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Paternalistic Discrimination: The Chevron Deference Misplaced In *Chevron U.S.A., Inc. v. Echazabal*

By Tricia M. Patterson*

I. INTRODUCTION

The Americans with Disabilities Act of 1990 (ADA) was promulgated due to Congressional findings that discrimination against individuals with disabilities is pervasive in areas such as employment.[1] Overprotective rules and policies[2] become the backbone for employers in creating a paternalistic discrimination for which a disabled person is made helpless to defend himself and has no other recourse but to plead to the mercy of the courts. Discrimination based on disability "often occurs under the guise of extending a helping hand or a mistaken restrictive belief as to the limitations of persons with disabilities."[3] However, the purpose of the ADA was made clear: "to provide a comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . . [and] to invoke the sweep of congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities."[4]

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* Pepperdine University School of Law, Class of 2003. I would like to thank Hashem for making this possible, and my parents for their unconditional love and support. This Case Note is dedicated to my grandfather, the late Honorable Alex Kraut.

1. 42 U.S.C. § 12101 (2000).

2. *Id.* at § 12101(a)(5)("Individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion" through overprotective rules and policies designed to isolate and segregate those with disabilities.)

3. Gary Phelan and Janet Bond Arterton, DISABILITY DISCRIMINATION IN THE WORKPLACE § 7:09 (1999).

4. 42 U.S.C. § 12101(b)(1)-(4) (2000).

In 2002, the Supreme Court decision in *Chevron U.S.A., Inc. v. Echazabal*[5] (*Echazabal*) made a startling announcement when it ruled in favor of Chevron's argument that an employee, who can perform the essential functions of his job, can be denied employment or terminated due to his disability. The justification for termination centers on the employer's belief that the job would pose a "direct threat" to employees' health; yet the argument is couched under the auspices of the "business necessity" doctrine.[6] The real issue was "whether the ADA permitted the EEOC [Equal Employment Opportunity Commission] to issue regulation 29 C.F.R. section 1630.15(b), which allows employers to defend disability discrimination charges where a person's disability would create a direct threat to himself in the job"[7] (direct threat to self). The Court acknowledged that the ADA defines "direct threat" in terms of risk to others,"[8] yet concluded that deference should be given to the Equal Employment Opportunity Commission's ("EEOC") provision enhancing the ADA's definition to include an employer's right to consider threats both to other workers and to the employee himself.[9] Language such as "may include," when referring to qualification standard requirements, are believed by the Court to suggest that the ADA may tolerate other standards.[10] This belief is felt even though Congress repeatedly expressed that the focus was a direct threat to others; the word "self" was never mentioned.[11]

This Note will explore the famed Chevron Doctrine that gives administrative agencies a great deal of deference when interpreting ambiguous statutes.[12] It will argue that the EEOC's interpretation of "direct threat" was not only unreasonable and inconsistent with the language and underlying purpose of the direct threat defense, but that such interpretation should not have been granted because

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5. Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73 (2002).

6. *Id.* at 76-79.

7. *Supreme Court Upholds ADA's "Threat-To-Self" Defense*, ANDREWS EMPLOYMENT LITIG. REP., June 25, 2002, at 1.

8. *Echazabal*, 536 U.S. at 78-79.

9. *Id.*

10. *Id.*

11. *See generally* 136 CONG. REC. S 9684-03 (1990).

12. *See infra*, note 24.

Congress's intent in the statute was clear and unambiguous. In order to properly address this issue, I will first discuss the birth of the Chevron Doctrine and what triggers its usage; second, the facts of *Echazabal* that leads us to the present ruling. Third, I will explore the Congressional intent behind the ADA statute through the Congressional findings. Fourth, I will analyze the Supreme Court's decision in *Echazabal* and will address the impact of the Court's decision and what it means for all disabled individuals in the workplace today.

II. HISTORICAL BACKGROUND

A. The Birth of the Chevron Doctrine

1. Chevron U.S.A., Inc. v. Natural Resources Defense Council

Chevron U.S.A., Inc. v. Natural Resources Defense Council (*Chevron*) dealt with the interpretation of the term "stationary source" as used in the Clean Air Act of 1977.[13] Through The Clean Air Act Amendments, Congress enacted requirements for states that did not achieve the national air quality standards established by the Environmental Protection Agency (EPA) pursuant to earlier legislation.[14] The Clean Air Act, "both prior to and following the Amendments, did not define the term stationary source for purposes of measuring pollutants."[15] Those states that had not achieved the national air quality standard were required to establish a permit program regulating "new or modified major stationary sources."[16] The EPA regulation allowed for states to adopt a plant-wide definition of the term "stationary sources."[17] Under this "stationary source" or "'bubble concept,' the amount of pollution emitted by a particular facility within a plant could

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13. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

14. *Id.* at 837-38.

15. David M. Hansen, *The Ambiguous Basis of Judicial Deferences to Administrative Rules*, 17 YALE J. ON REG. 327, 330-31 (2000).

16. *Chevron*, 467 U.S. at 837-38 (citing the requirements of The Clean Air Act of 1977).

17. *Id.*

increase as long as the increase was offset by a concomitant reduction in pollution emitted by one or more other facilities in the same plant."[18] The EPA, in turn, implemented a new rule that stated it did not matter if the "source" was located in a non-attainment state or not.[19] A suit was filed challenging the EPA's definition of source and the lower court concluded that "the legislative history bearing on the question was 'at best contradictory.'"[20]

In *Chevron*, the issue was whether the EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble" hinged on a reasonable construction of the statutory term "stationary source."[21] Because the Clean Air Act did not give a concrete definition of what Congress had envisioned to be a "stationary source,"[22] and this particular issue was not addressed in the legislative history,[23] the Supreme Court ruled in favor of the EPA's version of the "stationary source" definition, giving birth to the Chevron doctrine and a two part test to determine if deference should be given to an administrative agency's decision.

