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Direct Threat Defense under the ADA: Posing a Threat to the Protection of Disabled Employees, The

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The "Direct Threat" Defense Under the ADA: Posing a Threat to the Protection of Disabled Employees

Equal Employment Opportunity Commission v. Wal-Mart Stores, Inc.[1]

I. INTRODUCTION

The Americans with Disabilities Act[2] was passed with intentions of eliminating stereotypes and fear towards disabled individuals and their ability to function and contribute to society.[3] In the employment context, the Act will not permit an employer to refuse to hire an individual solely because of that person's disability.[4] However, it will permit the employer to defend such action when limitations caused by an individual's disability rise to the level of a direct threat to the safety of others.[5] When an employer raises such a defense, circuit courts are split as to whether the burden of proving the existence or absence of a threat should fall respectively on the employer or employee.[6] The Eighth Circuit addressed this issue in *EEOC v. Wal-Mart Stores, Inc.* and concluded that the employer bore the burden of proving direct threat posed by the employee,[7] thereby resolving a previously undecided issue within the circuit.

After highlighting the pertinent facts and procedure of *EEOC v. Wal-Mart*, this note will discuss the background of the Americans with Disabilities Act and introduce the direct threat provision. It will then lay out the court's analysis of the case in light of the framework of the ADA and how other circuits are split in their analyses. Ultimately, this note will argue that the Eighth Circuit's decision was correct and, although the court provided limited substantive reasoning, there is proper justification for the court's decision.

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1. 477 F.3d 561 (8th Cir. 2007).
2. The legislation is referred to as the "ADA" or "Act" throughout this note.
3. *See infra* text accompanying notes 39-45.
4. 42 U.S.C. § 12112(a) (2000).
5. 42 U.S.C. § 12113(a)-(b) (2000).
6. *See infra* Part III.C.
7. EEOC v. Wal-Mart Stores, Inc., 477 F.3d 561, 571-72 (8th Cir. 2007) (hereinafter *EEOC v. Wal-Mart*).

II. FACTS AND HOLDING

Steven Bradley (hereinafter Bradley) suffered from cerebral palsy, a condition that limited the use of his legs, requiring crutches or a wheelchair, and also limited some hand motions.[8] He was, however, fully able to walk, climb stairs, write, hold items, lift heavy objects, and perform daily tasks.[9] In July 2000, Bradley applied for a position at Wal-Mart,[10] but two answers on his application were unapproved by the retailer. First, Bradley stated that while he "was willing to work from 4:30 p.m. until close during the week-days, . . . working on weekends was 'negotiable,'"[11] and Wal-Mart did not want to "fool with somebody [who was] negotiable."[12] Second, Bradley checked a box stating that he did not want Wal-Mart to contact his current employer, as he was afraid that his current employer would fire him if it found out he was seeking additional part-time work.[13] Since both of these answers raised a concern with Wal-Mart, Bradley was denied the position.[14]

A short time later, the Wal-Mart store expanded, and its need for new employees increased.[15] As a result, Bradley again applied for a position in February 2001.[16] Bradley was given an interview, during which time the Wal-Mart interviewer mentioned that he was "best suited for a greeter [position]" because of his physical condition.[17] Again, however, Bradley was not hired, although the previous problematic responses were absent from his application.[18] This time, Bradley stated that he was seeking either full-time *or* part-time employment, including weekends.[19] Furthermore, Bradley made no indication that he wished Wal-Mart to refrain from contacting his current employer.[20]

Bradley was unaware that Wal-Mart's refusal to hire him was question-able until he offered his services to the Equal Employment Opportunity Commission (EEOC) as a witness in another pending claim against Wal-Mart.[21] An investigator from the agency interviewed Bradley and concluded

8. *Id.* at 563.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 565.
13. *Id.* at 563.
14. *Id.* at 565.
15. *Id.* at 563.
16. *Id.*
17. *Id.* at 564.
18. *Id.* at 563-64.
19. *Id.* at 563. Bradley indicated that he "was willing to work from 4:00 p.m. to 10:00 p.m. every evening, including Saturday and Sunday." *Id.*
20. *Id.*
21. *Id.* at 565. Bradley had "contacted the EEOC after seeing a news report about a Missouri man who had filed a disability discrimination claim against Wal-Mart . . . . [as he intended] to offer his services as a possible witness." *Id.*

that he had a claim of his own.[22] Shortly thereafter, a Charge of Discrimination was drafted and alleged that the retailer denied Bradley a position based on his disability.[23] After investigating the claim, the EEOC brought an action against Wal-Mart Stores claiming that Wal-Mart violated the Americans with Disabilities Act.[24]

The EEOC asserted that Wal-Mart improperly declined to hire Bradley because of the mobility limitations caused by his condition.[25] Claiming that the EEOC failed to show Bradley was qualified for any position, Wal-Mart moved for summary judgment.[26] Accordingly, it "attempted to show that no genuine issue of fact existed as to whether Bradley was a qualified applicant either for the people greeter position or the cashier position."[27]

Wal-Mart's 2001 "Cashier Job Description" and 2001 "People Greeter Job Description" spelled out the basic obligations and requirements of an employee in each position, and both stated that Wal-Mart would reasonably accommodate disabled individuals to enable them to "perform the essential job functions."[28] Wal-Mart used expert testimony based on an independent medical examination of Bradley to prove that "Bradley was not qualified to perform the essential functions of either job" because of physical limitations.[29] The EEOC also relied on expert testimony, which concluded that with reasonable accommodation, like a wheelchair, Bradley could indeed work as a cashier or greeter without posing a "direct threat" in either

22. *Id.*

23. *Id.*

24. *Id.* at 562.

25. *Id.*

26. *Id.* at 565.

27. *Id.*

28. *Id.* at 565-66. The "People Greeter Job Description" included tasks that physically demanded a greeter "to regularly stand, occasionally lift or move objects weighing up to 10 pounds, and perform tasks involving simple grasping." *Id.* The "Cashier Job Description" included tasks such as "assisting customers with the bagging and loading of their merchandise; . . . scanning merchandise quickly and accurately; ensuring that safe work practices [were] followed by using proper lifting techniques," which physically demanded a cashier to "regularly stand; use his . . . hands to scan items . . . ; perform tasks involving firm grasping; have sufficient coordination; and frequently lift or move at least 10 and up to 50 pounds." *Id.* at 566.

