR RELATIONS LAW COMM., LITIG. SECTION, AM. BAR ASS'N, MODEL JURY INSTRUCTIONS: EMPLOYMENT LITIGATION 66 (Jon W. Green & Susan Potter Norton eds., 2005) (emphasis added) [hereinafter MODEL JURY INSTRUCTIONS: EMPLOYMENT LITIGATION] ("It is [the] defendant's burden of proof that the plaintiff posed a direct threat. . . . *Your* determination must be based on *your* specific assessment of [the plaintiff's] ability to safely perform the essential functions of the job.").

129. MODEL JURY INSTRUCTIONS: EMPLOYMENT LITIGATION, *supra* note 128, at 66.

130. MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 9.61 (2018); COMM. ON PATTERN CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, FEDERAL CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 4.10 (2017); COMM. ON PATTERN JURY INSTRUCTIONS, DISTRICT JUDGES ASS'N: FIFTH CIRCUIT, PATTERN JURY INSTRUCTIONS (CIVIL CASES) § 11.12(C) (2016).

131. In a direct threat case, there is sometimes evidence in the record that the employee's treating physician concluded that plaintiff could safely perform job duties. Such evidence by itself would typically not be enough to overcome the employer's direct threat defense if the employer is relying on a reasonable medical judgment from a qualified medical provider stating that the employee poses too much of a safety risk to work in the job in question. *See Coleman v. Pa. State Police*, 561 F. App'x 138, 145 n.13 (3d Cir. 2014) ("[T]here is no law to bar [the employer] from trusting its own physician's assessment of risk over that provided by [the employee's] treating physician.").

132. *Nall v. BNSF Ry. Co.*, 912 F.3d 263, 281 (5th Cir. 2018) (Ho, J., dissenting), *withdrawn by* 917 F.3d 335, 338 (5th Cir. 2019) ("In a faithful application of the 'objectively reasonable' standard, the question for juries is not whether an employer was 'right' to find a direct threat to safety, but whether it was reasonable to do so. . . . The distinction between what is 'right' and what is simply

instructions should properly bring in language regarding employer consideration of the opinions of qualified medical experts. The following are suggested jury instructions and a jury question on the direct threat defense.

a. *Direct Threat Jury Instructions and Jury Question*

In this case, the defendant-employer has asserted that its decision to discharge the plaintiff-employee was based upon its determination that the plaintiff-employee posed a direct threat to the health and safety of himself or others in the workplace. A direct threat means a significant risk of substantial harm to the health or safety of the plaintiff-employee or others in the workplace. In determining whether an individual would pose a direct threat, 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.

The direct threat defense requires the defendant-employer to prove by a preponderance of the evidence that its determination that the plaintiff-employee posed a direct threat was objectively reasonable. As the fact finder, you must not independently assess whether you believe the plaintiff-employee posed a direct threat. Nor must you accept the defendant-employer's defense merely because the defendant-employer alleges it acted in good faith in concluding a direct threat existed. The defendant-employer must prove by a preponderance of the evidence that its direct threat determination was objectively reasonable; however, the defendant-employer need not prove that its determination was correct.

Objective reasonableness requires the defendant-employer to prove by a preponderance of the evidence that (1) it conducted an individualized assessment of the plaintiff-employee's ability to safely perform the essential functions of the job; (2) no reasonable accommodation exists that would have eliminated any possible direct threat; and (3) its direct threat determination was based on a reasonable medical judgment that the plaintiff-employee could not safely perform

'reasonable' is critical, because the ADA does not forbid reasonable reliance on allegedly incorrect experts, but rather, irrational discrimination against the disabled.").

the essential functions of the job or on the best available objective evidence that the plaintiff-employee could not safely perform the essential functions of the job. A reasonable medical judgment is one that is based on the most current medical knowledge.