2. Chevron Doctrine Two-Prong Test

By ruling in favor of the EPA's statutory interpretation of "stationary source," the Supreme Court established a new standard for reviewing how far an agency can go in interpreting the law.[24] When a court reviews an agency's construction of a statute, there are two questions that must be addressed. The first question is whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, the statute is unambiguous and the test concludes with the court ruling against an agency's

18. Hansen, *supra* note 15, at 331.

19. *Id.*

20. *Chevron*, 467 U.S. at 841 (citing Natural Resources Defense Counsel, Inc. v. Gorsuch, 685 F.2d 718, 726 n. 39 (1982)).

21. *Id.* at 846-47.

22. *Id.* at 851-52.

23. *Id.*

24. *Chevron*, 467 U.S. 837 (1984), is the hallmark case for the initiation of the Chevron Doctrine.

interpretation.[25] However, if the court determines that Congress has not spoken on the matter or directly addressed the issue, the agency's answer is examined to see if it is based on a permissible construction of the statute.[26] If the court finds that an agency's interpretation is reasonable, then the court will defer; however, if the court finds that the interpretation is not reasonable, it will then interpret the statute.[27] In *Chevron*, the Court found that the interpretation by the EPA was reasonable in light of the lack of congressional history on the subject matter.[28]

B. Congressional Intent of the ADA

1. The General Rule and the Prohibition of Paternalism

The ADA provides that:

> (a) In general[.] It may be a defense to a charge of discrimination under this chapter 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. . . (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.[29]

In the Senate's Congressional record, the reason for Section 12113, the defense for employers, was made clear when Senator Harkin of Iowa made the following address:

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25. *Chevron*, 467 U.S. at 481-82.
26. *Id.* at 843-44.
27. *Id.*
28. *Id.* at 865-66.
29. 42 U.S.C. § 12113 (2002).

> Fourth,[30] clarifies the meaning of the defense that an employer can fire or transfer a person who poses a direct threat to the health or safety of *other* individuals in the workplace. At the request of the business community the term direct threat is defined to mean a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.[31]

This sentiment was affirmed by Senator Kennedy when he asserted that "[t]he ADA provides that a valid qualification standard is that a person not pose a direct threat to the health or safety of other individuals in workplace-that is, to other co-workers or customers."[32] The Senate was not only concerned with the safety of others, but with the unfounded fear the community may have in letting those that are disabled to work among them. Allowing for this defense clause in the ADA would provide an employer with the opportunity, should a disabled individual pose a threat to others, to deny or terminate employment. However, the Senate duly noted that:

> [T]he ADA specifically refers to health and safety threats to others. Under the ADA, employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health. . . protecting the individual from opportunistic diseases to which the individual might be exposed. That is a concern that should rightfully be dealt with by the individual, in consultation with his or her private physician.[33]

Senator Kennedy's argument on paternalism is made clear: paternalistic behavior allows for an employer's own prejudices to

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30. 136 CONG. REC. § 9684-03 at S9686 (quoting Sen. Harkin: "With respect to title I of the legislation pertaining to employment, the conference report makes a limited number of clarifying changes to the Senate bill. These changes were made in response to concerns raised by the business community in order to further allay their fears about the legislation.")

31. 136 CONG. REC. S9684-03, at S9686 (emphasis added).

32. *Id.* at S9696.

33. *Id.* at S9697.

rule in favor of termination while ignoring the employee's qualifications and ability to do the work.

2. Attempting To Escape Insurance Costs

Congress goes further, addressing the issue of employers attempting to deny or terminate employment simply to avoid insurance costs. Although it is recognized that people with disabilities will have higher medical fees than others, "an employer may not refuse to hire an applicant because of feared increase in insurance costs . . . [I]f that could be used as a justification for employment discrimination, however, the employment protections of the ADA would, in practice, be more theory than reality."[34] In raising, then dismissing this potential claim for employers, Congress further solidifies the reason for the ADA: the disabled should receive "not pity but respect; not shame but dignity; not neglect but inclusion."[35]

Congress also qualifies its explanation for an employers attempt to circumvent the original intent of the ADA by discussing the definition of subterfuge. The word subterfuge "is used in the ADA to denote a means of evading the purposes of the ADA."[36] The term and its meaning, as used in the ADA, are not to be interpreted by the *Ohio v. Betts* standard.[37] On the contrary, Congress, not agreeing with the Supreme Court's decision and its interpretation of subterfuge, recently reported its intention to issue a bill to overturn the *Betts* decision.[38] The manner of determining whether or not an employee with a disability can or cannot handle the requirements for work in a particular field is clear: "Those with disabilities, including those with infectious diseases and infections, should be judged on the basis of their qualifications and the facts

34. *Id.*

35. *Id.* at S9684.

36. *Id.* at S9697.

37. *Id.*; *Cf.* Ohio v. Betts, 492 U.S. 158 (1989).

38. *Id.* (recognizing that the ordinary meaning of subterfuge includes a specific intent to circumvent or evade a statutory purpose, the Supreme Court, in *Ohio v. Betts*, held there could be no such intent if the challenged provision had been adopted prior to the statute's enactment); *See also Betts*, 492 U.S. at 158.

applicable to them and not on the basis of fear, ignorance, and prejudice."[39] Paternalistic legal interventions deliberately interfere with a person's freedom to choose.[40] Congress's intent with the ADA left no room for interpretation or deference. The focus of the direct threat is to *others* in the workplace and not the individual with the disability. An employer may not take it upon himself to intervene due to fear or concern for the employee in question.

III. CHEVRON U.S.A. INC., V. ECHAZABAL

For twenty four years, Mario Echazabal worked at Chevron's oil refinery in the coker unit[41] beginning as early as 1972.[42] In 1992, Echazabal applied to work for Chevron in the same capacity at the coker unit.[43] Chevron determined that he was qualified for the position and extended him an offer contingent upon passing a physical examination.[44] Chevron's physician discovered that Echazabal's liver was releasing certain enzymes at a higher than normal level.[45] The doctors determined that Echazabal's liver might be damaged by exposure to the solvents and chemicals at the refinery.[46] As a result, Chevron withdrew the job offer.[47]

Echazabal consulted with several doctors and was eventually diagnosed with asymptomatic,[48] chronic active hepatitis C.[49]

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39. 136 CONG. REC. 9684-03 at S9686.