29. *Id.* The expert concluded, among other things, that Bradley "[could not] carry or move objects that require two hands" because he had to use one arm "to support his weight while standing and both arms to walk with his crutches;" had to "use his crutches to climb on and off stools and takes considerable time transitioning from a sitting to standing position;" would be likely to fall daily in a retail environment because he "falls every other week in a controlled environment using his crutches;" and could not "perform prolonged walking and standing, as required by the positions." *Id.*

position.[30] While the Wal-Mart expert conceded that Bradley would be stable in something like a wheelchair, he concluded that Bradley would have to be standing generally about thirty-five to forty percent of the time and consequently still believed he would not be able to perform the essential functions of the job.[31]

The District Court ultimately agreed with Wal-Mart and granted its motion for summary judgment.[32] The court found that the EEOC "failed to establish that Bradley was qualified to perform the essential functions of the greeter and cashier positions."[33] The EEOC moved for reconsideration, but the District Court denied that motion, stating that "summary judgment was also appropriate because the EEOC failed to present evidence [showing] that WalMart's [sic] reasons for not hiring Bradley were pretextual."[34]

The EEOC appealed the district court's decision to the Eighth Circuit Court of Appeals, which reversed and held that issues of material fact remained.[35] More specifically, the court held three things: first, the EEOC established a prima facie case that Wal-Mart's failure to hire Bradley violated the ADA;[36] second, the EEOC presented sufficient evidence that there remained a genuine issue of material fact as to whether Wal-Mart's proffered reasons for not hiring Bradley were pretext for discrimination, thereby precluding summary judgment;[37] and finally, Wal-Mart failed to prove the affirmative defense of a direct threat.[38]

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30. *Id.* at 566-67. "Because the job descriptions for both jobs required 'some mobility and standing,' [the expert] recommended a sit-to-stand wheelchair, an ergonomic drafting-type stool with armrests, a scooter stool, or a lightweight wheelchair as reasonable accommodation." *Id.* Furthermore, the expert opined, "if Bradley used a wheelchair or electric scooter, he would pose no greater danger than any customer in a wheelchair or electric scooter, both of which Wal-Mart provides to customers for use in their stores." *Id.* at 567 (internal quotation omitted). Note that the EEOC alleged Bradley would not pose a direct threat *in response* to Wal-Mart saying that he would pose a threat. *See id.* at 571. Raising the issue independently would not lend credence to the EEOC's belief that it was the defendant's burden to prove direct threat.

31. *Id.* at 567.

32. *Id.*

33. *Id.*

34. *Id.* at 567-68.

35. *Id.* at 562.

36. *Id.* at 570.

37. *Id.* at 571.

38. *Id.* at 572.

III. LEGAL BACKGROUND

The Americans with Disabilities Act[39] was passed in 1990 in response to findings that "society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem . . . in such critical areas as employment."[40] Previous anti-discrimination legislation applying to the disabled population was limited in that it only applied to federal contractors.[41] The ADA was enacted to expand anti-discrimination legislation into other areas of society. As one of the "'most significant labor and employment statute[s]' signed into law in . . . decades," the ADA "prohibit[s] discrimination on the basis of physical [and] mental disabilities, and mandat[es] affirmative action to remove obstacles that hamper disabled [persons]."[42] The purposes behind the Act include addressing major areas of discrimination faced daily by those with disabilities,[43] including preventing employment decisions based on stereotypes or fear and speculation regarding risk of harm to others.[44] The ADA addresses these goals by providing for them in various arenas, including employment.[45]

In terms of employment, Title I of the Act provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[46] A plaintiff may bring a claim for disparate treatment when an employment decision is made that treats the disabled individual less favorably than a non-disabled person.[47] Alternatively, a plaintiff may bring a reasonable accommodation claim in situations where an employer fails or refuses to provide a qualified disabled individual with an accommodation necessary to enable him to function in a given position.[48]

The ADA was passed to expand the basic rights afforded under other civil rights legislation such as Title II and VII of the Civil Rights Act of

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39. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (2000)).

40. 42 U.S.C. § 12101(a)(2)-(3) (2000).

41. *See* Rehabilitation Act of 1973, 29 U.S.C. § 794 (2000).

42. Wayne L. Anderson & Mary Lizabeth Roth, *Deciphering the Americans With Disabilities Act*, 51 J. MO. B. 142, 142 (1995) (quoting HENRY H. PERRITT, AMERICANS WITH DISABILITIES ACT HANDBOOK (2d ed. 1991)).

43. 42 U.S.C. § 12101(b)(4) (2000).

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

45. 42 U.S.C. §§ 12101-12213 (2000).

46. *Id.* § 12112(a).

47. *See id.*

48. *See id.* § 12112(b)(5)(A).

1964,[49] and is analyzed under the same framework used to analyze claims under the previous legislation. As with the other statutes, there are several frameworks under which one can bring an employment discrimination claim under the ADA, depending upon the type of discrimination alleged and the evidence available.[50]

When there is no direct evidence of discrimination, federal courts apply the three-part proof structure of *McDonnell Douglas Corp. v. Green*.[51] Under this framework, the plaintiff must first establish a prima facie case of discrimination.[52] Second, "the burden shifts to the [employer] 'to articulate some legitimate, nondiscriminatory reason for the [adverse employment action].'"[53] Third, should the employer provide this reason, the burden shifts back to plaintiff to prove that the proffered reason is pretextual.[54] The defendant may also assert an affirmative defense as justification for the adverse employment action.[55]

A. Plaintiff's Prima Facie Case

To establish a prima facie case of discrimination, the plaintiff must show three things: (1) "that he has an ADA-qualifying disability," (2) "that he is qualified to perform the essential functions of his position," and (3) "that he

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49. Anderson & Roth, *supra* note 42, at 142.

50. "In disparate treatment cases, a similarly situated disabled individual is treated differently because of his disability than less- or non-disabled individuals." Peebles v. Potter, 354 F.3d 761, 766 (8th Cir. 2004). It is usually necessary to analyze these cases using circumstantial evidence, and thus, "the traditional burden-shifting framework of *McDonnell Douglas* will apply." Fenney v. Dakota, Minn. & E. R.R. Co., 327 F.3d 707, 711-12 (8th Cir. 2003) (citing Stanback v. Best Diversified Prods., Inc., 180 F.3d 903, 908 n.6 (8th Cir. 1999); Kiel v. Select Artificials, Inc., 169 F.3d 1131, 1136 (8th Cir. 1999) (en banc)). Alternatively, in a reasonable accommodations case, "the focus is on whether the employer should have reasonably accommodated the employee's disability but did not." Montgomery v. John Deere & Co., 169 F.3d 556, 562 (8th Cir. 1999) (Lay, J., concurring). "In such cases . . . the *McDonnell Douglas* disparate treatment analysis is inappropriate." *Id.*; *see also* Bultemeyer v. Fort Wayne Cmty. Sch., 100 F.3d 1281, 1283-84 (7th Cir. 1996); Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1182-83 (6th Cir. 1996).

51. 411 U.S. 792 (1973); *see, e.g.*, Didier v. Schwan Food Co., 465 F.3d 838, 841 (8th Cir. 2006); Strate v. Midwest Bankcentre, Inc., 398 F.3d 1011, 1016 n.4 (8th Cir. 2005).

52. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981).

