ECHAZABAL AND THE THREAT TO SELF-DEFENSE: THE MOST RECENT CALL FOR A CONSISTENT, INTERSTATE GENETIC NONDISCRIMINATION POLICY

Nicole Silvestri†

Initiated in 1990, the Human Genome Project has sought to identify each gene on a human being’s twenty-three pairs of chromosomes and then arrange them into a “map.”¹ The completion of the project was announced on April 14, 2003.² A landmark achievement for all of mankind, the genetic map’s completion has also left society confused by its conflicting costs and benefits: while many potential medical advances are expected to flow from this genetic map, there is an additional concern that its completion has identified a new form of discrimination which surges through our veins. While lawmakers have been struggling to pass bills which explicitly combat genetic discrimination since 1995, recent scientific breakthroughs like the completion of the human genome map have given this issue a higher priority. Before this discovery, the potential for employers to abuse genetic information was more of an impending fear than a scientific reality. Now these fears are rapidly materializing, and attempts to regulate this discrimination, specifically in the areas of health care and employment law,³ are quickly being taken more seriously.⁴

The Americans with Disabilities Act (ADA) has been the primary recourse for Americans with disabilities or handicaps in the area of employment.⁵ Legislators are divided in their views as to whether

† J.D. Candidate 2005, University of Pennsylvania Law School.


4. See generally, Preface to GENETICS POLICY REPORT: EMPLOYMENT ISSUES v (Cheye Calvo & Alissa Johnson eds., 2001) (noting the formation of the Genetic Technologies Project as a bipartisan effort to create sound policies in response to advances in human genetics).

additional genetic nondiscrimination legislation is needed at all. Yet, the most recent genetic nondiscrimination legislation (S. 1053) easily rifled its way through the Senate despite lobbyists' vigorous contention that the additional legislation was unnecessary. A number of states have passed legislation to address the issue of genetic discrimination, as it is not explicitly mentioned in the ADA. However, there is wide variation in the scope and extent of coverage offered by these laws, and some states have not initiated any legislation at all. The present level of protection against genetic discrimination is wholly insufficient: it is erratic among some states, deficient among others, and completely lacking in the rest. As yet, there have been no cases of genetic discrimination successfully litigated under the ADA. The recent Supreme Court decision of Chevron USA Inc. v. Echazabal highlights the problems that may result when and if genetic discrimination litigation is brought under the ADA. Echazabal is the most recent "call to arms" for instituting a genetic discrimination policy that is consistent across state lines.

In this Comment, I will first provide background on the issue of genetic discrimination in the workplace and on how a claim alleging genetic discrimination can be brought under the ADA. I will then explain why the ADA by itself is insufficient to prevent genetic discrimination.

In Part II, I will discuss existing state and federal statutory schemes which have been introduced in an attempt to prevent employers from gaining access to genetic test results. I will also discuss the Genetic


8. See, e.g., Statement of LPA Concerning S. 318, The Genetic Nondiscrimination in Health Insurance and Employment Before the Senate Committee on Health, Education, Labor, and Pensions, 107th Cong., 2–3 (2001) [hereinafter Statement of LPA], available at http://www.hrpolicy.org/memoranda/2001/01-128_GenDisc_Testimony_Senate.pdf (“[The prong of the ADA which protects individuals who are ‘regarded as’ having impairments] is designed to protect against unfounded myths, fears, and stereotypes about individuals with disabilities and reflects Congress’ determination that the reaction of others to an impairment or a perceived impairment should be prohibited the same way as discrimination based on an actual impairment.”).

9. One case, Burlington Northern Santa Fe Corp., got close to the issue when employees claimed that the railroad generally tested track workers without their knowledge in violation of the ADA. Steve Bates, Senate May Consider Genetic Bias Legislation, SHRM NEWS (May 30, 2003). The case did not end up going to trial, since Burlington settled with the Equal Employment Opportunity Commission for $2.2 million in May 2002. Id.

Information Nondiscrimination Act, the newest legislation addressing genetic discrimination which was recently passed in the Senate. Finally, I will provide a brief discussion on whether state or federal legislation is a more fitting statutory approach.

In Part III, I will explore the Supreme Court ruling in *Chevron USA Inc. v. Echazabal*, which extended an employer’s ability to assert the direct threat defense. According to *Echazabal*, the defense now includes a threat to oneself, supporting the EEOC’s broad interpretation of the language of the ADA, which explicitly includes only “threat to others” in its statutory language.