40. Paul Burrows, *Analyzing Legal Paternalism*, 15 INT'L REV. OF LAW AND ECONOMICS, 489 (1995).

41. A coker unit is part of the refinery that exposes employees to solvents and chemicals.

42. Echazabal v. Chevron U.S.A, Inc. ("Echazabal I"), 226 F.3d 1063 (9th Cir. 2000) *rev'd*, 536 U.S. 73 (2002) *on remand*, 336 F.3d 1023 (9th Cir. 2003).

43. *Id.* at 1065.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. M. Persico, et al., *Natural History of Hepatitis C Virus Carriers With Persistently Normal Aminotransferase Levels, available at* http://www.natap.org/2000/april/natural_history4300.html. ("In hepatitis C virus (HCV) patients with persistently normal alanine transaminase (ALT), the progression rate of fibrosis is unknown.")

49. Echazabal v. Chevron U.S.A. Inc., 226 F.3d at 1065.

However, none of the physicians that Echazabal went to for treatment encouraged Echazabal to stop working due to his medical condition.[50] Echazabal continued to work for three more years until 1995, when he again applied to Chevron for a position at the coker unit.[51] Tests showed the same result as before; however, this time Chevron did not allow Echazabal to continue working at the refinery.[52] Echazabal filed complaints with the EEOC and in state court claiming that Chevron discriminated against him on the basis of a disability in violation of the ADA.[53] The case was removed to federal court where the district court of California entered summary judgment in favor of Chevron.[54] Echazabal appealed and was heard by the Ninth Circuit.[55]

The Court of Appeals for the Ninth Circuit ruled that: (1) under the ADA, any direct threats from applicants to their health or safety did not give an employer an affirmative defense to liability for refusing to hire him; and (2) any risk that applicant's liver would be damaged from further exposure to solvents and chemicals present in refinery did not preclude him from being "otherwise qualified" within the meaning of the ADA."[56] The court further opined that "the fact that the statute consistently defines the direct threat defense to include only threats to others eliminates any possibility that Congress committed a drafting error when it omitted from the defense threats to the disabled individual himself."[57] Congressional intent appears to have been meticulously calculated to divorce a "direct threat to self" rationale from the wording of the statute.

Judge Trott, in his dissent, argued that Chevron was entitled to use the "direct threat" defense because (1) Echazabal is not otherwise qualified for the work due to the fact that it will endanger his life; and (2) "the EEOC's relevant regulation provides that 'the

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50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 1065.
55. *Id.*
56. *Id.* at 1063.
57. *Id.* at 1067; *Cf.* United States v. Garvey, 195 F.3d 1053, 1057-58 (9th Cir 1999).

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.'"[58] The Supreme Court agreed and reversed the ruling, holding that the EEOC regulation authorizing refusal to hire an individual because his performance on the job would endanger his own health owing to a disability did not exceed the scope of permissible rulemaking under the ADA.[59]

IV. SUPREME COURT'S ISSUES AND HOLDING

In its review of the *Echazabal* case, the main issue before the Supreme Court was whether the ADA permits a regulation by the EEOC authorizing refusal to hire an individual because his performance on the job would endanger his own health as a result of a disability.[60] The issue rested on the expansion of the ADA's "direct threat" language originating in the statute.[61] The lower court agreed with the argument that the ADA did not explicitly state that the right to bar an employee with a disability is affirmed when they pose a direct threat to themselves in the workplace.[62] However, the Supreme Court reversed the ruling and held that the EEOC regulation did not exceed the scope of permissible rulemaking under the ADA "[s]ince Congress has not spoken exhaustively on threats to a worker's own health, the agency regulation can claim adherence under the rule in *Chevron*."[63]

V. COURT'S ANALYSIS

The Court addressed the "job-related and consistent with business necessity"[64] provision in the ADA, concluding that Congress left "spacious defensive categories, which seem to give an agency (or in the absence of agency action, a court) a good deal

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58. *Id.* at 1074 (quoting 29 C.F.R. § 1630.15(b)(2)).
59. *Echazabal*, 536 U.S. at 73.
60. *Id.* at 2047.
61. *Id.* at 2048.
62. *Id.*
63. *Id.* at 82-85 (referencing *Chevron*, 467 U.S. at 843).
64. *Id.* at 78-80 (quoting 42 U.S.C. § 12113(a) (2000)).

of discretion in setting the limits of permissible qualification standards."[65] The Court qualified its reasoning, stating that discretion is heightened because "'qualification standards' may include a direct threat to others in the workplace." Direct threats fall within the limits of job relation and business necessity.[66] The Court's phrasing "may include," removed the focus from *others* in the workplace, and included employees within the qualification standards.[67]

The Court also did not find that the language in the ADA completely excludes the disabled employee from among those that can suffer a direct harm as a result of the disability.[68] The failure, in this case, "to identify any such established series, including both threats to others and threats to self, from which Congress appears to have made a deliberate choice to omit the latter item as a signal of the affirmative defense's scope," is another reason why the Court ruled against Echazabal.[69] Echazabal used the EEOC's rule interpreting the Rehabilitation Act of 1973 that defined the qualified individual with a handicap as a person who would pose a "direct threat to the health or safety of other individuals."[70] Although neither The Rehabilitation Act nor the ADA says anything about the direct threat to the handicapped employee, the Court believes that this does not conclude that the ADA deliberately omitted direct threat to self.[71] The Court reasoned that "[w]hile the EEOC did amplify upon the text of the Rehabilitation Act exclusion by recognizing threats to self along with threats to others, three other agencies adopting regulations under the Rehabilitation Act did not.[72]

The Court further reasoned that the EEOC's regulation is entitled to survive because the risk of exposing Echazabal to health

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65. *Id.* at 80-82.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* (quoting 42 U.S.C. § 12113(b) (2000)).