53. *Id.* at 253 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

54. *Id.*

55. JOEL WM. FRIEDMAN, THE LAW OF EMPLOYMENT DISCRIMINATION 149 (6th ed. 2007) ("[A] defendant can respond to a plaintiff's allegations and proof in two ways. It can attempt to deny or rebut the elements of the plaintiff's claim and/or assert an affirmative defense.").

suffered an adverse action due to his disability."[56] A disability under the ADA includes "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; . . . a record of such an impairment; . . . or being regarded as having such an impairment."[57] If an individual suffers from an ADA recognized disability, the next question is whether the individual is qualified for purposes of the ADA to perform the essential functions of the job.[58] This is a two-step inquiry made as of the time of the employment decision in question.[59] The individual must first "'possess[] the requisite skills, education, certification or experience necessary for the job.'"[60] Second, the court "consider[s] 'whether the individual can, despite his impairments, perform the essential functions of the job either with or without reasonable accommodation.'"[61]

The plaintiff bears the ultimate burden of proving that he is "qualified" to perform the essential functions of a position.[62] Whenever an employer disputes the plaintiff's ability to perform the essential functions of a job, the employer is required to present evidence establishing those functions.[63] The employer may utilize several kinds of evidence to establish that a particular function is an "essential" function. For example, the employer might introduce:

> (1) the employer's judgment as to which functions are essential; (2) [the] job descriptions prepared before advertising or interviewing of applicants . . . ; (3) the amount of time spent on the job performing that function; (4) the consequences of not requiring the incumbent to perform the function; [or] (5) the current work experience of incumbents in similar jobs.[64]

A plaintiff who would be unable to "perform the essential functions of the job *without* an accommodation . . . must only make a 'facial showing that

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56. EEOC v. Wal-Mart Stores, Inc., 477 F.3d 561, 568 (8th Cir. 2007) (citing *Didier*, 465 F.3d at 841).

57. 42 U.S.C. § 12102(2) (2000).

58. *Wal-Mart Stores*, 477 F.3d at 568.

59. *Id.*

60. *Id.* (quoting Browning v. Liberty Mut. Ins. Co., 178 F.3d 1043, 1047 (8th Cir. 1999)).

61. *Id.* (quoting *Browning*, 178 F.3d at 1047). An "essential function" is equivalent to "'the fundamental job duties of the employment position the individual with a disability holds or desires. . . . [but] does not include the marginal functions of the position.'" Moritz v. Frontier Airlines, Inc., 147 F.3d 784, 787 (8th Cir. 1998) (quoting 29 C.F.R. § 1630.2(n)(1)).

62. *Wal-Mart Stores*, 477 F.3d at 568.

63. Heaser v. Toro Co., 247 F.3d 826, 831 (8th Cir. 2001) (citing Benson v. Nw. Airlines, Inc., 62 F.3d 1108, 1113 (8th Cir. 1995)).

64. *Id.* (citing *Moritz*, 147 F.3d at 787).

a reasonable accommodation is *possible*.'"[65] Once this showing is made, "'the burden of production shifts to the employer to [demonstrate] it is unable to accommodate the [plaintiff].'"[66] Finally, should the employer be able to demonstrate that the plaintiff is unable to perform the essential functions of the job, even with reasonable accommodation, the plaintiff must rebut by presenting evidence of his individual abilities.[67] Hence, the plaintiff retains his ultimate burden of proving his qualification for the position.[68]

B. Defendant's Non-Discriminatory Reasoning and Plaintiff's Rebuttal

Once a plaintiff has established a prima facie case of discrimination, the burden of production shifts to the defendant-employer to "produce a legitimate, nondiscriminatory reason for the adverse employment action."[69] For example, the employer might say that a qualified applicant was not hired because someone better qualified was hired instead.[70] The employer's burden is not impossible – after all, it is a burden of production and not of persuasion. Once the employer offers a legitimate, nondiscriminatory reason for its actions, the burden shifts back to the plaintiff to show that the employer's proffered reason is pretext for discrimination.[71]

A plaintiff might prove pretext by showing that the employer's claimed reason for the action has no basis in fact[72] or that "'implausible explanations and false or shifting reasons support a finding of illegal motivation.'"[73] Furthermore, an employer "may not invent a *post hoc* rationalization for its actions at the rebuttal stage of the case."[74] It is not enough that the defendant later discovers what would have been a legitimate basis for termination had it been known at the time of the adverse employment action; the employer cannot rely on evidence that it did not have at the time of the decision.[75] After

65. *Wal-Mart Stores*, 477 F.3d at 569 (quoting Fenney v. Dakota, Minn. & E. R.R. Co., 327 F.3d 707, 712 (8th Cir. 2003)).

66. *Id.* (quoting *Benson*, 62 F.3d at 1112).

67. *Id.*

68. *Id.*

69. *Id.* at 570 (citing Didier v. Schwan Food Co., 465 F.3d 838, 841 (8th Cir. 2006)).

70. Page v. Bolger, 645 F.2d 227, 230 (4th Cir. 1981) (Title VII race discrimination claim).

71. *Wal-Mart Stores*, 477 F.3d at 570. The burden is to prove by a preponderance of the evidence that the reason offered is pretext for discrimination. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

72. *Wal-Mart Stores*, 477 F.3d at 570 (citing Stallings v. Hussmann Corp., 447 F.3d 1041, 1052 (8th Cir. 2006)).

73. *Id.* (quoting Hall v. NLRB, 941 F.2d 684, 688 (8th Cir. 1991)).

74. Sabree v. United Bhd. of Carpenters & Joiners Local No. 33, 921 F.2d 396, 404 (1st Cir. 1990).

75. *See* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 356-63 (1995) (ADEA case in which the Supreme Court ruled that an employer could not defeat an

all, "'proving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made.'"[76] Ultimately, if the employer fails to "articulate[] a legitimate, nondiscriminatory reason for not hiring the plaintiff that *actually* motivated the decision, the reason is legally insufficient."[77]

C. Defenses and the Circuit Split on the Direct Threat Defense

Finally, if the plaintiff establishes that the employer's reasons were pretextual, the plaintiff has fulfilled his burden of proving unlawful discrimination, provided the defendant does not offer an affirmative defense accepted by the court.[78] To defend its action, a defendant-employer might claim that certain qualification standards are "job-related and consistent with business necessity," and that "such performance cannot be accomplished by reasonable accommodation."[79] Alternatively, the employer might claim that the plaintiff could not be hired because he posed a "direct threat" to the safety of others.[80] Section 12113 of the ADA, entitled "Defenses," enables an employer to require as a qualification standard that "an individual . . . not pose a direct threat to the health or safety of other individuals in the workplace."[81] "Direct threat" is defined by the ADA as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[82]

Under the EEOC Regulations, this definition has been expanded to characterize direct threat as "a significant risk of substantial harm to the health or safety of the *individual or others* that cannot be eliminated or

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employment discrimination claim with "after-acquired evidence" of wrongdoing by the plaintiff). This concept has been assumed in the Title VII and ADA contexts as well. *See* EEOC v. Dial Corp., 469 F.3d 735, 745 (8th Cir. 2006) (Title VII case in which the court cited *McKennon* and ruled that, "[u]nder the after acquired evidence framework," the employer had the burden of proving that it would have fired the plaintiff because of the new information); Rooney v. Koch Air, LLC, 410 F.3d 376, 382 (7th Cir. 2005) (ADA case in which the court referenced *McKennon* and recognized that "after-acquired evidence . . . does not bar all relief, although it can limit recoverable damages").

76. *Sabree*, 921 F.2d at 404 (internal quotation marks omitted) (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989)).

77. *Wal-Mart Stores*, 477 F.3d at 570 (internal quotation marks omitted) (quoting Hill v. Seaboard Coast Line R.R. Co., 767 F.2d 771, 774 (11th Cir. 1985)).

78. *See* 42 U.S.C. § 12113 (2000).