Part IV will discuss the ramifications of *Echazabal* for an individual alleging genetic discrimination under the ADA. A paternalistic decision like *Echazabal* has potentially devastating effects for workers if more consistent state or federal legislation is not enacted in the area of genetic discrimination. For example, based on the results of genetic tests, one with a propensity for a certain disease may be legally barred from obtaining a particular job because the employer considers working at the job to be a “direct threat” to that individual’s own health. Such an attitude is likely to instill fear among workers whose chances of gaining recourse for such employer action depends on the scope of coverage provided by a patchwork of ADA provisions and coverage in the state where the worker resides.

Finally, Part V discusses some recent decisions, and analyses the affect *Echazabal* has had on an employer’s ability to assert the newly-created “threat to self” defense.

I. GENETIC DISCRIMINATION AND THE ADA

A. Genetic Discrimination and its Place in the Context of Employment Law

It is difficult even for experts to agree on a definition of “genetic discrimination,” and it is not a term with which most people are familiar. Yet advances in science and technology require an advance in both our awareness and our level of understanding of this concept. Robert Olick, author and expert in the area of law and bioethics, defines genetic discrimination as “negative differential treatment of an individual based solely upon that person’s possession of one or more genetic traits that deviate from the ‘normal’ genome, or on the perception that the individual possesses one or more genetic traits that deviate from the ‘norm,’” when that
The human genome has now been mapped, giving more meaning to the genetic information stored in each of our cells. Information can now be derived from genetic tests of an individual and his or her family members, or from one’s family history.

In the employment context, the greatest concern anticipated in the area of genetic discrimination is that employers will begin basing their hiring, firing, assignment, promotion, and wage, term, and benefit negotiation decisions on the results of predictive genetic tests. Genetic tests seek to identify the presence or absence of certain genetic markers, which can indicate one’s propensity to develop a particular disease or disorder. While the presence of some of these markers indicate that an individual will be highly likely to develop a disease in the course of his or her lifetime (for example, Huntington’s or Tay-Sach’s), the majority of these markers are indicators that an individual is merely “predisposed” for getting the disease. To demonstrate the potential of the problem, even if a person has a genetic propensity for Huntington’s Disease, one of the disorders that is highly predictive, the individual still has only a fifty percent chance of actually developing it. Until the individual does, he may be completely asymptomatic. The rest of that fifty percent will never contract the disease at all.

Surely, letting an employer gain access to this predictive information exposes an applicant or an employee to the chance of not being hired at all, being denied a conditional offer, or being fired because of test results, while the employer offers pretextual explanations for the decision. On the
employer's end, incentives to base employment decisions on predictive information are great and could likely save the employer the future costs (for example, disability, worker's compensation, and health-care related costs) associated with taking on the "potentially-defective" worker. Genetic discrimination is a scary prospect since it can be based on information that is highly speculative—a worker may be denied an employment opportunity yet never actually contract the disease that is written in his genes.

B. Bringing Suit for Genetic Discrimination Under the ADA

1. The History of the ADA Reveals its Attempts to Move Away from Paternalism

The ADA was enacted in 1990 in response to Congressional concern about the growing number of people with disabilities encountering a disproportionate lack of opportunity and level of outright discrimination as compared to ordinary Americans. Until the ADA was passed, the United States had adopted what was known as a "medical" or "charity" model of disability: there were assistance programs (in the form of health care, vocational rehabilitation, income supports, and the like) to give aid to the disabled; however, the ADA was one of the first empowering pieces of disability legislation. The same support system as before was available for the disabled, but after the passage of the ADA, those affected had a recourse for stereotyping and a remedy for discrimination. An indication of the move away from paternalism is embedded in the legislative history of the ADA itself: one of Congress' main intents was to prohibit employers from denying someone an employment opportunity because of paternalistic concerns regarding that person's own health.

20. See D. Aaron Lacy, Am I My Brother's Keeper: Disabilities, Paternalism, and Threats to Self, 44 SANTA CLARA L. REV. 55, 68 (2003) (citing H.R. Rep. No. 101-485, pt. 2, at 74 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 356) ("The legislative history of the ADA clearly shows that one of Congress's purposes under the ADA was to ensure that employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person's own health."); see also Chevron v. Echazabal, 536 U.S. 73, 86 n.5 (noting that the concerns regarding paternalism are rooted in the possibility of pretextual decisions).
2. Asymptomatic Individuals are “Regarded as Having a Disability” Under the ADA

Liberally defined by the ADA, the term "disability" has been found to encompass discrimination based on genetic abnormalities: although the legislation does not specifically target genetic discrimination in its language, the Equal Employment Opportunity Commission (EEOC) takes the position that genetic discrimination is prohibited under the definition of “disability” that protects individuals who are regarded as having an impairment under section 12,102(2)(C). Thus, at least as far as the EEOC is concerned, individuals who are presymptomatic or genetically predisposed to getting a particular disease are covered under the statutory scheme of the ADA. There is, however, significant debate about whether the EEOC’s interpretation coincides with Congressional intent.