71. *Id.*

72. *Id.* (*See* 28 C.F.R. § 42.50 (l)(1) (1990) (Department of Justice); 29 CFR § 32.3 (1990) (Department of Labor), and 45 C.F.R. § 84.(k)(1) (1990) (Department of Health and Human Services)).

hazards violate the national Occupational Safety and Health Act of 1970 (OSHA).[73] The OSHA text makes references to the obligation of the employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[74] Under this theory, Section 651(b) of the Act calling for "every working man and woman in the Nation [to have] safe and healthful working conditions"[75] would mean that Chevron's decision in terminating Echazabal's employment due to direct risk of health would be justifiable. Additionally, these competing objectives put employers at risk by hiring a disabled individual under the ADA yet is contrary to the OSHA policy.[76] This argument shows that the EEOC can be called upon at times to make substantive choices that is the best interest of the disabled person especially when Congress "leaves the intersection of competing objectives both imprecisely marked but subject to the administrative leeway found in 42 Section U.S.C. 12113(a)."[77]

In addressing the area of paternalism, the Court recognized the EEOC's regulation in disallowing that sort of stereotype.[78] Current medical knowledge is one of many factors viewed in light of the risk and severity of the harm to an employee in the workplace.[79] As a result, the Court reasoned that the EEOC was acting within a reasonable zone by rejecting paternalism and refusing to ignore "specific and documented risks to the employee himself, even if the employee would take his chances for the sake of getting a job.[80] Also, when the Court expressed its disfavor for Echazabal's argument that legislative history runs counter to the EEOC's regulation, the Court emphasized that paternalism, as discussed in the hearings, focused more on the misperceptions of individuals

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73. *Echazabal*, 536 U.S. at 84-85.
74. *Id.* (quoting 29 U.S.C. § 654(a)(1) (1970)).
75. *Id.* (quoting 29 U.S.C. § 654(b) (1970)).
76. *Id.*
77. *Id.*; *See also* 42 U.S.C. § 12113(a) (2000).
78. *Id.*
79. *Id.*
80. *Id.*

about disability rather than general terms.[81] The Court also raised the concern that the lower court's decision conflicted with both an Eleventh Circuit and a Seventh Circuit case.[82] Both cases are addressed below.

1. Koshinski v. Decatur Foundry, Inc.[83]

The issue in *Koshinski v. Decatur Foundry, Inc.* was whether an employer can use the ADA as a means to keep an employee from working a job that he his capable of currently doing, but will, sometime in the future, be unable to do as a result of a disabilitating disease that will become increasingly worse over time.[84] The court was faced with two competing interests: (1) the employer's interest in protecting its employees from harmful injuries while protecting itself from any liabilities; and (2) the disabled employee's interest in maintaining quality of life by earning a living while he or she is still able.[85] In 1995, Koshinski experienced pain in his left wrist.[86] After seeing his personal physician, further tests showed he had "'non-occupational'. . . degenerative osteoarthritis."[87] As time progressed, further tests were done and it was determined that his grip strength had become increasingly worse.[88] A final test was done and it was concluded that due to deterioration in his grip strength he was no longer able to perform the necessary functions of his job as a cupola operator.[89] Working a cupola required Koshinski to:

> operate a pneumatic hammer and chisel, a pressurized water hose, various hand tools, a hand joist, fork truck and

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81. *Id.* at note 5.
82. *Id.* at 76-77.
83. Koshinski v. Decatur Foundry, Inc., 177 F.3d 599 (7th Cir. 1999).
84. *Id.* at 600.
85. *Id.*
86. *Id.*
87. *Id.* at 601.
88. *Id.* At 600-01.
89. *Id.* at 601 ("A cupola is a cylindrical shaft blast furnace for re-melting. . . iron before casting. *Id.* at 600 (referencing Webster's II New Riverside University Dictionary 336 (1994)).

> bobcat, he had to go up and down a chain ladder, lift 80 to 100lb. bags and boxes, lift slabs and bricks into overhead position and pound them into place with a hammer or mallet, and paint and shovel.[90]

Evidence pointed to the conclusion that Koshinski had "Kienbock's Disease"[91] and could no longer perform the essential functions of his job.[92] Koshinski had also told the Social Security Administration that: "If I pick up something heavy left wri[s]t hurts,"[93] and admitted at his deposition that "he was incapable of meeting the rigorous demands of the cupola operator position."[94] To qualify for protection under the ADA, Koshinski had to show that he was "a qualified individual with a disability [and] that 'with or without reasonable accommodation, he can perform the essential functions of the employment.'"[95] The District Court held that Koshinski could not show that he was entitled to protection under the ADA and the record clearly showed that he could no longer perform the essential functions of his job.[96]

2. Moses v. American Nonwovens, Inc.[97]

In *Moses v. American Nonwovens, Inc.*, summary judgment was affirmed where an American Nonwovens' (American) employee Mark Moses, suffered from epilepsy.[98] Moses' job required him to work near fast-moving press rollers and conveyer belts.[99] Because he was a web operator, he would sit underneath a

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90. *Id.*

91. Kienbock's Disease is a disease that causes "the lunate (the small bone in the wrist) to collapse," causing pain and decreased movement of the wrist. *Id.* at 601.

92. *Id.* at 602.

93. *Id.*

94. *Id.* at 603.

95. *Id.* (quoting 42 U.S.C. § 12112(a) (1997)).

96. *Id.* at 603.

97. Moses v. American Nonwovens, Inc., 97 F.3d 446 (11th Cir. 1996).

98. *Id.* at 447.

99. *Id.*

conveyer belt with in-running pinch-points.[100] He was also a hot splicer assistant where he worked next to exposed machinery that reached temperatures of 350 degrees Fahrenheit.[101] American knew "he was taking medication for his epilepsy but that his medication was not controlling his seizures." Moses was subsequently fired.[102] Moses brought suit against his employers alleging that he was fired in violation of the ADA as a result of his disability.[103] The court ruled that Moses failed to show that 1) he was not a direct threat to his own health or safety and 2) he still was able perform his duties if reasonable accommodations were available.[104] The court focused on the EEOC's additional language of the "direct threat to self,"[105] concluding that Moses failed to prove he was not a direct threat, that Moses' job duties presented great risks to an employee with seizures, and that Moses did not show that any reasonable accommodations would prove effective.[106] The court duly noted, however, that the employer failed to investigate possible accommodations, which was in violation of the EEOC.[107]

VI. AUTHOR'S ANALYSIS

The Chevron Doctrine calls for a lack of clear Congressional intent in order for an administrative agency to receive deference in its interpretation.[108] Justice Stevens suggested that courts should defer to reasonable agency interpretations. Stevens reasoned that Congress explicitly or implicitly delegates power to administrative agencies to fill gaps in ambiguous statutes.[109] The operative word is ambiguous. The Congressional Record clears up Congress's