79. *Id.* § 12113(a).

80. *Id.* § 12113(b).

81. *Id.*

82. 42 U.S.C. § 12111(3) (2000). The EEOC Interpretive Guidance on Title I of the ADA suggest that "a speculative or remote risk is insufficient," and that "[t]he risk can only be considered when it poses a *significant* risk," one of "high probability" or "of substantial harm." 29 C.F.R. pt. 1630 app. (2008) (emphasis added).

reduced by reasonable accommodation."[83] The Supreme Court approved this definitional expansion covering a direct threat to the individual plaintiff in *Chevron U.S.A., Inc. v. Echazabal*.[84] Furthermore, any determination that an individual poses a direct threat is made upon "an individualized assessment of the individual's present ability to safely perform the essential functions of the job."[85] According to the EEOC, and as required by the Supreme Court, this assessment must be based on "reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence."[86] Finally, to determine whether an individual poses a direct threat, the court must consider specific factors, including: "(1) [t]he duration of the risk; (2) [t]he nature and severity of the potential harm; (3) [t]he likelihood that the potential harm will occur; and (4) [t]he imminence of the potential harm."[87]

There is a split among circuit courts as to which party bears the burden of proving the direct threat provision. At its most basic level, the disagreement centers on the manner in which the direct threat defense is classified by the court – as an affirmative defense or as part of the plaintiff's prima facie case. Those circuits that place the burden on the plaintiff-employee reason that direct threat fits into the "qualification" prong of the plaintiff's prima facie case.[88] A qualified individual is one who can perform the essential functions of the job.[89] Employers sometimes assert that performing a job in a safe manner is itself an essential function, so "if performing a particular job poses a direct threat to others or to the employee himself, then the employee is not fulfilling one of the 'essential functions' of the job."[90] "When . . . essential functions implicate the safety of others, plaintiff cannot perform

83. 29 C.F.R. § 1630.2(r) (2008) (emphasis added).

84. 536 U.S. 73 (2002). There, the employer defended his action of refusing to hire the plaintiff on the grounds that the EEOC regulation permitted "the defense that a worker's disability on the job would pose a 'direct threat' to his health" and the Supreme Court ruled that such a regulation did not exceed the scope of the EEOC's permissible rulemaking authority under the ADA. *Id.* at 77, 87.

85. 29 C.F.R. § 1630.2(r).

86. *Id.*; Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1248 (9th Cir. 1999) (stating that the Supreme Court has required "an individualized direct threat inquiry that relies on the best current medical or other objective evidence" (citing Bragdon v. Abbott, 524 U.S. 624 (1998))).

87. 29 C.F.R. § 1630.2(r); *see* EEOC v. Wal-Mart Stores, Inc., 477 F.3d 561, 571 (8th Cir. 2007) (citing *Nunes*, 164 F.3d at 1248).

88. *See, e.g.*, EEOC v. Amego, Inc., 110 F.3d 135, 144 (1st Cir. 1997) ("[I]t is the plaintiff's burden to show that he or she can perform the essential functions of the job, and is therefore 'qualified.'").

89. 29 C.F.R. § 1630.2(m) (2008).

90. Kathleen Amerkhanian, Note, *Direct Threat to Self: Who Gets to Decide?*, 34 U. TOL. L. REV. 847, 856 (2003).

successfully – and hence, is not qualified – unless she can do so without threatening others."[91]

The Eleventh Circuit strictly adheres to this standard.[92] The First[93] and Tenth[94] Circuits have also placed the burden on the plaintiff, but do so in a more restricted fashion, contingent upon the nature of the plaintiff's employment. More specifically, these courts place the burden on the plaintiff-employee when taking care of others is an essential function of the job[95] or the job is inherently dangerous,[96] leaving open room for other cases in which the direct threat issue is purely a matter of defense.[97]

On the other hand, the majority view consists of those circuits that place the burden on the employer, who view the "direct threat" defense as always an affirmative defense, which has traditionally been the defendant's burden.[98]

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91. Stafne v. Unicare Homes, Inc., No. CIV 97-470 JRT/FLN, 1999 WL 1212656, at *2 (D. Minn. Aug. 12, 1999).

92. *See* LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 836 (11th Cir. 1998) ("The employee retains at all times the burden of persuading the jury . . . that he was not a direct threat . . . ."); Moses v. Am. Nonwovens, Inc., 97 F.3d 446, 447 (11th Cir. 1996) (stating that "[t]he 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" and that the plaintiff in that case had "failed to produce probative evidence that he was not a direct threat").

93. *See Amego*, 110 F.3d at 144 ("[I]n a Title I ADA case, it is the plaintiff's burden to show that he or she can perform the essential functions of 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.").

94. *See* McKenzie v. Benton, 388 F.3d 1342, 1354-56 (10th Cir. 2004). The court acknowledged that the case was different from *Amego* because there was no concern for the safety of others where the essential functions of the job involved the care of others. *Id.* at 1354. However, the court stated, "there [was] a special risk to others, co-workers and the public, who [would be] exposed to the danger of a firearm in the control of [the plaintiff] . . . . The job qualifications [there] properly included the essential function of performing [plaintiff's] duties without endangering her co-workers or members of the public with whom she came in contact." *Id.* at 1354-55. Therefore, the court held that "under [the] circumstances, the district court did not err by instructing the jury that the burden rested on the plaintiff to prove that she did not pose a 'direct threat' to others." *Id.* at 1356.

95. *Amego*, 110 F.3d at 144.

96. *McKenzie*, 388 F.3d at 1349.

97. *Amego*, 110 F.3d at 144.

98. *E.g.*, Jankovitz v. Des Moines Indep. Cmty. Sch. Dist., 421 F.3d 649, 654 (8th Cir. 2005) ("Defendant bears the burden of proving its statutory affirmative defense."); Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1247 (9th Cir. 1999) ("Because [direct threat] is an affirmative defense, [the employer] bears the burden of proving that [the plaintiff] is a direct threat.").

In that case, even if the plaintiff is qualified, the defendant is not required to hire him if he poses a direct threat to himself or others. The Second,[99] Fifth,[100] Seventh,[101] and Ninth[102] circuits have all placed the burden on the defendant-employer. The Eighth Circuit remained undecided on the issue until *EEOC v. Wal-Mart*, in which the court determined that the burden fell on the employer, thereby joining the majority of courts on the issue.[103]

IV. THE INSTANT DECISION

In the instant case, the plaintiff alleged disparate treatment using circumstantial evidence; therefore, the court utilized the *McDonnell Douglas* framework to analyze the parties' arguments. First, the court had to determine whether the plaintiff established a prima facie case of discrimination. Here, neither the EEOC nor Wal-Mart disputed that the first and third prongs of the prima facie case had been established.[104] That is, they both agreed that Bradley had an ADA-qualifying disability and that he suffered an adverse

99. Hargrave v. Vermont, 340 F.3d 27, 35 (2d Cir. 2003) ("In the employment context, it is the defendant's burden to establish that a plaintiff poses a 'direct threat' of harm to others."); *see also* Lovejoy-Wilson v. NOCO Motor Fuel Inc., 263 F.3d 208, 219-21 (2d Cir. 2001) (a reasonable accommodations case, where the affirmative defense of "direct threat" was unavailable because the employer failed to provide evidence that plaintiff posed a significant risk of substantial harm).