In considering whether the defendant-employer's direct threat determination was objectively reasonable, you should consider the defendant-employer's reliance on the opinion of one or more qualified medical experts who have conducted an individualized evaluation of the plaintiff-employee's medical condition and assessed the safety risks of the plaintiff-employee performing essential job functions. A defendant-employer's determination that a person cannot safely perform his job functions is objectively reasonable when the defendant-employer relies upon one or more medical opinions that are objectively reasonable. One medical opinion may conflict with other medical opinions and still be objectively reasonable. However, a medical opinion would not be objectively reasonable when there is convincing evidence that discredits the opinion, and a reasonable defendant-employer should understand that such evidence renders the opinion invalid or unreliable.¹³³

There is not much case law on jury instructions in direct threat cases. But there is indication that some courts would agree with framing jury instructions in a way similar to the one I propose. The Third, Fifth, Sixth, and Tenth Circuits have the most case law focusing on objective reasonableness as the direct threat standard.¹³⁴ In the Tenth Circuit, a jury verdict against an employer in a direct threat case was reversed because the jury instructions did not include and explain the objective reasonableness concept.¹³⁵ It is not far-fetched to believe that other circuits might properly require some type of objective reasonableness

133. The jury question would ask: Did the defendant-employer prove by a preponderance of the evidence that its direct threat determination was objectively reasonable?

134. See *Coleman*, 561 F. App'x at 144–45; *Nall*, 917 F.3d at 342–43; *Michael v. Troy Police Dep't*, 808 F.3d 304, 307 (6th Cir. 2015); *Jarvis v. Potter*, 500 F.3d 1113, 1121–23 (10th Cir. 2007).

135. *EEOC v. Beverage Distrib. Co., L.L.C.*, 780 F.3d 1018, 1021–22 (10th Cir. 2015) (determining that “direct threat” jury instruction stating that the employer had to prove that the employee posed a direct threat was erroneous because under Tenth Circuit case law the employer only had to prove that it reasonably believed the employee working in the job would cause a direct threat; a separate part of the instruction did not cure the error by directing the jury, without explanation, to consider the reasonableness of the employers' belief).

instruction in a direct threat case. That change would significantly improve “direct threat” law.

3. Objections and Responses

There are a variety of possible objections to the approach advocated. First, some might quibble with the burden of proof issue and my advocacy for direct threat as an affirmative defense. There certainly is a good argument that the employee should have to prove the ability to safely perform essential job functions to be a qualified individual.¹³⁶ But even if the burden of proof is flipped to the employee in a direct threat case to address the safety issue, it would still seem that objective reasonableness is the standard and cases should be evaluated on that basis. Indeed, in some direct threat cases the courts are saying they will not resolve the burden of proof issue but are just deciding the case the same way regardless of who has the burden of proof.¹³⁷ The issue seems to be more about whether to conceptualize the standard as objective reasonableness. If so, then the issue becomes how to apply that standard in the context of a set of facts where the employer is provided with conflicting evidence about the employee’s safety risk, without burden of proof issues driving the resolution of the case.¹³⁸

Second, an objection could be made to bringing in the procedural steps the employer goes through to make a direct threat determination as part of the

136. *See supra* Section III.A.

137. *Nall*, 917 F.3d at 343 n.5 (emphasis omitted) (“We do not reach the question of which party bears the burden of proof regarding the direct threat defense. . . . Even assuming arguendo that the burden is [on the employee], at this stage, he has satisfied it.”); *Wurzel v. Whirlpool Corp.*, 482 F. App’x 1, 12 n.14 (6th Cir. 2012) (raising the issue but noting that Sixth Circuit has not decided the issue and declining to resolve the issue because it was unnecessary to resolve the case); *Sista v. CDC Ixis N. Am., Inc.*, 445 F.3d 161, 170 n.3 (2d Cir. 2006) (“Although the parties disagree as to which party bears the burden of proving or disproving that an employee poses a direct threat . . . , we need not address this issue, given our resolution of this case.”); *Rose v. Laskey*, 110 F. App’x 136, 138 (1st Cir. 2004) (finding an employee who made workplace violence threats was not qualified for employment regardless of whether the employer had the burden to prove he posed no threat to safety in order to show he was otherwise qualified or whether the defendant is viewed as having the burden of proving “direct threat” as an affirmative defense).