100. *Id.*
101. *Id.* at 448.
102 *Id.*
103. *Id.* at 447.
104. *Id.* at 448.
105. 29 C.F.R. § 1630.2(r) (1990).
106. *American Nonwovens, Inc.*, 97 F.3d at 447-48.
107. *Id.* at 448; *See also* 29 C.F.R. §§ 1630.2(r) (1990); 1630.9, Interp. Guidance.
108. *Chevron*, 467 U.S. at 843-46.
109. *Id.*

reason for the ADA and its primary focus: "The conferees reaffirmed the basic precept of the legislation that persons with disabilities, including those with infectious diseases and infections, should be judged on the basis of their qualifications and the facts applicable to them."[110] Moreover, the debate as to whether Congress intended the "direct threat to others" provision to include a direct threat to self also seems to have been raised and dismissed by the language of direct threat defense plainly expressing "Congress's intent to include within the scope of a section 12113 defense only threats to other individuals in the workplace."[111] This raises concerns as to the EEOC's expansion of the ADA's regulation and why the Chevron Doctrine was administered in the first place.

The EEOC's expansion of the ADA's "direct threat" provision in its regulation far exceeds the scope and intent of Congress and their purpose for the ADA.[112] According to the Congressional records, direct threat was never meant to include the direct threat of the disabled employee.[113] This issue was raised and dismissed by Congress stating that "[e]mployers may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health."[114] It has been determined that "paternalistic attitudes and beliefs are the principal causes of disability discrimination."[115] The ADA was specifically designed to prevent this type of implementation.[116] The Supreme Court has rejected this view by overlooking the Congressional talks and affirming the EEOC's decision to insert words that is contrary to the ADA statutory language.[117]

The first section of analysis, Part VII (A), describes how the use of the Chevron Doctrine in deferring to the EEOC's addition of threat to self was misplaced due to the unambiguous language and

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110. 136 CONG. REC. S9684-03 at S9686.

111. Echazabal v. Chevron U.S.A. Inc. , 226 F.3d 1063 at 1068.

112. *Id.* at 1069.

113. *See generally* 136 CONG. REC. S9684-03.

114. *Id.* at S9697.

115. Sedey, *infra* note 175.

116. *Id.*

117. *Echazabal*, 536 U.S. at 73-74.

clear intent of Congress as to the motive and aim of the ADA. If this is the case, the Court should never have ruled in favor of Chevron under a "threat to self" theory. The remaining sections, Parts VII (B)-(D), will illustrate how the EEOC exceeded its scope of permissible rulemaking by interpreting the statute language in a paternalistic fashion, thus harming the disabled and running contrary to the expressed intent of Congress. This note will distinguish the *Echazabal* case from *Koshinski* and *Moses* to show that there is no factual support for the Ninth Circuit consideration of *Echazabal*, and will discuss the OSHA red herring. The final section, Part VII (E), addresses the concerns of the impact the Court's decision will now have for the disabled community.

VII. ANALYSIS

A. The Chevron Doctrine Was Misplaced in Echazabal because There Was Clear Congressional Intent

The Chevron doctrine was never intended to give agencies unfettered discretion to interpret regulatory provisions[118] or to take away the duty of the judicial department to say what the law is.[119] This is confirmed by the doctrine's limiting mechanism on when it can be applied by proof of unclear congressional intent.[120] If a closer reading of the statutory term under the "plain meaning" of Congress rings true, this puts limits on both the courts and the agencies in terms of when they may intervene to decide what Congress had in mind.

The Chevron Doctrine is applied using a two-step process: "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the

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118. See Russell L. Weaver, *Some Realism About Chevron*, 58 MO. L. REV. 129, 138 (1993).

119. Marbury v. Madison, 5 U.S. (1 Cranch) 37 (1803) (holding that the Supreme Court lacked the power to order the Secretary of State to deliver judicial commissions) (Marshall, J.).

120. Unless there is lack of congressional intent or ambiguity in the statute, neither agencies nor courts can make changes contrary to what Congress has spoken to.

agency, must give effect to the unambiguously expressed intent of Congress."[121] Only if this question is answered in the negative, the analysis moves to its second step:

> If, however, the court determines that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[122]

Most courts reach their decision by focusing solely on step one of the Chevron analysis because if congressional intent is found for a statute that is clear and unambiguous, the second step is unnecessary.[123] If the court decides that the statute was in fact ambiguous and an administrative agency makes an interpretation of the statute, "the question for the court is whether the agency's answer is based on a permissible construction of the statute . . . [without] substitut[ing] its own construction of the statutory provision for a reasonable interpretation by the administrator of an agency."[124]

In *Echazabal*, neither unclear congressional intent nor an ambiguous statute was present. It can be perceived that Congress intentionally left a direct threat to self rationale out of the statute in an attempt to reinforce the goal and motivation behind enacting the ADA.[125] Facially, the provision does not include a direct threat to the disabled individual. By specifying that only those threats to

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121. *Chevron*, 467 U.S. 837, 842-43 (1984).

122. *Id.* at 843 (citations omitted).

123. *Id*; *See also* Bruce Fein, *Agency Discretion Unwisely Limited in 'Dimension'*, LEGAL TIMES, Feb. 10, 1986.

124. *Chevron*, 467 U.S. at 843.

125. *Echazabal I*, 226 F.3d at 1066 (Judge Reinhardt for the Ninth Circuit arguing that "the fact that the statute consistently defines the direct threat defense to include only threats to others eliminates any possibilities that Congress committed a drafting error when it omitted from the defense threats to the disabled individual himself.").

other individuals in the workplace are to be included as a defense, Congress confirms that "the term direct threat means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodations."[126] Moreover, the congressional record supports the singular "threat to others" standard, clearly omitting any drafting errors on the part of Congress. The congressional record reiterates the purpose of the "direct threat" language as one that focuses on the other employees in the workplace and not the disabled themselves.[127] The fact that the words "may include" should change the definition to somehow allow for additional words to be added such as "the individual," finds no reasoning within congressional record, on point.[128]

Senator Kennedy, believing that "we have worked out a good resolution"[129] raised the issue of significant risks and stated that:

> [A] specific decision was made to state clearly in the statute that, as a defense, an employer could prove that an applicant or employee posed a significant risk to the health of safety of others . . . it is important, however, that the ADA specifically refers to the health and safety threats of others.[130]

This argument focused on the paternalistic concerns that an employer might have against a disabled employee. Noting that "[t]his is a concern that should rightfully be dealt with by the individual, in consultation with his or her private physician,"[131] shows that Congress's intent to divorce a direct threat to self was

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126. Echazabal v. Chevron U.S.A., Inc. ("Echazabal III"), 336 F.3d 1023 (9th Cir. 2003) (referencing 42 U.S.C.A. § 12113(b)).