100. The Fifth Circuit's view is difficult to conclusively classify because it seems to place the burden on the employer only when certain components are met by the plaintiff. *See* Rizzo v. Children's World Learning Ctrs., Inc. (*Rizzo II*), 173 F.3d 254, 259-60 (5th Cir. 1999) ("[T]he burden of proof is on the plaintiff to prove that, as a qualified individual, she is not a direct threat to herself or others. . . . [W]hen a court finds that the safety requirements imposed [by an employer] 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."); Rizzo v. Children's World Learning Ctrs., Inc. (*Rizzo III*), 213 F.3d 209, 213 (5th Cir. 2000) (deciding that the district court did not err by giving the defendant the burden of proving the plaintiff was a direct threat).

101. *See* Branham v. Snow, 392 F.3d 896, 906 (7th Cir. 2004) ("'[I]t is the employer's burden to show that an employee posed a direct threat to workplace safety that could not be eliminated by a reasonable accommodation.'" (quoting Dadian v. Vill. of Wilmette, 269 F.3d 831, 841 (7th Cir. 2001))).

102. *See* Hutton v. Elf Atochem N. Am., Inc., 273 F.3d 884, 893 n.5 (9th Cir. 2001) ("[D]efendant-employer should bear the burden of proof on the direct threat issue."); *Nunes*, 164 F.3d at 1247 ("Because [direct threat] is an affirmative defense, [the defendant] bears the burden of proving that [the plaintiff] is a direct threat.").

103. 477 F.3d 561, 571 (8th Cir. 2007) (holding that the employer bears the burden of proof). As to the remaining circuits, the allocation of the burden is not as pronounced, if it has even been mentioned. For example, the Third Circuit failed to address the issue when it was presented. *See* Donahue v. Consol. Rail Corp., 224 F.3d 226 (3d Cir. 2000) (stating that although the two sides disagreed regarding the allocation of the burden of proof, the court found it unnecessary to address the issue).

104. *Wal-Mart Stores*, 477 F.3d at 568.

employment action due to that disability.[105] The prong on which they disagreed, however, was whether Bradley was "'qualified' to perform the essential functions of his position, with or without reasonable accommodation."[106]

Using the two step analysis[107] to determine whether an employee is qualified, the court found that Bradley was indeed qualified for the positions of cashier and greeter.[108] First, he met "the skill, education, and experience requirements for the positions," as the job descriptions for each position stated "that 'no experience or qualification [was] required.'"[109] Second, the EEOC made a facial showing that a reasonable accommodation such as use of a wheelchair would make it possible for Bradley to perform the essential functions of either the greeter or cashier position.[110] Wal-Mart attempted to attack the method by which the EEOC's expert proposed the accommodations, stating that the expert "never observed Bradley use these devices or perform the duties . . . required of him as a greeter [and] cashier."[111] This argument failed to defeat the EEOC's showing that Wal-Mart *could* provide Bradley accommodation.[112] Furthermore, "Wal-Mart's own expert . . . [had] conceded Bradley was 'very . . . stable in a wheelchair'"[113] and focused on Bradley's lack of ability only while he was on "*crutches*, not [in] a wheelchair."[114] Therefore, because "Wal-Mart . . . offered no evidence that Bradley [could not] perform the essential functions of the greeter and cashier positions with reasonable accommodation,"[115] the court held that "the EEOC [had] sufficiently established a prima facie case of discrimination."[116]

The burden then shifted to Wal-Mart to provide non-discriminatory reasoning for the decision not to hire Bradley. Wal-Mart attempted to offer several legitimate reasons for not hiring Bradley, focusing mainly on his past job history, his aversion to Wal-Mart contacting his current employer, and his

105. *See id.*

106. *Id.*

107. *See supra* notes 58-61 and accompanying text.

108. *Wal-Mart Stores*, 477 F.3d at 569.

109. *Id.*

110. *Id.* The EEOC's main expert proposed specific accommodations that would enable Bradley to have the requisite mobility and standing required, including a sit-to-stand wheelchair, a narrow wheelchair and more. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* Additionally, Wal-Mart's own guidebook suggested accommodations that could assist an employee with limited mobility, including a cashier in a wheelchair. *Id.* at 569-70.

114. *Id.* at 570.

115. *Id.*

116. *Id.*

limited availability.[117] The Wal-Mart employee who made the hiring decision, Janet Daugherty, attempted to justify the three reasons.[118] First, regarding Bradley's job history, Daugherty stated that "she was personally aware of short-term jobs Bradley . . . held in their 'small town' that he failed to list on his application."[119] These included work at a Texaco service station (where she claimed she saw him), Shirkey Leisure Acres, Station Casino, and work as a police dispatcher.[120] Yet Daugherty also conceded that "she was unaware whether Bradley [had] worked at [most of these jobs] *before or after* she decided not to hire him."[121] Although Daugherty claimed personal knowledge of the jobs, Bradley did not *ever* work at Station Casino, did not work at Shirkey or for the police department until *after* rejected by Wal-Mart, and only worked at Texaco for one day (thus making it possible for a jury to question her having ever seen him).[122] Second, Daugherty claimed she was concerned about Bradley's aversion to Wal-Mart contacting his "current" employer.[123] This, however, was only noted on his first application in July of 2000, not the second application in February of 2001 that gave rise to the employment action in dispute.[124] The court believed a jury could find that not hiring Bradley based on "job history" had no basis in fact and was merely a post-hoc rationalization.[125]

Third, the court declined to find merit in Daugherty's claim that Bradley's lack of availability motivated Wal-Mart's decision not to hire him.[126] Daugherty considered both the July 2000 *and* February 2001 applications to determine whether to hire Bradley, claiming she recalled him stating his weekend hours were "negotiable" on the July application.[127] However, Wal-Mart produced no evidence that it was routine to examine a repeat applicant's previous applications.[128] The court concluded that a "jury could question whether Daugherty actually 'remembered' the details of [the]

117. *Id.* at 570-71. Other reasons proffered by Wal-Mart included "the way he responded to associates in the store as a customer" and "lack of work experience directly working with the general public or in retail operations." *Id.* at 565.

118. *Id.* at 564. A dispute arose between the parties as to "who actually made the decision not to hire Bradley." *Id.* However, the court focused on the reasons proffered by Daugherty, as she was the Personnel Manager who made the hiring decisions during the store's transition into a Supercenter. *Id.* at 563, 570.

