

**ADA Update: Developments Affecting
Definition of "Direct Threat"¹**

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**David K. Fram
Director, ADA and EEO Services
National Employment Law Institute**

¹ The following paper contains excerpts from **RESOLVING ADA WORKPLACE QUESTIONS: How Courts and Enforcement Agencies are Currently Dealing with Evolving Employment Issues** (Eighth Edition publication date: April 2000). Nothing in this paper is legal advice from Mr. Fram or NELI.

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"Direct Threat" Issues

About This Paper

This paper presents a discussion of the complex questions concerning whether an individual poses a "direct threat" under the ADA, and includes recent case citations on these issues. A basic primer on the definition of "direct threat" can be found in the EEOC's Technical Assistance Manual, Chapter 4.5.

Introduction and Background

An employer may exclude someone from a job if that person would pose a "direct threat" to health or safety. 42 U.S.C. 12113. Therefore, any time an employer wants to exclude someone for *safety-related reasons* resulting from a disability, the employer should be prepared to show that the person poses a direct threat. In other words, according to the EEOC and most courts, the employer should be able to show that the individual poses a "significant risk" of "substantial harm" to the individual or others, and that there is no reasonable accommodation that would reduce the risk of harm below that level.

A number of ADA cases involve situations where an employer fired an employee, or refused to hire an applicant, because the employer believed s/he posed a safety risk because of disability. Many of these cases deal with hidden disabilities, like back impairments, mental illness, AIDS, or epilepsy.

Practical Considerations Involving Direct Threat

Burden of Proving Direct Threat

Most authority indicates that the employer will have the burden of showing that an individual posed a direct threat. Therefore, if an employer wants to exclude someone with a disability for safety reasons, it should have done its homework and should have substantial documentation as to its individualized assessment of both the particular individual and the particular job at issue.

However, some federal courts have held that the employee has the burden of proving that s/he was *not* a direct threat. In Moses v. American Nonwovens, Inc., 97 F.3d 446, 5 AD Cases 1651 (11th Cir.

1996), cert. denied, 117 S. Ct. 964 (1997), the court noted that the "employee retains at all times the burden of persuading the jury either that he was not a direct threat or that reasonable accommodations were available." In Moses, the court also found that although the ADA does not "mandate" an individualized assessment of direct threat, "the possibility of a lawsuit will, as a matter of practice, compel most employers to undertake such an investigation." See also Lachance v. Duffy's Draft House, Inc., 146 F.3d 832 (11th Cir. 1998)(employee has burden of persuasion that "he was not a direct threat or that reasonable accommodations were available").

Some courts have held that who bears the burden of proving direct threat depends on the facts of the case. For example, in EEOC v. Amego, Inc., 110 F.3d 135, 6 AD Cases 997 (1st Cir. 1997), the court considered whether a health care worker, responsible for dispensing medications, posed a direct threat because she had attempted suicide by overdosing on medications. The court held that the *worker* had the burden of proving that she did not pose a direct threat in the position. Specifically, the court stated that since a plaintiff has the burden of proving s/he is qualified, where "essential job functions necessarily implicate the safety of others," s/he must demonstrate that s/he "can perform those functions in a way that does not endanger others." The court noted that there may be other cases where "the issue of direct threat is not tied to the issue of essential job functions but is purely a matter of defense, on which the defendant would bear the burden." In Rizzo v. Children's World Learning Centers, Inc., 173 F.3d 254 (5th Cir. 1999), the court somewhat confusingly stated that "the burden of proof is on the plaintiff to prove that, as a qualified individual, she is not a direct threat to herself or others." However, the court also stated that "when a court finds that the safety requirements imposed tend to screen out the disabled, then the burden of proof shifts to the employer, to prove that the employee is, in fact, a direct threat."

Standard for Showing Direct Threat and Need for Individualized Assessment

The most important thing an employer can do concerning direct threat issues is to perform the individualized assessment mentioned above. According to the U.S. Supreme Court decision in Bragdon v. Abbott, 524 U.S. 624, 118 S.Ct. 2196 (1998), this assessment should be based on objective, scientific information. It is therefore extremely risky for an employer to have a "no-exception" blanket exclusion or to rely on generalizations or stereotypes about particular conditions.

In analyzing whether someone poses a direct threat, the EEOC and courts have said that employers should consider:

- ! the duration of the risk;
- ! the nature and severity of the potential harm;
- ! the likelihood that the potential harm will occur; and
- ! the imminence of the potential harm.