127. *Echazabal I*, 226 F.3d at 1066; *See also* 136 CONG. REC. S9684-03.

128. The EEOC argues that the words "may include" invites a modification from the original definition.

129. 136 CONG. REC. S9684-03 at S9686.

130. *Id.* at S9687.

131. *Id.*; *See also* Sch. Bd. of Nassau County, Florida v. Arline, 480 U.S. 273, 273-74 (1987) (involving an action brought by school teacher alleging that her dismissal due to tuberculosis susceptibility violated the Rehabilitation Act. Teachers afflicted with tuberculosis were held by the Court to be "handicapped individuals" within the meaning of the Act and, as a result, discrimination was a violation).

clearly realized in the record. The statute was not ambiguous, unclear, nor silent to this fact.

In addition to Congressional intent, the legislative history of the ADA proves conclusively that a direct threat to self does not apply. In the House of Representatives Conference Reports, the term "direct threat" is used repeatedly.[132] Not once is the term synonymous with a direct threat to oneself.[133] The term is used to refer to others in the workplace with no references being made that the threat is also to the disabled individual.[134] For the Chevron Doctrine to be triggered, a statute must show a lack of clear congressional intent or silence on the issue.[135] Neither one is present in the ADA, therefore, the Chevron Doctrine was misplaced in *Echazabal.*

B. The EEOC Exceeded the Scope of Permissible Rulemaking under the ADA and Lends to Paternalism

The EEOC's regulations interpreting the statutory term that the qualification standard *may* include a requirement that an individual shall not pose a threat to the health or safety of the individual or others in the workplace exceeded the scope of permissible rulemaking under the ADA because it conflicts with the plain meaning of the statute and with congressional intent. In *Federal Elections Commission v. Democratic Senatorial Campaign,*[136] a pre-Chevron case, the court held that an agency interpretation could be overturned if it was contrary to clear congressional intent or because it frustrated the policy that Congress sought to implement.[137] The EEOC exceeded its scope of permissible rulemaking because the language of the provision does not provide for an alternative to a "direct threat to others" reading. Congress almost unanimously[138] supports "a direct threat to the health and

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132. *See generally* H.R. CONF. REP. NO. 101-596, at 57, 60, 77, 84 (1990).

133. *Id.*

134. *Id.*

135. *Chevron*, 467 U.S. 837 (1984).

136. Federal Elections Commission v. Democratic Senatorial Campaign, 660 F.2d 773 (1980) *rev'd on other grounds,* 454 U.S. 27 (1981).

137. *Id.* at 782.

138. *See* 136 CONG. REC., S9684 at S9695 (voting 91 yeas, 6 nays).

safety of other individuals in the workplace,"[139] even specifying co-workers and customers. The additional language not only changes the meaning of the statute and the reason it was implemented in the first place, but it also gives way to paternalistic concerns and a type of indirect discrimination that has only one goal: to keep the disabled ostracized from the society and the workplace. By frustrating Congress's policy and its purpose of the ADA, the EEOC's additional "direct threat to self" language has exceeded the scope of permissible rulemaking.

With regards to federal statutes, Title VII has been interpreted by the Supreme Court to similarly outlaw paternalistic employment policies. For example, in *UAW v. Johnson Controls, Inc.*, [140] the Supreme Court held that respondents could not exclude women with childbearing capacity from lead-exposed jobs regardless of the potential harm to their reproductive health and their unborn children.[141] Potential health issues did not justify the employer's decision to exclude women from positions at a battery manufacturing plant.[142] On the contrary, the Court left the decision of whether to accept the risk of employment to the individual.[143] Based on the facts above, it can be concluded that Congress intended to extend the freedom of choice given to Title VII plaintiffs to the disabled as well.

Paternalistic attitudes and beliefs are the principal causes of disability discrimination. Discrimination on the basis of disability "often occurs under the guise of extending a helping hand or a mistaken restrictive belief as to the limitations of persons with disabilities."[144] A regulation which enables employers to deny employment because a disability might threaten the individual's health or safety could encourage the paternalistic belief that the ADA was designed to eradicate. The direct threat defense cannot be based on an assumption to injuries or harms the employee

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139. *Id.* at S9697.

140. UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991).

141. *Id.*

142. *Id.*

143. *Id.* at 206.

144. Gary Phelan and Janet Bond Arterton, DISABILITY DISCRIMINATION IN THE WORKPLACE § 7:09 (1999).

would probably or may likely face. The statute and case law leave that choice to the disabled and his or her private physician.[145]

C. The Cases of Koshinski v. Decatur Foundry, Inc., and Moses v. American Nonwovens, Inc., are Distinguishable from the Echazabal Case, and Should Not Have Been Raised by the Court.