By enabling individuals to bring suit whether they were actually disabled as well as if they were simply regarded as such, Congress intended to expand the ADA to include all those who felt the effect of discrimination, even if it arose more from stereotypes than from an actual disability. The Senate Committee stated:

21. The ADA defines disability as “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment.” 42 U.S.C. § 12,102(2) (2000).


24. Olick, supra note 12, at 295–96. In his article, Olick reviews several commentators’ remarks on whether the ADA was, in fact, enacted with genetic discrimination in mind. His conclusion is that, had the state of genetic technologies been more advanced at the time the legislation was passed, the ADA would have more specifically addressed the issue. Id. For added discussion of legislative intent, see Mark A. Rothstein, Genetic Discrimination in Employment and the Americans with Disabilities Act, 29 Hous. L. Rev. 23, 49–50 (1992) (noting that it is unclear how the ADA will be interpreted).

Clause [iii] in the new definition clarifies the intention to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped . . . . This subsection . . . includes those persons who do not in fact have the condition they are perceived as having, as well as those persons whose mental or physical condition does not substantially limit their life activities and who thus are not technically within clause [i] of the new definition. Members of both of these groups may be subjected to discrimination . . . .

The Supreme Court has since spoken on the criteria used to determine whether an entity has "regarded" an individual as disabled under prong three of the ADA's definition.\textsuperscript{27} In order to fall within the statutory definition, the individual must show that the employer-entity either: 1) believes that the candidate has "a physical impairment that substantially limits one or more . . . major life activities" when one actually does not have the impairment at all, or 2) "believes that an actual, non-limiting impairment substantially limits one or more major life activities."\textsuperscript{28} In fleshing out these criteria, the court stated:

\begin{quote}
[A]n employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment—such as one's height, build, or singing voice—are preferable to others, just as it is free to decide that some limiting, but not \textit{substantially} limiting, impairments make individuals less than ideally suited for a job.\textsuperscript{29}
\end{quote}

The \textit{Sutton} Court further eroded the "regarded as" definition and the ability of an individual to bring suit under the third prong of the ADA. The Court found that the existence of other types of jobs which require the same skills as the one for which the petitioner was denied employment precludes a finding that the employer has regarded the individual as having a substantially limiting impairment since a number of other positions using the individual's skills were available.\textsuperscript{30}

While \textit{Sutton} may have been decided correctly under its own facts, the

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\textsuperscript{27} Sutton v. United Air Lines, Inc., 527 U.S. 471, 489–90 (1999). In \textit{Sutton}, an allegation that United Air Lines had a vision requirement in place did not, without more, establish that the entity regarded the petitioners (who were denied employment as global airline pilots) as disabled. \textit{Id.}
\textsuperscript{28} Id. at 489.
\textsuperscript{29} Id. at 490–91.
\textsuperscript{30} Id. at 493.
\end{flushleft}
holding may have a dire effect on individuals attempting to bring a claim of genetic discrimination under the third prong of the ADA. The Court acknowledges that discrimination may be allowed if an individual has a limiting condition, as long as it does not limit "substantially." The fear is that employers may be able to use genetic screening processes to preference certain individuals over others in the employment arena. These biased employment decisions may be able to find support rendered in Sutton: since the medical condition to which the employee is predisposed is not "substantially limiting" at the time when the screening is done, perhaps the employer is "free to decide" that the impairment makes the employee less than ideally suited for the position. Further, as long as there are other jobs available to the individual which require the same skill set as the one he was denied employment for, the preferential hiring practices may not be considered unlawful under prong three of the ADA.

Sutton thus poses a powerful road block for individuals who may try to bring suit for genetic discrimination claiming they were "regarded as" having a disability when they were denied employment because of predictive genetic tests. Under Sutton, it is quite possible that an asymptomatic individual who is prone to a genetic condition may be legally denied employment because of a potentially limiting impairment, so long as there are other similar jobs available to him.

