

TASC/NAPAS

Q & A on Burden of Proof in Direct Threat Cases

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Q. I am litigating an ADA employment case in which the employer is contending that my client is not qualified for her job because she poses a direct threat to others. The parties are now preparing cross-motions for summary judgement. Who has the burden of proof on the direct threat issue?

A. This question has sharply divided the federal Courts of Appeals, which have provided three distinct analyses of the issue. Thus, at least at this point in time, the answer to the question depends on where the case is being litigated.

I. The Statutory Background

The “Defenses” section of Title I of the ADA, 42 U.S.C. § 12113, provides in pertinent part:

(a) In general. It may be a defense to a charge of discrimination ... that an alleged application of qualification standards ... 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.

(b) Qualification standards. The term “qualification standards” [in subsection (a)] may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the work place.

Given that Title I mentions direct threat in the context of potential defenses available to an employer, a strong argument can be made that – as with other affirmative defenses – the defendant has the burden of proof. The ADA’s legislative history seems to support this conclusion. *See* H.R. Rep. No. 101-485, pt. 3, at 46, *reprinted in*, 1990 U.S.C.C.A.N. 445, 469 (“the plaintiff is not required to prove that he or she poses no risk”). The EEOC’s interpretative guidance also appears to place the burden on the employer to establish that the employee constitutes a direct threat. *See* 29 C.F.R. Pt. 1630, App., § 1630.2(r).¹ Finally, the Supreme Court has stated, in a Title III case, that the defendant bears the burden of establishing the existence of a direct threat. *Bragdon v. Abbott*, 524 U.S. 624, 652 (1998) (“The [defendant] was required to establish that there existed a genuine issue of material fact” regarding the existence of a direct threat.).

As shown below, however, the appellate courts have not uniformly followed this straightforward approach in Title I cases.

II. The Court Decisions

¹ The EEOC’s litigation position on this issue, however, appears to be somewhat fluid. While the EEOC initially argued that the defendant bears the burden of proof on the direct threat issue, *see EEOC v. Amego, Inc.*, 110 F.3d 135, 137, 142 (1st Cir. 1997), it subsequently has argued as an *amicus* “that where the essential job duties necessarily implicate the safety of others, the burden may be on the plaintiff to show that she can perform those functions without endangering others; but where the alleged threat is not so closely tied to the employee’s core job duties, the employer may bear the burden of proof.” *Rizzo v. Children’s World Learning Centers, Inc.*, 213 F.3d 209, 213 n.4 (5th Cir.) (en banc), *cert. denied*, 531 U.S.958 (2000).

A. Eleventh Circuit – Plaintiff Always Bears the Burden of Proof

In *Moses v. American Nonwovens, Inc.*, 97 F.3d 446 (11th Cir. 1996) (per curiam), *cert. denied*, 519 U.S. 1118 (1997), an employee with epilepsy was terminated from a job in which he worked near dangerous machinery. In sustaining summary judgment in favor of the employer, the Eleventh Circuit held that “[t]he employee retains at all times the burden of persuading the jury ... that he was not a direct threat or that reasonable accommodations were available,” and that the plaintiff “failed to produce probative evidence that he was not a direct threat.” *Id.* at 447. *Accord Waddell v. Valley Forge Dental Assoc., Inc.*, 276 F.3d 1275, 1280 (11th Cir. 2001) (holding that dental hygienist who was fired after he was diagnosed with HIV infection had burden of proving that he was not a direct threat to patients), *cert. denied*, 535 U.S. 1096 (2002); *LaChance v. Duffy’s Draft House, Inc.*, 146 F.3d 832, 836 (11th Cir. 1998) (holding that person with epilepsy who was fired from his job as a line cook due to his seizures had burden of proving that he was not a direct threat).

B. Second, Fifth, Seventh & Ninth Circuits – Defendant Bears the Burden of Proof

The Second, Fifth, Seventh, and Ninth Circuits have interpreted Title I literally, holding that direct threat is a defense that defendant has the burden to prove. In these circuits, this standard is applied even when the employee’s job implicates safety considerations.

- Second Circuit – *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 220 (2d Cir. 2001) (holding that the defendant failed to meet its burden of proof that a convenience store employee with occasional seizures constitutes a direct threat); *cf. Hargrave v. Vermont*, 340 F.2d 27, 35 (2d Cir. 2003) (holding in a case under Title II of the ADA and Section 504 of the Rehabilitation Act that the defendant bore the burden of proof on direct threat).
- Fifth Circuit – In *Rizzo v. Children’s World Learning Centers, Inc.*, 84 F.3d 758 (5th Cir. 1996) (*Rizzo I*), a person employed by a day care center whose job included driving a school van was terminated due to her hearing

impairment. The employer contended that the hearing impairment rendered her unable to perform the essential job functions because she was a direct threat to the safety of the children. The Fifth Circuit reversed the district court's decision to grant summary judgment for the employer and ruled that the employer bore the burden to prove that the employee was a direct threat. *Id.* at 764. In a subsequent appeal, the Fifth Circuit upheld the jury verdict for the plaintiff. *Rizzo v. Children's World Learning Centers, Inc.*, 213 F.3d 209 (5th Cir.) (en banc) (*Rizzo II*), *cert. denied*, 531 U.S. 958 (2000). In a split decision, the majority declined to decide the burden of proof issue since the employer had not objected at trial to the jury instruction that placed the burden of proof on it. As such, the appellate court's review of the burden of proof instruction was limited to the question of whether it constituted "plain error," and the majority concluded that the instruction was not plainly erroneous since the "district judge carefully followed the marching orders we gave him" in *Rizzo I*. *Id.* at 213.