29 C.F.R. § 1630.2(r).

Of course, even if an employer determines that the person poses a significant risk of substantial harm, the employer should analyze whether a reasonable accommodation is available so the individual would not pose a direct threat. The employer should certainly document all of the efforts it took to seek such reasonable accommodations.

Courts have applied the EEOC's standards in determining whether an individual posed a direct threat. For example, in Rizzo v. Children's World Learning Centers, Inc., 173 F.3d 254 (5th Cir. 1999), the court found that a school van driver did not pose a direct threat because of her hearing impairment. Specifically, after an individualized assessment, the court noted that there was no evidence that the plaintiff had any problems driving the van, no evidence of prior accidents or close-calls, and no evidence that she was ever distracted from her duties because of her impairment. In EEOC v. Kinney Shoe Corp., 917 F. Supp. 419, 5 AD Cases 506, 513 (W.D. Va. 1996), *aff'd*, Martinson v. Kinney Shoe Corp., 104 F.3d 683, 6 AD Cases 434 (4th Cir. 1997), although holding for the employer on other grounds, the court applied the EEOC's direct threat standards and found that a shoe salesman with epilepsy did not pose a direct threat. On the other hand, in Robertson v. The Neuromedical Center, 161 F.3d 292 (5th Cir. 1998), the court held that a neurologist with short-term memory problems posed a direct threat where there was evidence that these problems "had already caused various mistakes to be made in patients' charts and in dispensing medicine." In that case, the court also noted that the doctor himself acknowledged that it was only a matter of time before he seriously hurt someone.

At least one federal court has held that an employer proved direct threat by showing a "reasonable belief" that there would be a high probability of substantial harm. In Stratton v. Hawaii Electric Light Co., 1996 U.S. App. LEXIS 33151 (9th Cir. 1996)(unpublished), the employer reasonably believed that the plaintiff was subject to such harm because she was severely allergic to ammonia and her job involved handling blueprints treated with ammonia. However, in Bragdon v. Abbott, 524 U.S. 624, 118 S.Ct. 2196 (1998), the U.S. Supreme Court held that a "good faith" belief that a direct threat existed is *not* a defense.

"Significant" Risk and "Substantial" Harm

The EEOC has stated that "significant" means "highly probable," *not* just "more likely" -- the way some courts looked at safety issues under the Rehabilitation Act. Appendix to 29 C.F.R. § 1630.2(r). Federal courts appear to be using this standard. For example, in Hamlin v. Township of Flint, 165 F.3d 426 (6th Cir. 1999), the court noted that for a risk to be significant, it must be "highly probable." In Hamlin, the town argued that the employee, an Assistant Fire Chief, posed a direct threat since he could not physically fight fires if needed. The court stated that the town needed to present more than mere speculation that someone in such a job (*i.e.*, arguably administrative in nature) would be required to fight fires. Similarly, in EEOC v. Kinney Shoe Corp., 917 F. Supp. 419, 5 AD Cases 506, 513-14, *aff'd*, Martinson v. Kinney Shoe Corp., 104 F.3d 683, 6 AD Cases 434 (4th Cir. 1997), *supra*, the court adopted this "high probability" standard. The court found it persuasive that the plaintiff "has never injured himself or others since he was diagnosed with epilepsy." The court concluded that this evidence "makes the threat of any future injury so remote that it hardly can be considered a direct threat." Some courts have held that "significant" means less than "highly probable." For example, in Onishea v. Hopper, 171 F.3d 1289 (11th Cir. 1999), an ADA Title II prison case involving HIV-infected prisoners, the court concluded that "significant" can mean that there is "proof of a theoretically possible method of transmission."

The EEOC also has stated that "substantial" harm means "serious" harm, not just minor harm. Appendix to 29 C.F.R. § 1630.2(r). The EEOC has written that substantial harm would include a situation where an employee's performance of a particular job function would "immediately and permanently" injure an employee's shoulder "to the point where his left arm will be useless." EEOC Enforcement Guidance: Workers' Compensation and the ADA, No. 915.002 (9/3/96), at p. 10, Example B.

Whether Risk to the Individual Him/Herself is Enough to Prove Direct Threat

As noted above, the EEOC has stated that an employer can satisfy the direct threat standard by showing that the individual poses a significant risk of substantial harm *to him/herself or to others*. 29 C.F.R. § 1630.2(r). Most courts have adopted this standard. However, at least one federal court has held that an employer *cannot* prove direct threat merely by showing that the individual poses a risk of harm to him/herself. In Kohnke v. Delta Airlines, Inc., 93-C-7096, 1996 U.S. Dist. LEXIS 9656 (N.D. Ill. 1996), the court refused to adopt the EEOC's regulations on this point. Rather, the court stated that an individual is a direct threat *only* if s/he poses a significant risk of substantial harm to others.