119. *Id.* at 564.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 571.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

July 2000 application."[129] The court decided that the EEOC satisfied its burden of demonstrating that Wal-Mart's reasons were pretextual, as the EEOC had produced sufficient evidence showing the reasons given did not actually motivate Wal-Mart's decision not to hire Bradley.[130] Therefore, the court held that "the district court erred in granting summary judgment to Wal-Mart on the EEOC's discrimination claim."[131]

Finally, Wal-Mart attempted to provide the court with an alternative basis for upholding the district court's grant of summary judgment by arguing the "direct threat" defense.[132] The court conceded that "'summary judgment *would* still be appropriate under the ADA if [Bradley] posed a direct threat to the health or safety of other individuals in the workplace.'"[133] Although it had previously declined to resolve the issue, the court held that the employer bears the burden of proving direct threat because it is an affirmative defense.[134] Wal-Mart's expert's opinion suggested that Bradley would pose a safety risk because his legs were not capable of holding him without arm support, thereby causing him to fall frequently.[135] Additionally, Bradley was "very wide when he [used] his crutches," making him an "obstacle" to people entering and exiting.[136] However, this "opinion [assumed] that Bradley would be using crutches, not a wheelchair."[137] Furthermore, the expert conceded Bradley was stable while in a wheelchair and would be less of a threat if he were not on crutches, and Wal-Mart did not explain how a wheelchair would pose any more of a threat than customers who used wheelchairs.[138] The Eighth Circuit held that Wal-Mart failed to prove Bradley would pose a direct threat to the safety of himself or others when using a wheelchair or other reasonable accommodation, and accordingly reversed the grant of summary judgment by the district court and remanded for a trial on the merits.[139]

V. COMMENT

In *EEOC v. Wal-Mart Stores, Inc.*, the Eighth Circuit finally resolved the issue of which party bears the burden of proving "direct threat" and joined

129. *Id.* Additionally, "Daugherty conceded that she would hire Bradley based on the availability he listed on his February 2001 application alone." *Id.*

130. *Id.* at 570-71.

131. *Id.* at 571.

132. *Id.*

133. *Id.* (emphasis added) (internal quotation marks omitted) (quoting Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1247 (9th Cir. 1999)).

134. *Id.* at 571-72.

135. *Id.* at 572.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

the majority of circuit courts on the issue by holding that the employer bears that burden. However, the Eighth Circuit did not fully articulate the reasoning behind its decision nor did it mention the circuit split on the issue, as most courts do.[140] Instead of spelling out the foundation for its decision, the court briefly mentioned that because the direct threat defense is an affirmative defense, and because it has "[i]n other contexts . . . held that the defendant bears the burden of proving an affirmative defense," it chose to place the burden of proof on the employer in this instance.[141] The court indicated that it had previously declined to address the issue when it was presented in *Stafne v. Unicare Homes*.[142] There, the court stated that it "need not address [the plaintiff's] argument" regarding who bore the burden of proof because the plaintiff had "fail[ed] to present a submissible case."[143] The dissent in *Stafne*, however, believed the issue was one worthy of consideration; it noted the split among circuits and the importance of properly instructing the jury on the issue of burden of proof regarding a direct threat.[144]

The court in *EEOC v. Wal-Mart* did, however, cite other circuit court opinions which held the same, thereby implicitly adopting the same reasoning as those courts which classify "direct threat" as an affirmative defense for the employer to prove.[145] First, the court cited *Nunes v. Wal-Mart Stores, Inc.*, which stated, "[b]ecause [direct threat] is an affirmative defense, Wal-Mart bears the burden of proving that Nunes is a direct threat."[146] Next, the court cited *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, which stated that "[t]he legislative history of the ADA . . . supports the premise that '[t]he plaintiff is not required to prove that he or she poses no risk.'"[147] Finally, the court cited *Dadian v. Village of Wilmette*, which concluded that "a public entity that asserts the reason it failed to accommodate a disabled individual was because she posed a direct threat to safety bears the burden of proof on that defense at trial."[148] Looking at the justifications on which the court implicitly relied in making its decision, it is apparent that the decision is proper and is most

140. *See, e.g.*, Branham v. Snow, 392 F.3d 896, 907 n.5 (7th Cir. 2004) ("We note that there is a dispute among the circuits regarding the burden of proof with respect to the question of whether an employee poses a direct threat to his own safety or that of others."); Borgialli v. Thunder Basin Coal Co., 235 F.3d 1284, 1291 (10th Cir. 2000) (noting that different courts have gone separate ways and "it seems that there may be a question of whether the burden of proving risk rests upon the employee or the employer").

141. *Wal-Mart Stores*, 477 F.3d at 571-72.

142. *Id.* at 571 (citing Stafne v. Unicare Homes, 266 F.3d 771, 775 (8th Cir. 2001)).

143. *Stafne*, 266 F.3d at 775.

144. *Id.* at 778-80 & nn.6-7 (Lay, J., dissenting).

145. *Wal-Mart Stores*, 477 F.3d at 572.

146. 164 F.3d 1243, 1247 (9th Cir. 1999).

147. 263 F.3d 208, 220 (2d Cir. 2001) (quoting H.R. REP. NO. 101-485, pt. 3, at 46 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 469).

148. 269 F.3d 831, 840-41 (7th Cir. 2001).

consistent with the text, legislative history, and purposes behind the Americans with Disabilities Act.

The Eighth Circuit's decision is properly aligned with the text of the ADA, throughout which the phrase "direct threat" appears several times. First, it is defined in the "Definitions" section.[149] Next, it appears under the heading "Defenses," where the statute permits as a defense the "application of *qualification standards*, tests, or selection criteria that screen out . . . or otherwise deny a job . . . to an individual with a disability [when it] has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation."[150] Furthermore, an acceptable "qualification standard" for use by an employer "may include [the] requirement that an individual . . . not pose a direct threat to the health or safety of other individuals in the workplace."[151] This confusing and vague language has been interpreted differently by courts and causes conflict in clarifying what elements comprise the "direct threat" defense. "Most, though not all, federal appellate courts have treated the existence of a 'direct threat' as an affirmative defense, predominantly because of [this] codification in a provision located under the heading of 'Defenses.'"[152] Such courts argue that the burden is expressly placed on the defendant-employer, who traditionally bears the burden of proving affirmative defenses.[153]

However, a minority of courts look more closely to the fact that direct threat falls immediately below the subheading "Qualification Standards" under ADA "Defenses."[154] These courts assume this placement is a reference to the plaintiff's prima facie case of proving that he is "qualified" for the position and therefore the plaintiff bears "the ultimate burden [of proof that he] is not a direct threat to the health or safety of others."[155] At first glance, both interpretations seem plausible. After all, the "statute simply points in two directions," as the placement "under 'Defenses' . . . suggests [that] the employer has the burden of proof" and classification of "Direct Threat . . . as a 'qualification standard' . . . suggests [that] the employee [bears] the burden."[156] Ultimately, however, it is more consistent to place the burden on employers as has been done with other defenses under the Act.[157] For

149. 42 U.S.C. § 12111(3) (2000).

150. 42 U.S.C. § 12113(a) (2000) (emphasis added).

151. *Id.* § 12113(b).

152. FRIEDMAN, *supra* note 55, at 900.

153. *See* EEOC v. Wal-Mart Stores, Inc., 477 F.3d 561, 572 (8th Cir. 2007).

154. *See* 42 U.S.C. § 12113.

155. Stafne v. Unicare Homes, Inc., No. CIV 97-470 JRT/FLN, 1999 WL 1212656, at *2 (D. Minn. Aug. 12, 1999).

156. Jon L. Gillum, *Tort Law and the Americans with Disabilities Act: Assessing the Need for a Realignment*, 39 IDAHO L. REV. 531, 565-66 (2003).

