SUPREME COURT PERMITS EMPLOYERS TO REFUSE TO HIRE DISABLED INDIVIDUALS WHEN THE POSITION POSES A DIRECT THREAT TO THE HEALTH OF THE INDIVIDUAL EMPLOYEE

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On June 10, 2002, the United States Supreme Court issued a unanimous decision in *Chevron U.S.A. Inc. v. Echazabal*, No. 00-1406, which resolved a conflict among circuit courts of appeals over the legality of a regulation of the Equal Employment Opportunity Commission ("EEOC") that allows an employer to refuse to hire a disabled worker when the position poses a direct threat to that individual's health and safety. The Court held that the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.*, ("ADA"), does in fact permit the regulation recognizing the "threat-to-self" defense.

The ADA prohibits discrimination against a qualified individual with a disability in a number of employer actions, including hiring. Employers may not use qualification standards that screen out disabled individuals. However, the ADA creates an affirmative defense when the qualification standard is "job-related" and "consistent with business necessity." 42 U.S.C. § 12113(a). The ADA expressly provides that such a standard may include a requirement that an individual not pose a direct threat to the health or safety of *other individuals in the workplace*. 42 U.S.C. § 12113(b). The EEOC issued a regulation under the ADA permitting employers to screen out disabled potential workers not only for risks they would pose to others in the workplace, but also for risks to their *own* health or safety. 29 C.F.R. § 1630.15(b)(2).

THE FACTS OF *CHEVRON*

In the *Chevron* case, the employee, Mario Echazabal, worked for an independent contractor at an oil refinery owned by Chevron. Twice, Chevron offered to hire Echazabal if he could pass the company's medical examination. Each time, the exam revealed a liver abnormality and Echazabal was eventually diagnosed with Hepatitis C. Chevron's doctors reported that his liver condition would be aggravated by continued exposure to toxins at the refinery. In each instance, Chevron withdrew its offer of employment. After the second

medical evaluation, Chevron asked the contractor employing Echazabal either to reassign him to a job without exposure to the harmful chemicals or to remove him from the refinery. In response, the contractor terminated Echazabal's employment.

Echazabal commenced an action against Chevron, claiming, *inter alia*, that Chevron violated the ADA by refusing to hire him, or to permit him to continue working in the plant, because of a disability. As a defense, Chevron relied upon the EEOC regulation permitting employers to refuse to hire a disabled worker when the job would pose a "direct threat" to his own health. Echazabal argued that because the ADA expressly recognizes threats only to others in the workplace in the affirmative defense, a health threat to the worker himself is not a permitted defense.

THE DECISIONS OF THE DISTRICT COURT AND COURT OF APPEALS

The District Court granted summary judgment in favor of Chevron. On appeal, the Ninth Circuit considered whether the EEOC's regulation expanding the ADA's "direct threat" defense beyond the "threat to others" express language of the statute was permissible. 226 F.3d 1063 (9th Cir. 2000). The Circuit Court held that the regulation exceeded the scope of permissible rulemaking, finding that Congress intended to include only threats to "other individuals in the workplace" in the "direct threat" defense. The court reasoned that since the statute specifies threats to other persons in the workplace, it is clear that threats to any other individuals, including disabled individuals as well as persons outside the workplace, are not within the scope of the defense. The court also held that such a regulation would conflict with the Congressional policy against paternalism in the workplace.

THE SUPREME COURT PERMITS THE REGULATION

The Supreme Court granted *certiorari* to resolve the conflict between the circuits.[1] In an opinion written by Justice Souter and joined in by the entire Court, the Court, in reversing the Ninth Circuit, held that the ADA permits the EEOC regulation.

[1] The Ninth Circuit's decision conflicted with *Moses v. American Nonwovens, Inc.*, 97 F.3d 446 (11th Cir. 1996) and *Koshinski v. Decatur Foundry, Inc.*, 177 F.3d 599 (7th Cir. 1999).

As an initial matter, the Court reviewed the EEOC's authority to promulgate such a regulation. The Court held that Congress included the threat-to-others provision in the statute as an example of a legitimate qualification that is "job-related and consistent with business necessity," and the statutory language did not suggest that this example was exclusive.

The Court also held that there was no evidence that Congress made a deliberate choice to omit threats-to-self from the scope of the affirmative defense. The Rehabilitation Act, the precursor to the ADA, excepted from the definition of a protected qualified individual anyone who would pose a direct threat to other individuals. 29 U.S.C. § 701 *et seq*. The Rehabilitation Act contained no express provision about threats-to-self, although it had been extended by the EEOC to cover threat-to-self employment. The Court concluded that Congress's decision to list only threats-to-others, and not threats-to-self, did not signify that Congress intended to eliminate this defense, since Congress knew that the EEOC had extended the language of the Rehabilitation Act to include threats-to-self.

The Court also reasoned that if, by specifying a threat-to-others defense, Congress intended to exclude threats to individuals other than those in the workplace, the result would be untenable in that an employer would also not be able to defend a refusal to hire an applicant whose disability would threaten others outside the workplace. After the Court found that Congress had not spoken exclusively on the scope of the affirmative defense, the Court determined that the EEOC may promulgate regulations as long as they comport with the statutory requirement that the qualification standards be "job-related and consistent with business necessity." Chevron argued that the regulation is reasonable because employers want to avoid time lost to sickness, excessive turnover, litigation under state tort law, and violations of the Occupational Health and Safety Act ("OSHA"), which assures "safe and healthful working conditions" for individuals in the workplace. The Court addressed the OSHA concern and agreed that an employer that hired an individual who knowingly consented to the particular dangers of a job would be "asking for trouble" under OSHA since employers are obligated to furnish a place of employment free from recognized hazards that may cause serious physical harm to employees.

Furthermore, in finding this expansive reading of the statutory language reasonable, the Court pointed to the fact that the "direct threat" defense must 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 most available objective evidence." 29 C.F.R. § 1630.2(r). Other factors that must be examined include: "(1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm." 29 C.F.R. § 1630.2(r). The Court concluded that "[t]he EEOC was certainly acting within the reasonable zone when it saw a difference between rejecting

workplace paternalism and ignoring specific documented risks to the employee himself, even if the employee would take his chances for the sake of getting a job." The Court reversed the judgment of the Court of Appeals and remanded the case to the Ninth Circuit for proceedings consistent with its decision.

CONCLUSION

The Court's decision in *Chevron* upheld the EEOC regulation allowing employers to refuse to hire an applicant when the position will be harmful to that individual's health. Although *Chevron* does not introduce a new defense to the ADA, it does definitely expand the range of the statutory affirmative defenses available to employers where the individual poses a health or safety risk to others beyond his immediate co-employees. However, employers must proceed with caution when relying on this defense and must provide an individualized assessment before refusing to hire such an individual.

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