Availability of Reasonable Accommodation

An employer will probably be unable to prove that someone poses a direct threat if there is a reasonable accommodation available so that the individual would not pose such harm. For example, in Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243 (9th Cir. 1999), the employer argued that the employee -- who experienced fainting episodes -- posed a direct threat because she could hurt others if she fainted while carrying a heavy item. The court noted that since such an incident was simply "possible," the risk was not significant. In addition, the court stated that even if the risk were significant, the employer should have considered possible accommodation, such as allowing the employee to avoid such lifting. In EEOC v. Kinney Shoe Corp., 917 F. Supp. 419, 5 AD Cases 506, 513, *aff'd*, Martinson v. Kinney Shoe Corp., 104 F.3d 683, 6 AD Cases 434 (4th Cir. 1997), *supra*, the court stated that even *if* the shoe salesman posed a danger because of the risk of epileptic seizures, there were reasonable accommodations available so that he would not be a direct threat in his job. The court pointed out that, as a reasonable accommodation, the employer could have removed stock from high shelves so the salesman would not have to climb a ladder and, therefore, avoid having a seizure on the ladder.

In a nationwide training conducted throughout 1996, EEOC headquarters trained its investigators to carefully analyze whether a reasonable accommodation was available to reduce risk or harm below the direct threat level. Investigators were told to analyze a number of potential accommodations (depending on the case) including:

- ! "protective shields or other safety equipment or devices";
- ! "permission to store medication at the workplace";
- ! "breaks for medication or rest";
- ! "use of leave to adjust medication or treat contagion"; and
- ! "reassignment (for current employees only, and as a last resort)."

EEOC ADA Case Study Training (1996), C.S.6 at p. 3.

Applying Direct Threat Standard to Cases Involving Workplace Injuries

Sometimes, employers believe an individual poses a direct threat because that person has had a workplace injury. In investigating cases where an individual with a disability is adversely treated because of a prior workplace injury, the EEOC has stated that its investigators should consider:

- ! "whether the prior injury is related to the person's disability (e.g., if employees without disabilities in the person's prior job had similar injuries, this may indicate that the injury is not related to the disability and, thus, is irrelevant to the direct threat inquiry");
- ! "the circumstances surrounding the prior injury (e.g., the actions of others in the workplace or the lack of appropriate safety devices or procedures may have caused or contributed to the injury)";
- ! "the similarities and differences between the position in question and the position in which the prior injury occurred (e.g., the prior position may have involved hazards not present in the position under consideration)";
- ! "whether the current condition of the person with a disability is similar to his/her condition at the time of the prior injury (e.g., if the person's condition has improved, the prior injury may have little significance)";
- ! "the number and frequency of prior occupational injuries";

- ! "the nature and severity of the prior injury (e.g., if the injury was minor, it may have little or no significance)";
- ! "the amount of time the person has worked in the same or a similar position since the prior injury without subsequent injury"; and
- ! "whether the risk of harm can be lowered or eliminated by a reasonable accommodation."

EEOC Enforcement Guidance: Workers' Compensation and the ADA, No. 915.002 (9/3/96), at pp. 9-10.

Whether an Employer Can Balance "Significance" of the Risk Against "Substantialness" of the Harm

Although the EEOC has said there must be both a "significant" risk and "substantial" harm, one very difficult issue is whether risk and harm can be *balanced*. In other words, the question is whether less risk will be required where the harm is very great. For example, suppose an employee operates a nuclear power plant. If the risk is only 1/1000 that harm will occur (probably not a "significant" risk), but the harm is that a nuclear power plant operator will blow up a city (definitely "substantial" harm), it seems likely that a court *would* balance risk and harm.