157. *See* Ann Hubbard, *Understanding and Implementing the ADA's Direct Threat Defense*, 95 NW. U. L. REV. 1279, 1337-43 (2001). Hubbard argues that

example, this is how courts have treated the business necessity defense, which appears just above the "direct threat" provision under "Defenses."[158] Accordingly, the placement of "direct threat" in the text under "Defenses" indicates it is truly that—a defense to be proved by the one asserting it, the employer.

Beyond the text of the ADA, several portions of the ADA's legislative history support the proposition that the employer is the intended bearer of proof in terms of the direct threat defense. First, in House Report 101-485 Part III, the "qualification standards" section discusses "direct threat" in great detail.[159] Here, the Report plainly states that "[i]f the applicant is otherwise qualified for the job, he or she cannot be disqualified on the basis of a physical or mental condition unless the *employer can demonstrate* that the applicant's disability poses a direct threat to others in the workplace."[160] Furthermore, "[t]he legislative history of the ADA also supports the premise that '[t]he plaintiff is not required to prove that he or she poses no risk.'"[161] The Report so states verbatim, immediately following the provision pertaining to the employer.[162] The ordering of language in the House Report suggests that the employer is the bearer of proof, as it first emphasizes the employer's obligation to demonstrate direct threat and then follows by emphasizing the absence of a similar requirement for the plaintiff.

Proponents of placing the burden on the employee, however, look beyond this sequence and focus on other portions of the legislative history. More specifically, they look to the fact that the ADA is supposed to be "enforced in a manner . . . consistent with the requirements of the Rehabilitation Act of 1973" and believe they can look to "caselaw under § 504 of the Rehabilitation Act for guidance in interpreting the ADA."[163] Courts rely on *School Board of Nassau County v. Arline*, in which the Supreme Court "held that the issue of the threat to others posed by an

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because the business necessity defense found in subsection (a) of 42 U.S.C. § 12113, for which the employer bears the burden of persuasion, "addresses 'qualification standards' 'in general,' and subsection (b) provides the specialized rule for when those 'qualification standards' are grounded in safety concerns," the subsections "work in tandem" and "the burden of proof for the two subsections should be the same." *Id.* at 1338-42.

158. *See, e.g.*, Belk v. Sw. Bell Tel. Co., 194 F.3d 946, 951-53 & n.5 (8th Cir. 1999) (stating that the business necessity defense, also found in 42 U.S.C. § 12113(a), was for the employer to prove).

159. *See* H.R. REP. NO. 101-485, pt. 3, at 45-46 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 468-69.

160. *Id.* at 46, *as reprinted in* 1990 U.S.C.C.A.N. at 469 (emphasis added).

161. Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208, 220 (2d Cir. 2001) (quoting H.R. REP. NO. 101-485, pt. 3, at 46, *as reprinted in* 1990 U.S.C.C.A.N. at 469).

162. H.R. REP. NO. 101-485, pt. 3, at 46, *as reprinted in* 1990 U.S.C.C.A.N. at 469.

163. EEOC v. Amego, Inc., 110 F.3d 135, 143 (1st Cir. 1997) (citation omitted).

employee . . . was properly analyzed as a question of whether the employee was 'otherwise qualified.'"[164] House Report 101-485 Part III intimates that "[t]he Committee intend[ed] to codify the direct threat standard used by the Supreme Court in *School Board of Nassau County v. Arline*."[165] Proponents are quick to say that "[t]he intent to codify *Arline* suggests that the burden is on plaintiff to show that he or she is qualified in the sense of not posing a direct threat [because] *Arline* considered that issue to be part of the 'qualification' analysis under § 504 [of the Rehabilitation Act] as to which plaintiff bears the burden."[166] Stopping at this point in the Report is erroneous, however, as it fails to appreciate Congress' express statement that the employer must demonstrate that the individual's disability poses a direct threat. Congress' intent to codify the *Arline* standard is obvious, but it refers not to the notion that the plaintiff bears the burden of proof, but rather to the manner in which a risk is determined – an individualized inquiry in which "the perceived health or safety threat posed by the person with a disability must be based on solid facts and not on speculation or generalizations."[167]

While the struggle to correctly allocate the burden is evident,[168] the Eighth Circuit's choice to classify direct threat as an affirmative defense, and consequently to put the burden on the employer, proves to be the most consistent with the purposes behind the ADA. There are several policy justifications that are consistent with the purposes of the Act, including allocating the burden to the party in the best position to fulfill it, aligning it

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164. *Id.* (citing Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 287 (1987)). The First Circuit has declared that it "discern[ed] 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.*

165. H.R. REP. NO. 101-485, pt. 3, at 34, *as reprinted in* 1990 U.S.C.C.A.N. at 457.

166. *Amego*, 110 F.3d at 143.

167. Chai R. Feldblum, *Employment Protections*, *in* THE AMERICANS WITH DISABILITIES ACT: FROM POLICY TO PRACTICE 81, 103-4 (Jane West ed., 1991); *see* Hubbard, *supra* note 157, at 1287 ("Congress expressly modeled the direct threat provision on the Rehabilitation Act standard set forth in School Board of Nassau County v. Arline, which calls for a careful, scientific, individualized assessment of the actual risk presented by the specific employee."); *see also* H.R. REP. NO. 101-485, pt. 3, at 45, *as reprinted in* 1990 U.S.C.C.A.N. at 468. The report states:

> While the *Arline* case involved a contagious disease, tuberculosis, *the reasoning in that case is applicable to other circumstances*. A person with a disability must not be excluded, or found to be unqualified, based on stereotypes or fear. Nor may a decision be based on speculation about the risk or harm to others. Decisions are not permitted to be based on generalizations about the disability but rather must be based on the facts of an individual case.

Id. (emphasis added).

168. *See supra* note 140 and accompanying text.

with treatment of other defenses in the legislation's framework, and avoiding placing the plaintiff in the very position that Congress intended to prevent.

The employer is in a much better position than the plaintiff to establish that the plaintiff poses a direct threat to others because it is the employer who knows the contours of the workplace—people, equipment, expectations—and how those factors interact to make the business operate.[169] Classifying the direct threat defense as the employer's burden "finds support. . . in common sense. The [employer] is certainly in the best position to furnish the court with a complete factual assessment of both the physical qualifications of the candidate and the demands of the position."[170] A plaintiff who is a mere applicant to that working environment will not have the same first-hand knowledge to accurately determine whether he or she will pose a threat to others. For example, one of Wal-Mart's own objections in *EEOC v. Wal-Mart* was that the EEOC's expert never observed Bradley perform the duties that would be required of him as a greeter or cashier.[171] Yet an employer is in a better place to observe this sort of behavior than an applicant who has not been hired or an expert without access to observe the individual in the workplace.[172] Therefore, placing the burden on the employer ensures that the employer is not basing the employment decision on stereotypes, false assumptions, or prejudices, as the Act was passed to prevent, but instead is basing it on an actual assessment of the individual's genuine capability of functioning in the workplace.[173]

Furthermore, it has traditionally been the defendant's burden to prove his affirmative defenses.[174] Allowing the defendant-employer to claim direct threat as a "defense," while placing the burden of proof on the plaintiff, is essentially permitting the employer to validate a discriminatory action with a post hoc rationalization or a pretextual justification.[175] In many cases, that is what the direct threat defense becomes. For example, reviewing the facts of *EEOC v. Wal-Mart*, it seems that Wal-Mart knew Bradley was qualified, yet

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169. *See* Gillum, *supra* note 156, at 569 ("[B]ecause the Direct Threat Defense is concerned with on-the-job risks, it is the employer who is in the best position to offer evidence of those threats.").