138. *Nall v. BNSF Ry. Co.*, 912 F.3d 263, 270 n.5 (5th Cir. 2018), *withdrawn*, 917 F.3d 335, 338 (5th Cir. 2019) (“We note that the dissenting opinion acknowledges that we have stated the law correctly [objectively reasonable standard]. Our disagreement with that opinion stems from the proper application of the law in this case—specifically, how to evaluate the objective reasonableness of [the employer’s] actions.”).

overall objective reasonable analysis. Indeed, in *Nall*, the judges on the panel seemed to ultimately agree that there was no independent process-based theory of liability in an ADA direct threat case.¹³⁹ The response is that pragmatically looking at employer protocols in helping to prove objective reasonableness is not the same as imposing liability on the employer for not following a specified set of procedures applicable in every case. If courts look carefully at how employers are taking certain steps to help them make direct threat determinations, it can only help courts make better decisions on the objective reasonableness of the employer's actions.

Third, an objection could be made that the advocated approach is a road map for employers to avoid liability under the defense. Simply put, just find one medical provider who will opine that the employee cannot safely perform job duties and the employer automatically escapes ADA liability and proves the direct threat defense.¹⁴⁰ That is not my position.

My approach is consistent with the purposes of the ADA. Under the *Arline* rationale and the ADA's legislative history, a key point of the ADA is to make sure that employers are not acting against disabled employees on the basis of myth, stereotype, or the lack of objective evidence.¹⁴¹ The objective reasonableness approach—with some level of deference to employer decision-making based on a medical provider's assessment of the employee posing a direct threat—requires thorough individualized assessment, verified attempts at reasonable accommodation, and employer action on the basis of reasonable medical judgments. It does not permit employer actions on the basis of

139. *Nall*, 917 F.3d at 344 n.6, 352.

140. *Nall*, 912 F.3d 263, 273 n.7 (5th Cir. 2018) (emphasis omitted) (“If the proper inquiry is into the reasonableness of the employer's conclusion about the employee's fitness to work, the employer will win at the summary judgment stage as long as one doctor agrees with the employer's decision. Our approach, in contrast, does not distill summary judgment in these cases into a syllogism under which plugging in the proper premises produces a certain result regardless of the facts. Simply put, facts matter, and we reserve material fact issues for juries.”); *Michael v. Troy Police Dep't*, 808 F.3d 304, 315 (6th Cir. 2015) (Gilman, J., dissenting) (“[E]ven if the majority's broad proposition that employers can never be penalized for choosing to credit one objectively reasonable medical opinion over another objectively reasonable medical opinion is correct, there must come a point where a medical opinion ceases to be objectively reasonable. A contrary rule would allow an employer to avoid liability for an adverse employment action simply by seeking the opinion of a doctor known to consistently favor the employer. This expedient would strip employees of the protections that the ADA was intended to provide, and it accordingly cannot be the law.”).

141. *See supra* Parts I & II.

irrational discrimination against a disabled individual that is focused on myth, stereotype, or unfounded evidence.

The advocated approach simply recognizes that it is appropriate to give employers some amount of space to choose to err on the side of workplace safety when a qualified medical provider has opined that there is too much risk involved in allowing an employee to perform the job and that a sufficient explanation exists for the opinion. Within a proper spectrum, some reasonable employers may choose to be more risk-averse than other reasonable employers, and the law should permit erring on the side of greater safety. This approach permits consideration and analysis of arguments that the employer actions were a sham to find a biased medical provider to manufacture an improper opinion on safety, the medical provider's medical judgment is unreliable because of lack of knowledge of the essential job duties or workplace environment,¹⁴² or that the medical provider's opinions were so unsubstantiated that they could not be believed and relied upon by a reasonable employer.¹⁴³ The outcome would generally be, however, that when reasonable medical providers follow proper procedural protocols and then reach different medically reasonable conclusions as to whether a particular employee can safely perform job functions, the employer can choose as a matter of law the path that is more risk-averse.¹⁴⁴ Without this perspective, the law will push the employer to run risks that the law was designed to prevent.¹⁴⁵ This approach would change the results of a number of direct threat cases where courts are seemingly not applying an objectively reasonable standard and are then finding that genuine issues of material fact exist simply because there are conflicting reasonable medical

142. *Justice v. Crown Cork & Seal Co.*, 527 F.3d 1080, 1090–92 (10th Cir. 2008) (denying summary judgment because doubts about whether employer provided a reviewing medical professional with full information about the essential job functions of the electrician position factored into direct threat analysis, creating a material issue of fact).