It appears that courts *are* in fact balancing risk and harm in cases where the harm would be very grave. For example, in Montalvo v. Radcliffe, 167 F.3d 873 (4th Cir. 1999), an ADA Title II case, the court considered whether a 12-year old boy with AIDS would pose a direct threat in a karate school. The court balanced risk and harm in holding that the boy could be excluded from the school because of the safety implications. Specifically, the court noted that "when the disease at risk of transmission is, like AIDS, severe and inevitably fatal, even a low probability of transmission could still create a significant risk." Likewise, in Onishea v. Hopper, 171 F.3d 1289 (11th Cir. 1999), a Title II prison case, the court considered whether HIV-infected prisoners could be denied access to certain programs -- such as flower arranging, gardening, and automotive repair -- because of their HIV status. The court stated that "the potential gravity of the harm . . . imbues certain odds of an event with significance." By way of analogy, the court noted that "we are far more likely to consider walking a tightrope to pose a significant risk if the rope is fifty feet high than if it is one foot off the ground. This is so even if the odds of losing our balance

are the same however far we have to fall.” Therefore, the court concluded that “when the adverse event is the contraction of a fatal disease, the risk of transmission can be significant even if the probability of transmission is low: death itself makes the risk "significant.” Similarly, in several cases involving surgeons with HIV or AIDS, courts have stated that the risk is minuscule, but the harm is very great; these courts have ruled in favor of employers that wanted to remove such individuals from their invasive surgery tasks. For example, in Mauro v. Borgess Medical Center, 137 F.3d 398 (6th Cir. 1998), the court found that an operating room surgical technician who refused to submit to an HIV test posed a direct threat because he occasionally had to put his hands in the patient's body cavity, and he had cut himself during past medical procedures. The court specifically noted that it was "weighing" the probability of transmission against the harm that could occur and how the disease is transmitted. Likewise, in Doe v. University of Maryland Medical System, 50 F.3d 1261, 1266, 4 AD Cases 379 (4th Cir. 1995), the hospital suspended a neurosurgical resident (who was infected with HIV from a needle stick) from surgery, and offered him other residencies not involving surgery. The doctor refused the hospital's offer and was terminated from the residency program. The court held that a neurosurgeon with HIV posed a direct threat -- even though there was no documented case of surgeon-to-patient transmission -- in light of the harm that would result. Similarly, in Bradley v. University of Texas M.D. Anderson Cancer Center, 3 F.3d 922, 924, 2 AD Cases 1297 (5th Cir. 1993), cert. denied, 510 U.S. 1119, 3 AD Cases 192 (1994), the court allowed the employer to transfer an HIV-positive surgical technician even though risk of transmission was small, because of the "catastrophic consequences" if transmission did occur. Likewise, in Scoles v. Mercy Health Corp., 887 F. Supp. 765, 772, 3 AD Cases 1665 (E.D. Pa. 1994), the hospital suspended the privileges of the Director of Surgery to perform diagnostic or therapeutic invasive procedures. The hospital later reinstated him on the condition that he disclose his HIV-status to patients. The court found that an HIV-positive surgeon posed a direct threat to patients even though "there is a great deal of uncertainty in the measure of the risk." The court based its decision on the fatal nature of AIDS, and the fact that *some* risk did exist.

Importance of Analyzing the Actual Job at Issue

Aside from performing an individualized assessment of the person, it also is critical to perform an assessment of the job's actual requirements. If the individual has a condition that does not cause harm given the particular job's requirements, s/he will not be found to pose a direct threat. For example, in Mantolite v. Bolger, 767 F.2d 1416, 1 AD Cases 811, amended, 38 FEP Cases 1517 (9th Cir. 1985),

the court found that the U.S. Postal Service improperly excluded an individual with epilepsy from a letter sorting job. The employer's reason for rejecting the individual was that she posed an unacceptable risk of injury because of her record of photic sensitivity (*i.e.*, exposure to flashing lights could cause seizures). However, the court found that the plaintiff had photic sensitivity where the light flashed at a rate of fifteen times per second. In the actual job, the rate was no faster than one flash per second. In addition, the plaintiff testified that in 12 years in her previous job (a job more dangerous than letter sorting), she had no seizures that resulted in injury.

A number of other cases have held that an individual did not pose a direct threat given the actual job duties. For example, in Doe v. D.C., 796 F. Supp. 559, 569, 2 AD Cases 197 (D.D.C. 1992), the court held that the City improperly refused to employ someone with HIV in a firefighter position; the court noted that "the risk of transmission by a firefighter during the performance of official duties is so remote as to be unmeasurable." In another firefighter case, Roe v. D.C., 842 F. Supp. 563, 569, 2 AD Cases 1632 (D.D.C. 1993), vacated on other grounds, 25 F.3d 1115 (D.C. Cir. 1994), the lower court held that a firefighter with hepatitis B could not be prohibited from performing mouth-to-mouth resuscitation; the court found it significant that the Centers for Disease Control "do not consider the risk of salivary transmission of [hepatitis B] as anything more than theoretical." Similarly, in Chalk v. U.S. District Court, 840 F.2d 701, 706-08, 1 AD Cases 1210 (9th Cir. 1988), the court held that the employer improperly removed a teacher with AIDS from classroom duties; the court noted that there is simply no danger of transmitting AIDS from a teacher to students in the classroom setting. Likewise, in EEOC v. Dolphin Cruise Line, Inc., 945 F. Supp. 1550, 6 AD Cases 187 (S.D. Fla. 1996), the court held that an individual with HIV did not pose a direct threat as an entertainer/staff member on a cruise ship because the risk of transmission in the "particular work environment" was too remote.