170. Branham v. Snow, 392 F.3d 896, 907 n.5 (7th Cir. 2004).

171. *See supra* notes 111-12 and accompanying text.

172. *See* Gillum, *supra* note 156, at 569 ("Placing the burden of proof on the employer . . . forces the party with the easiest access to information to bear the burden of proof.").

173. *See* H.R. REP. NO. 101-485, pt. 3, at 45 (1990), *as reprinted in* 1990 U.S.C.C.A.N. at 468 (indicating an intention to avoid employment decisions based on "fear and stereotype" as "[t]he purpose of creating the 'direct threat' standard [was] to eliminate exclusions which are not based on objective evidence about the individual involved").

174. FED. R. CIV. P. 8(c).

175. Placing the burden on the defendant-employer would "[require] employers to affirmatively substantiate their 'direct threat' claims, not simply wait for the employee to disprove them or call their bluff." Gillum, *supra* note 156, at 569.

discriminated against him and claimed ex post facto that he was a direct threat (and thus unqualified) in a last effort to justify its actions.[176] Bradley was not a threat and claiming so was blatant pretext. Therefore, the direct threat "defense" should remain true to its allocation in the statute and be treated as a traditional affirmative defense, as are other defenses under the *McDonnell Douglas* burden-shifting framework.[177]

Finally, placing the burden on the plaintiff essentially requires the plaintiff to prove a negative.[178] Such practice has been discouraged in traditional American jurisprudence.[179] Allocating the burden to the plaintiff places a disabled person in a situation intended to be prevented by the ADA.[180] The Act was passed with the purpose of eradicating employment decisions based on prejudices and stereotypes about the alleged inadequacies of disabled individuals.[181] The Act essentially encourages society to dispel false assumptions and paternalistic attitudes and to presume first that disabled individuals are capable and ready for the workforce. Putting the burden on the plaintiff to prove he is not a threat to others is tantamount to putting him in a position based on the false assumption that he is incapable.

When presented with the opportunity, the Supreme Court has twice declined to resolve the dispute among circuit courts regarding who bears the burden in proving a direct threat claim. First, in *Chevron U.S.A., Inc. v. Echazabal*,[182] the Court characterized direct threat as an "affirmative

176. *See supra* notes 132-39 and accompanying text.

177. *See, e.g.*, Belk v. Sw. Bell Tel. Co., 194 F.3d 946 (8th Cir. 1999) (in which the employer had to prove the business necessity defense, an affirmative defense that he raised).

178. Brief of Petitioner-Appellant at 45, EEOC v. Wal-Mart Stores, Inc., 477 F.3d 561 (8th Cir. 2007) (No. 06-1583).

179. *Id.* ("We understand that the law generally frowns on requiring a party to prove a negative." (quoting United States v. Ollie, 442 F.3d 1135, 1343 (8th Cir. 2006))).

180. *See* H.R. REP. NO. 101-485, pt. 3, at 23 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 445, 446 ("The purpose of the [ADA] is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to *bring those individuals into the economic and social mainstream of American life*." (emphasis added) (citation omitted)); *see also* Gillum, *supra* note 156, at 567 ("[P]lacing the burden on employees puts many disabled persons in the same position they were prior to the passage of the ADA . . . where they [had to] single-handedly cure their second-class status." Furthermore, "the placement of the burden of proof on employees allows employers to stand back and wait for applicants to prove they are not direct threats . . . [which] gives employers a license to make preemptive and irrational risk assessments.").

181. *See* H.R. REP. NO. 101-485, pt. 3, at 45, *as reprinted in* 1990 U.S.C.C.A.N. at 468 (indicating an intention to avoid employment decisions based on "fear and stereotype").

182. 536 U.S. 73 (2002).

defense," but did not directly address the dispute.[183] There, defendant Chevron argued that the plaintiff carried the burden to prove he was a "qualified individual" under the ADA, a standard that would require him to show "there was evidence, reasonably available to Chevron when it made its decision, demonstrating that he could perform the essential functions of the job without posing a significant risk of serious injury."[184] Some believe, however, that the Supreme Court, while not having ruled conclusively, stated its resolution in dicta in *Echazabal*. Because the Supreme Court did not specifically address this claim, some assume the argument failed.[185] The Supreme Court found that, read in conjunction with the ADA's definition of discrimination, direct threat is "an affirmative defense for action under a qualification standard shown to be job-related for the position in question and consistent with business necessity."[186] "By continually referring to 'direct threat' as a defense, rather than as a prima facie element of plaintiff's case, the Court [seemed] to be rejecting [the defendant's] argument that [the plaintiff bore] the burden of proof."[187]

The Supreme Court also declined to address the issue in 2005 when it denied certiorari to the Tenth Circuit case, *McKenzie v. Benton*, which sought clarification specifically on the allocation of the burden with the direct threat defense.[188] Since *McKenzie*, yet another court has spoken and the divide among circuits widened.[189] There is a need for clarification by the Supreme Court if the ADA is to become the uniform piece of legislation that Congress intended.[190] One of Congress' purposes in enacting the ADA was "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities,"[191] a purpose that can only be fulfilled if the statute is enforced uniformly across jurisdictions.

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183. Amerkhanian, *supra* note 90, at 867.

184. *Id.* (quoting Brief for Petitioner at 42-44, Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73 (2002) (No. 00-1406)).

185. *Id.* at 868.

186. *Echazabal*, 536 U.S. at 79.

187. Amerkhanian, *supra* note 90, at 868.

188. 544 U.S. 1048 (2005) ("Petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied."); Petition for a Writ of Certiorari, *McKenzie*, 544 U.S. 1048 (No. 04-1057).

189. *See* EEOC v. Wal-Mart Stores, Inc., 477 F.3d 561 (8th Cir. 2007).

190. *See* Petition for a Writ of Certiorari, *supra* note 188, at 16-17 (stressing the need to "restore uniformity to federal law in this area" because "the outcome of ADA cases will depend not on their merits, but on the circuit in which the plaintiff has the fortune (or misfortune) to reside").

191. 42 U.S.C. § 12101(b)(2) (2000).

VI. CONCLUSION

The Americans with Disabilities Act was passed as an effort to eradicate the barriers facing disabled individuals attempting to enter the employment arena – barriers such as decisions that deny willing employees opportunities based on false assumptions of their incapability. Based on unfounded fears, an employer might assume that a person with a disability would be dangerous to others' safety and use that potential threat as a defense for refusing to hire the individual. When this defense is raised, the employer should have to prove that it is indeed true. The Eighth Circuit so held in *EEOC v. Wal-Mart*, stating that an individual with a disability does not have to prove that he or she does *not* pose a threat to the health or safety of others. While this decision is in conflict with the manner in which other circuits have allocated the burden of proof, it is consistent with the text, legislative history, and policy justifications behind the Americans with Disabilities Act.

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