- Seventh Circuit -- *Branham v. Snow*, 392 F.3d 896, 906-07 & n.5 (7th Cir. 2004) (in Rehabilitation Act case challenging IRS's refusal to hire man person with diabetes as criminal investigator due to concern that he could not perform the job safely, the court followed ADA decisions and held that the IRS had the burden of proving that the person posed a direct threat even though it related to qualification standards); *Dadian v. Village of Willmette*, 269 F.3d 831, 841 (7th Cir. 2001) (in case under the Fair Housing Act and Title II of the ADA, the court placed the burden of proof on the defendant to establish direct threat); *U.S. EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1283-84 (7th Cir. 1995) (in Title I case, the court indicated that the defendant had the burden to establish that the employee is a direct threat).

- Ninth Circuit -- *Echazabal v. Chevron USA, Inc.*, 336 F.3d 1023, 1027 (9th Cir. 2003) (holding that employer had the burden of proving direct threat); *Hutton v. Elf Atochem North America, Inc.*, 273 F.3d 884, 893 (9th Cir. 2001) (holding that employer met his burden of proving that the employee constituted a direct threat); *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999) (“Because this is an affirmative defense, Wal-Mart bears the burden of proving that [the plaintiff] is a direct threat.”)

C. First & Tenth Circuits – Who Bears the Burden of Proof Depends on the Job

The First and Tenth Circuits have developed a compromise position on this issue, holding that the allocation of the burden of proving direct threat depends on whether the employee’s essential job functions implicate safety.

In *EEOC v. Amego, Inc.*, 110 F.3d 135 (1st Cir. 1997), the plaintiff was employed as a team leader in a group home for individuals with disabilities, and her job duties included the administration and monitoring of medications. After she intentionally overdosed on drugs several times, she was diagnosed with mental illness. The district court granted summary judgment for the employer, and the First Circuit upheld that ruling. The appellate court specifically rejected the EEOC’s argument that the defendant had the burden of proving that the employee constituted a direct threat. The court noted that (1) the employee bears the burden of proving that she is qualified to perform the essential job functions, either with or without reasonable accommodation; and (2) the essential job functions of the team leader included administration and monitoring of the residents’ medications. *Id.* at 141. The court concluded that it could “discern no congressional intent to preclude the consideration of essential job functions that implicate the safety of others as part of the ‘qualifications’ analysis, particularly where the essential functions of a job involve the care of others unable to care for themselves.” *Id.* at 143. The court reasoned that shifting the burden of proof to the defendant under these circumstances “would lead to the anomalous result that there is a lesser burden of proving qualifications on a plaintiff where the job involves the care of others, and necessarily entails risk to others, than when the job does not.” *Id.* at 144. Thus, the court held:

[I]n a Title I ADA case, it is the plaintiff's burden to show that he or she can perform the job, and is therefore "qualified." Where those essential job functions necessarily implicate the safety of others, plaintiff must demonstrate that she can perform those functions in a way that does not endanger others. There may be other cases under Title I 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.

Id.

The Tenth Circuit drew a similar dichotomy in *McKenzie v. Benton*, 388 F.3d 1342 (10th Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3473 (U.S. Feb. 2, 2005) (No. 04-1057). In that case, a woman who had worked as a sheriff's deputy for ten years resigned after she began to suffer from post-traumatic stress disorder, which resulted in her firing her gun at her father's grave, incidents of self-mutilation, drug overdoses, and psychiatric hospitalizations. After receiving treatment, the plaintiff asked her former employer to consider her for any open positions. The employer ultimately refused to re-hire her, citing liability concerns and fear of public uneasiness due to her past illness. The jury returned a verdict in favor of the defendant. On appeal, the plaintiff challenged the trial court's jury instruction that she bore the burden of proving that she did not pose a direct threat to herself or others. The Tenth Circuit held that the burden of proof instruction was not erroneous. *McKenzie*, 388 F.3d at 1353-56. The court acknowledged that *EEOC v. Amego, Inc.* was not directly on point because the essential functions of the job in that case included caring for individuals who were unable to care for themselves. *Id.* at 1354. Nevertheless, the court held that it was appropriate to place the burden on the plaintiff to prove she was not a direct threat since she stipulated that her law enforcement job was "inherently dangerous," and the essential functions of the plaintiff's job included "performing [her] duties without endangering her co-workers or members of the public with whom she came in contact." *Id.* at 1355.²

² The dissenters in *Rizzo II* similarly supported an approach that would require the employee to disprove that he is a direct threat if an essential job function implicates safety, but would require the employer to prove that the employee is a direct threat "either where an employee is unable safely to perform a non-essential job function, or where his disability only renders him a threat to the workplace generally."

While the Supreme Court may choose to resolve this circuit conflict by granting *cert* in *McKenzie*, until such a resolution occurs each advocate dealing with a direct threat claim – the statutory language and legislative history notwithstanding – needs to be aware of the applicable law in his or her circuit, especially if the job in question implicates safety considerations.

Rizzo II, 213 F.3d at 221 (Jones, J., dissenting). While conceding that “nothing in the text of the direct threat provision [in Title I] supports this distinction,” the dissent reasoned that the primary concern of Congress in the direct threat provision was that employers would assert “generalized, rather than job-function-specific justifications” that are based on fears on stereotypes. *Id.* at 221-22.