On the other hand, a number of cases have held that the individual poses a direct threat *because of* the safety sensitive nature of the actual job duties. For example, in Burroughs v. City of Springfield, 163 F.3d 505 (8th Cir. 1998), the court considered whether a police recruit with diabetes posed a direct threat. The recruit had suffered two episodes where he became dysfunctional and disoriented while he was on duty (although no harm occurred during these episodes). The court held that -- in light of these episodes -- the recruit posed a direct threat, noting that "the risk of an armed patrol officer being unable to function in an emergency situation is not a risk we are prepared to force a police department to accept. The inherent and substantial risk of serious harm arising from such episodes, given the nature of police work, is self-evident." In Daugherty v. City of El Paso, 56 F.3d 695, 4 AD Cases 993 (5th Cir. 1995),

cert. denied, 516 U.S. 1172 (1996), the court held that someone with insulin-dependent diabetes would, as a matter of law, pose a direct threat as a bus driver (following Chandler v. City of Dallas, 2 F.3d 1385, 1395, 2 AD Cases 1326 (5th Cir. 1993) cert. denied, 511 U.S. 1011 (1994)). The court specifically noted that the employer did not have a duty to accommodate the individual by requesting a "waiver" from the U.S. Department of Transportation. Similarly, in Wood v. Omaha School District, 25 F.3d 667, 668-69, 3 AD Cases 481 (8th Cir. 1994), the court allowed the school district to demote insulin-dependent diabetics from school van drivers to lower-paid aide positions because of the "dangers inherent in insulin-using diabetics driving school buses." Likewise, in Myers v. Hose, 50 F.3d 278, 4 AD Cases 391, 394 (4th Cir. 1995), the court held that an individual's diabetes, severe heart condition and hypertension would make him a safety risk as a bus driver. The court noted that the plaintiff's condition "would profoundly compromise the safety of his passengers, pedestrians, and other motorists." Interestingly, the court quoted the lower court's notation that "[i]t is difficult to imagine the public outrage, let alone the potential liability, if plaintiff . . . had an accident after suffering a heart attack behind the wheel."

Several cases concerning safety-sensitive work, such as Doe v. University of Maryland Medical System, Bradley v. University of Texas M.D. Anderson Cancer Center, and Scoles v. Mercy Health Corp., involved surgeons and were discussed earlier. Another revealing case in which an individual was found to pose a direct threat is Altman v. NYC Health & Hospitals Corp., 100 F.3d 1054, 6 AD Cases 73 (2d Cir. 1996). In that case, the plaintiff, the Chief of Medicine for the hospital, was denied reinstatement after treatment for alcoholism and enrollment in a recovery program. He had gotten treatment after he was found visibly drunk while treating a patient. The court found that, despite his treatment, the plaintiff posed a direct threat because of the nature of his duties (for example, treating patients, making decisions as to proper courses of treatment by other doctors). The court noted that the plaintiff's proposed accommodation of "monitoring" would not reduce the risk to "insignificant" proportions since the plaintiff had -- in the past -- been able to drink a great deal of alcohol without detection by his colleagues.

In a number of other cases, courts found that the particular plaintiff was properly excluded from the job because s/he posed a direct threat. For example, in Huber v. Howard County, Md., 849 F. Supp. 407, 3 AD Cases 262, 268-69 (D. Md. 1994), aff'd, 56 F.3d 61, 4 AD Cases 864 (4th Cir.), cert. denied, 516 U.S. 916 (1995), the court found that the plaintiff with asthma posed a safety risk in a firefighter job because there was a "ten percent" chance he could become incapacitated during fires. The court noted

that, given "the life and death circumstances facing firefighters," the employer "does not have to assume such a ten percent risk."