Koshinski is distinguished from *Echazabal* because, unlike Echazabal, Koshinski could no longer perform the essential functions of his job due to his disability. Koshinski's disability caused the use of his hand, which was needed to perform the basic essentials of his job, to deteriorate, and, according to medical examinations, "needs some permanent accommodation in the work place if possible . . . no exposure to vibration, no high force/high frequency repetitive tasks."[146] Unfortunately, Koshinski's job required operation of: a pneumatic hammer and chisel, a pressurized water hose, and various hand tools. Koshinski's job also required him to go up and down a chain ladder, lift heavy bags, paint, and shovel.[147] Koshinski himself believed that he could no longer perform the work according to deposition testimony, "If I pick up something heavy left wrist hurts. . . swells," and stated to a physician that he was experiencing "constant pain with use . . . 'nothing' could relieve the pain."[148] He finally admitted that he could not meet the demands of his job.[149]

Moses and *Koshinki* are distinguishable from *Echazabal* because neither Echazabal nor his doctors believed that his disability prevented him from performing the essential functions of his job.[150] Not once did Echazabal claim to be in pain so severe that he could no longer meet the demands of his job.[151] On the contrary, the facts in *Koshinski* are in stark contrast to *Echazabal* for three reasons: (1) Echazabal's disability did not render him

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145. 136 CONG. REC. at S9697.
146. *Koshinski*, 177 F.3d 599 at 601.
147. *Id.* at 602.
148. *Id.* at 600.
149. *Id.* at 602.
150. *Echazabal*, 536 U.S. at 76-77.
151. *Id.*

incapable of performing the job's day to day functions; and (2) his private physicians repeatedly tested him and concluded that he should not stop working at the refinery because of his medical condition;[152] and (3) his disability did not stop Chevron from offering him a permanent position in the coker unit when they were already put on notice of his ailments years prior,[153] because he did in fact meet the demands of his job to their obvious satisfaction.

The problem with the Court's holding in *Moses* is that it gives no basis for its decision, and hence, no guidance for a complete and thorough analysis.[154] Additionally, although "American admits that it fired Moses because of his epilepsy . . . Moses does not deny that there was a significant risk that if he had continued working at American, he would have had seizures on the job."[155] Unlike Echazabal, Moses admitted that his seizures did in fact pose a problem in the workplace.[156] Because his job required him to work directly with fast-moving press rollers and machines that reached temperatures of 350 degrees Fahrenheit, epileptic seizures had the potential of posing harm to others around him.[157] Although a "direct threat to others" argument was not mentioned in this case, the issues presented were (1) whether Moses produced evidence from which a reasonable jury could conclude that he was not a direct threat *"or"* (2) that reasonable accommodations were available.[158]

Echazabal proved he was not a direct threat to others or himself in the workplace by presenting evidence showing that "two medical witnesses disputed Chevron's judgment that Echazabal's liver function was impaired and subject to further damage under the job conditions in the refinery."[159] This evidence was ignored. The Court does mention that a reasonable accommodations argument was not raised by Echazabal, however, the EEOC advises

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152. *Echazabal I*, 226 F.3d at 1065.
153. *Id.*
154. *Id.* at 1066.
155. *Moses*, 97 F. 3d at 447.
156. *Id.*
157. *Id.* at 447-48.
158. *Id.* at 447.
159. *Echazabal*, 536 U.S. at 76-77.

employers to "determine whether a reasonable accommodation would . . . eliminate the direct threat."[160] Facts are silent as to whether this ever took place. However, the most compelling argument in Echazabal's favor is that he worked for Chevron in the coker unit for 24 years prior to being terminated; this includes an extra three years after Chevron first became aware of his condition and failed to take any action at that time.

Both *Koshinski* and *Moses* show that the plaintiffs were aware that their conditions prevented them from performing the essential functions of their job. Echazabal, for twenty-three years continued to provide Chevron with quality work that resulted in two job offers from the company. These cases are distinguished from the *Echazabal* case and should not have been raised by the Court as examples.

D. An OHSA Regulation Should Not Be Used to Subterfuge an Employer's Discrimination of a Disabled Employee

Although the text of OSHA's purpose is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions,"[161] it was not designed to aid an employer's paternalistic behavior. The Supreme Court reads this passage to conclude hiring an individual who knowingly consented to the particular dangers a job would pose to him would render the employer liable under OSHA.[162] Whether an employer would be liable under OSHA for hiring an individual who knowingly consented to particular dangers his or her job may impose still remains an open question.[163] However, it is common knowledge that OSHA is comprised of a series of requirements that an employer must comply with in order to maintain healthful work conditions for the employee.[164] For example, OSHA encourages

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160. 29 C.F.R. §§ 1630.2(r) (2000); 1630.9, Interp. Guidance.

161. 29 U.S.C.A. § 651(b) (2000).

162. *Echazabal*, 536 U.S. at 84-85.

163. *Id.*

164. U.S. Department of Labor Occupational Safety & Health Administration, OSHA Act of 1970 Congressional Findings and Purpose, *available at*

employers and employees to reduce safety and health hazards by "institut[ing] new and to perfect existing programs for providing safe and healthful working conditions."[165] Also, it provides for "training programs to increase the number and competence of personnel engaged in the field of occupational safety and health."[166] Moreover, regulations include such things as: "encouraging joint labor-management efforts to reduce injuries and disease arising out of employment," "exploring ways to discover latent diseases," and providing medical criteria which will assure that no employee will suffer diminished health as a result of his work experience.[167] However, none of the regulations allude to termination of employment as a result of a disability stemming from work conditions.[168]

The author finds no competing interests against the ADA and OSHA in this case. Raising OSHA as a defense was not reasonable because Chevron should not have been allowed to place its interest in avoiding time lost to sickness and excessive turnover from medical retirement or death as a reason to raise the argument.[169] Litigation under state tort law as a result of an OSHA violation is not a valid excuse.[170] The Court rejected this view, finding that:

> [T]here is no denying that the employer would be asking for trouble: his decision to hire would put Congress's policy in the ADA, a disabled individual's right to operate on equal terms within the workplace, at loggerheads with the competing policy of OSHA, to ensure the safety of each and every worker.[171]

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http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=OSHACT&p_id=28.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Echazabal*, 536 U.S. at 84-85.

170. *Id.*

171. *Id.*

However, Congress did not create a competing interest with respect to the ADA's direct threat to others and OSHA's providing a workplace free from recognized hazards likely to cause death or serious harm to their employee. One Act is concerned with the threat posed by one employee to another, while the other Act is concerned with safety conditions in the workplace that should be remedied to avoid health concerns to all employees.

OSHA also requires that "all occupational illnesses must be recorded regardless of the severity."[172] However, the record is silent as to whether Chevron ever contacted OSHA after their doctors first tested Echazabal and discovered that his disability is irritated by the toxic fumes present at work. Assuming they did, Echazabal was never terminated from his job. Echazabal also raises an issue that should be taken into greater consideration: "there is no known instance of OSHA enforcement, or even threatened enforcement, against an employer who relied on the ADA to hire a worker willing to accept a risk to himself from his disability on the job."[173] OSHA appears to focus more on preventative measures and procedures for safe and healthful working conditions in the workplace, than terminating one's employment due to exacerbated health conditions.