143. *Keith v. Cty. of Oakland*, 703 F.3d 918, 924 (6th Cir. 2013) (finding employer's doctor failed to make adequate inquiry when the doctor immediately dismissed the employee's ability to perform the job without any analysis at all); *Holiday v. City of Chattanooga*, 206 F.3d 637, 646 (6th Cir. 2000) (finding the doctor's opinion, which was only "two scribbled lines at the bottom of a boilerplate evaluation form," was inadequate).

144. *Michael*, 808 F.3d at 309 ("Reasonable doctors of course can disagree . . . as to whether a particular employee can safely perform the functions of his job. That is why the law requires only that the employer rely on an 'objectively reasonable' opinion, rather than an opinion that is correct.").

145. *Id.* ("[I]n many cases, the question whether one doctor is right that an employee can safely perform his job functions, or another doctor is right that the employee cannot, will be unknowable—unless the employer runs the very risk that the law seeks to prevent.").

determinations from different qualified medical providers about the safety risks, and there is some evidence to support a finding that the employee was not a direct threat.¹⁴⁶

Finally, an objection could be made that *de novo* review by juries of whether the employer made the “correct” direct threat decision is the proper standard. Under this argument, the *Bragdon* standard does not apply to disability discrimination in employment cases under Title I of the ADA, and the law takes a different route than “objective reasonableness.” For the reasons articulated throughout this Article, that standard would not be a good approach.¹⁴⁷ But if that view somehow carries the day, it would require a reshaping of employer decision-making when evaluating safety risks posed by employees. Perhaps the law would need to establish a more formalized system where medical provider disagreements on direct threat can be resolved more authoritatively and definitively such that employers can have assurances that they will be protected by law when making safety decisions.¹⁴⁸ Absent such a change, it would be more difficult to accomplish the purposes of the direct threat defense.

V. CONCLUSION

The direct threat defense should be applicable in limited circumstances. The stakes are high. The law does not want to improperly screen out disabled individuals from employment opportunities based on irrational fear, myth, stereotype, or unfounded evidence. If disabled employees lose job opportunities because of safety issues, they may face challenges finding other types of work and social services to sustain their livelihood. This practical issue should always be a focus. But the law should also provide the employer with

146. *Umanzor v. N.Y.C. Police Dep’t*, No. 14-CV-9850 (VSB), 2018 U.S. Dist. LEXIS 22707, at *10–23 (S.D.N.Y. Feb. 12, 2018); *Pollard v. Drummond Co.*, No. 2:12-CV-03948-MHH, 2015 U.S. Dist. LEXIS 120279, at *18–23 (N.D. Ala. Sept. 10, 2015); *Nelson v. City of New York*, No. 11 Civ. 2732 (JPO), 2013 U.S. Dist. LEXIS 117742, at *28–43 (S.D.N.Y. Aug. 19, 2013).

147. *See supra* Section IV.A.2.

148. *See Anderson v. Consolidation Coal Co.*, 636 F. App’x 175, 178–84 (4th Cir. 2016) (noting with approval the outcome of a collective bargaining agreement process where conflicting medical evidence about the employee’s safety led to consideration of the direct threat issue by a three-doctor panel with resolution by the majority’s decision); *Hart v. City of Johnstown*, No. 6:16-CV-619 (NAM/TWD), 2019 U.S. Dist. LEXIS 52011, *2–20 (N.D.N.Y. Mar. 27, 2019) (granting summary judgment for employer that reinstated a police officer it had previously determined posed a direct threat only after a formal hearing—pursuant to a New York leave procedure law applicable to police officers—resolved a disagreement among doctors and made a determination that the employee was qualified to safely perform the job).

the freedom to act reasonably to protect the health and safety of the individual and other employees in the workplace. The direct threat provision under Title I of the ADA should be an affirmative defense, an objective reasonableness standard should apply to the defense, evaluation of the proof of the defense should take into consideration the procedural steps the employer uses in making its direct threat determination, and an employer's direct threat determination may be objectively reasonable if based on a reasonable medical opinion from a qualified medical provider that the employee poses a direct threat even if another reasonable medical professional disagrees.