Whether "Off-Duty" Conduct Can be Used to Prove Direct Threat

Courts have held that "off-duty" conduct is relevant in ADA cases, including cases analyzing whether an individual poses a direct threat. For example, in Johnson v. The New York Hospital, 96 F.3d 33 (2d Cir. 1996), the court found that the plaintiff's off-duty conduct, in which he became intoxicated and belligerent with security guards, was relevant to whether he posed a direct threat in his position as a hospital nurse.

Blanket Exclusions

Blanket exclusions of particular conditions are frequently difficult to justify, especially if the employer does not perform an individualized assessment of the applicant or employee who is being excluded. For example, in Bombrys v. City of Toledo, 849 F. Supp. 1210, 1213-21, 3 AD Cases 651 (N.D. Ohio 1993), the court enjoined the blanket enforcement of the city's rule against hiring police officers with insulin-dependent diabetes. The court, in analyzing the particular plaintiff, found that he was qualified for the job; specifically, he had passed all of the physical examinations and was able to control his diabetes by taking insulin. The court also examined the specific job, finding that nothing in the job prevented a police officer from controlling his blood sugar level, and an on-duty officer could easily and safely take insulin. Significantly, the court found that insulin-dependent diabetics were currently serving as officers without any problems.

Likewise, in Sarsycki v. United Parcel Service, 862 F. Supp. 336, 3 AD Cases 1039, 1044 (W.D. Okla. 1994), the court concluded that the company unlawfully excluded the plaintiff from a job as a delivery truck driver because of its blanket exclusion of insulin-dependent diabetics. Again, the court found that the company had not performed an individualized assessment, and that it could not show that the plaintiff posed a direct threat. In particular, the court noted that the plaintiff's evidence showed that he had not a hypoglycemic episode since he was diagnosed with diabetes. In addition, the plaintiff demonstrated that *even if* he posed a risk of harm, he could safely perform the job with reasonable

accommodation (*i.e.*, having food within reach, driving vehicles under 10,000 pounds, and not carrying passengers or hazardous materials). Importantly, in Kapche v. City of San Antonio, 176 F.3d 840 (5th Cir. 1999), the court agreed to revisit its earlier holdings allowing police departments to uniformly exclude police officers with insulin-dependent diabetes. The court noted that, although driving is an essential function of a police officer's job, an officer with insulin-dependent diabetes may be able to show s/he is qualified in light of medical improvements for individuals with diabetes.

Mental Disabilities as Direct Threat

Many direct threat cases involve mental disabilities, especially because of the uncertainties frequently associated with such conditions. For example, many people believe that people with mental disabilities automatically pose a danger in the workplace. Mental disabilities, like physical disabilities, require an individualized assessment. It is very important for the employer to focus on *why* the individual poses a safety risk (for example, is the individual threatening to harm other employees, or is s/he simply talking to him/herself?), and whether there is a reasonable accommodation available.

Medical Examinations and Disability-Related Questions When Safety Issues Arise

If an employer has a legitimate concern that an individual may pose a direct threat, the employer may ask relevant disability-related questions and may require relevant medical examinations. In a nationwide training conducted throughout 1996, the EEOC instructed investigators to this effect. The EEOC stated that "[i]f there is a legitimate reason for believing that [an individual] might pose a direct threat, the [employer] may lawfully make inquiries and/or conduct medical exams necessary to determine" whether the individual, "in fact, poses a direct threat." EEOC Case Study Training (1996), C.S.6 at p. 5. Similarly, in its Enforcement Guidance on the ADA and Psychiatric Disabilities, the EEOC has stated that a question or examination is job-related and consistent with business necessity when an employer "has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition." EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities, No. 915.002 (3/25/97), at p. 15.

Furthermore, the EEOC has stated that the individual "has an obligation to cooperate" with an employer's lawful efforts "to determine whether s/he poses a direct threat, and whether that threat could be reduced or eliminated by reasonable accommodation." C.S.6 at p. 14. If the employer does have a legitimate concern and if the individual "refuses to cooperate and by so doing prevents [the employer] from being able to obtain the information necessary to make a proper assessment," the individual "would not be able to claim that [the employer's] determination of direct threat was discriminatory." *Id.*

Courts have allowed medical examinations when deemed necessary to determine whether an individual posed a direct threat, and to determine whether job modifications were necessary to avoid safety risks. For example, in EEOC v. Prevo's Family Market, Inc., 135 F.3d 1089 (6th Cir. 1998), the court held that the grocery store could require a produce clerk to submit to a medical examination when he disclosed that he had HIV. The court pointed out that the employee admittedly had incurred scrapes, cuts, and puncture wounds in his job and that he shared cutting utensils which were not always properly cleaned.