E. The Impact of the Echazabal Decision

The Supreme Court's ruling will make it difficult for the disabled to ever maintain or sustain employment. By deferring to the EEOC regulation that direct threat to self is a reasonable interpretation of Congresss' intent, "the EEOC regulation will undoubtedly give rise to protracted litigation in this area."[174] In addition to paternalistic discrimination having the potential of becoming uncontrollable within the workplace, another type of discrimination will be added to society's growing list as a result of

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172. *See generally* Bernard L. Erven and Eric E. Barrett, *OSHA: The Occupational Safety and Health Act of 1970*, *at* http://www-agecon.ag.ohio-state.edu/resources/docs/abstract.cfm?DocID=291.

173. *Echazabal*, 536 U.S. at 84-85.

174. Mary Anne Sedey, *The Threat to Safety Defense Under the Americans with Disabilities Act*, 39 FED. B. NEWS & J. 96, 96 (1992).

this ruling: genetic discrimination.[175] Concerns regarding genetic discrimination have already been raised and the argument is a similar one:

> [G]enetic information is, in fact, predictive, but nevertheless we still shouldn't allow employers to use genetic information because it violates some public policy. I think an analog would be the Pregnancy Discrimination Act. Pregnant applicants for employment clearly are more likely, at some point in the future, to request leave from work and therefore represent an increased cost to employers. But we say for policy reasons that employers still can't use pregnancy as a basis for discrimination.[176]

Similarly, the Supreme Court has also ruled in the past that pregnancy discrimination is unacceptable where danger of exposing toxins to an unborn fetus resulted in terminating a pregnant employee. The Court held that it was up to the employee to decide whether to accept the risk.[177] Echazabal faithfully worked as Chevron's employee for twenty years without incident. The choice and risk, if there is one, should rightfully be left up to Echazabal and his personal physicians, the way Congress intended it.

By overturning *Echazabal*, Congress's vision of "bring[ing] forty-three million Americans with disabilities under the protection

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175. A 2002 bill has already been introduced discussing the harm of insurance discrimination as a result of genetic testing on potential applicants for employment. Employers can learn about an employee's genetic information through company medical exams and use the information for the purposes of not hiring a qualified employee. New concerns have been raised in the area of employment discrimination. There is a fear that "the erroneous assumption that if an individual has a certain genetic makeup, that he or she is likely to get a certain illness and will be unable to perform the job." *See infra* note 171, at 70; *See also Enzi Introduces Bill to Prevent Genetic Discrimination, available at* http://www.senate.gov/~enzi/gendis.htm.

176. Cynthia Nance et al., *Discrimination in Employment on the Basis of Genetics: Proceedings of the 2002 Annual Meeting, Association of American Law Schools Section on Employment Discrimination Law*, 6 EMPLOYEE RTS. & EMP. POL'Y J. 57, 69-70 (2002).

177. *See supra* note 139.

of our Constitution"[178] will become a reality. After all, Title VII of the Civil Rights Act of 1964 "put into place a framework for equal opportunity in the workplace,"[179] and "Title I of the ADA is patterned after Title VII of the Civil Rights Act."[180] The potential for *Echazabal* to be overturned seems likely because "the case has been sent back to the Ninth Circuit to decide whether the company's decision not to hire Echazabal was based on. . . 'reasonable medical judgment'."[181] Moreover, the Ninth Circuit has a tendency "to rule against employers."[182] By allowing employers to deny an individual employment because of a disability will threaten the very framework of all discrimination cases that have been held to the contrary and run counter to protective legislation that focus on rights for the disabled. If *Echazabal* is overturned, "antidiscrimination and workplace safety legislation [will continue to] exemplify the liberal postwar American mind set: to utilize the regulator power of government to protect and secure the rights of all citizens, particularly in situations where they could be exploited by powerful and conservative economic or social interests."[183]

VIII. CONCLUSION

There was no need to defer to the EEOC's regulation in this case. One commentator stated that, "*Chevron* made agency interpretations binding and gave them force of law."[184] However, the Chevron deference establishes a formal test that

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178. 136 CONG. REC. S9684-03 at S9697.

179. Judith Richter, *Taking the Worker As You Find Him*, 8 MD. J. OF CONTEMP. LEGAL ISSUES 189, 189 (1997).

180. Phelan, *supra* note 145.

181. Greenebaum Doll, McDonald, *High Court Tells Worker: 'This Is For Your Own Good'* 12 No. 11 KY. EMP. L. LETTER 7 (explaining that the Court reasoned that in order for the defense to be used as crafted in the regulations, it must be based on a "reasonable medical judgment that relies on the most current medical knowledge.").

182. *Id.*

183. Richter, *supra* note 180, at 190.

184. Weaver, *supra* note 119, at 135 (citing Robert A. Anthony, *Which Agency Interpretations Should Bind the Courts*?, 7 YALE J. ON REG. 1, 3 (1990).

should only be administered in the event that Congress has not spoken on the matter or has explicitly delegated the authority to an agency of expertise. The validity of the test has nothing to do with whether or not invoking it would be a good idea for the health and safety of the disabled individual, but gives deference only in situations where Congress did not address the issue. The ADA makes clear the language in the statute that addresses qualifications standards that include a requirement that an individual not pose a direct threat to the health and safety of others in the workplace. There is no mistaking Congress's intent not to allow paternalistic views to overshadow the reason and purpose of the ADA to prevent discrimination in the workplace against individuals who are disabled but can still perform the essential functions of the job. The Chevron doctrine simply was not applicable here.

Today, we say "no" to second class citizenship for people with disabilities, "no" to segregation, isolation, and exclusion, and "no" to patronizing attitudes. Today we say "yes" to treating people with disabilities with dignity and respect, "yes" to empowerment, and "yes" to judging people on the basis of their abilities, not on the basis of fear, ignorance, and prejudice.[185]

185 136 CONG. REC. S9684-03 at S9697.