While courts have dealt with cases that address the ADA’s coverage of asymptomatic individuals,31 no cases of genetic discrimination have been brought thus far under the ADA, and a detailed discussion as to whether the ADA was intended to extend its coverage to genetic discrimination is beyond the scope of this Comment. For the purposes of this discussion, I will assume that a case of genetic discrimination can be brought and would be allowed under the ADA.

C. Applicants and Employees are Left Exposed when Genetic Tests are Considered “Medical Examinations and Inquiries” Under the ADA

Even if genetic tests are classified as “medical examinations and inquiries” (as they would be if a case were to be litigated under the ADA), employers remain limited as to how and when they can test applicants and employees. With regard to applicants, medical inquiries regarding an individual’s disability or the severity of the disability are only allowed if they are job-related. With respect to conditional employees, generalized medical tests are allowed as long as all employees, regardless of disability, are administered the test and as long as the information is kept

31. See Bragdon v. Abbott, 524 U.S. 624, 639–40 (1998) (holding that an asymptomatic individual with HIV could bring suit under the ADA because it was an impairment that substantially limited the major life activity of reproduction).
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In a recent case, plaintiffs voluntarily subjected themselves to a urine test for a post-offer entrance exam. Instead, the test was used disproportionately among blacks and women to check for syphilis, sickle cell, and pregnancy. Plaintiffs brought claims under both Title VII and the ADA. Plaintiffs argued that, under the provisions of the ADA, their employer was prohibited from administering any entrance examinations. While the court acknowledged that plaintiffs’ Title VII claims had validity, it affirmed the dismissal of the ADA claims, stating that “the ADA imposes no restriction on the scope of entrance examinations; it only guarantees the confidentiality of the information gathered... and restricts the use to which an employer may put the information.” The court further explained that, according to 29 C.F.R. section 1630.14(b)(3), the results of these tests could be used to exclude an individual on the basis of a disability as long as the criteria themselves were job-related and consistent with business necessity.

This case exemplifies one reason why ADA coverage for genetic discrimination is inadequate. If the ADA’s definition of “medical tests” includes genetic tests, then employers can simply require medical “genetic screening” tests as a preemployment requirement. As long as employers administer the test to all employees, they are acting legally and are within the bounds of ADA regulations. In the process, they become privy to the predictive genetic information for all of their potential employees.

Despite the fact that employers cannot determine which employees have genetic abnormalities based on physical appearance, and despite the fact that employers are prohibited from discriminately administering

32. 42 U.S.C. § 12,112(d)(2)(B) (2000) states, “[a] covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.” Section 12,112(d)(3) states,

[a] covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination if—
(A) all entering employees are subjected to such an examination regardless of disability; [and]
(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record...

Id.

33. Norman-Bloodsaw v. Lawrence Berkeley Lab., 135 F.3d 1260, 1265 (9th Cir. 1998).
34. Id. at 1271–74.
35. Id. at 1273.
36. Id.
medical tests under the ADA, employers can still figure out who is genetically predisposed for every disease by simply testing all employees. Once an employer has determined which employees are at risk for which genetic disorders, it then has many options. First, the employer can chose not to hire the genetically predisposed individual, covering up this choice by claiming it was for a reason unrelated to the person's "bad genes." Second, under section 12,113(a) of the ADA, the employer can claim that the genetic predisposition is job-related and that it is consistent with business necessity not to hire the person. Third, under section 12,113(b) of the ADA, the employer can claim that the individual poses a direct threat to others. Finally, under the recent Supreme Court decision in Echazabal, an employer can claim that it is acting in the best interest of an applicant by refusing to hire the individual because their genetic predisposition creates a direct threat to their own health or safety.  

II. IS THE ADA NOT ENOUGH? EXAMPLES OF "GAP-FILLING" LEGISLATION TO BOLSTER THE ADA

A. Executive Order 13,145

Recently, there has been an attempt to pass federal legislation that specifically targets genetic discrimination. Before leaving office, President Clinton signed Executive Order 13,145, which forbids federal employers or those receiving federal funding from discriminating based on protected genetic information. The order (with certain exceptions) prohibits federal employers from using, requesting, requiring, collecting, purchasing, and disclosing "protected genetic information." The order certainly is a sign that the issue of genetic discrimination has become important enough to receive attention at the executive level. Unfortunately, the order has several major downfalls. For one, it is limited in scope, covering only those applying for federal employment. In addition, its exceptions are numerous and extensive. While the order gave added publicity to the problem of genetic discrimination, federal employees need more protection than this order provides. Even more importantly, the entire American work force needs this protection, not just those employed by the federal

40. Id. at 6878. "Protected genetic information" is defined as: "information about an individual's genetic tests; information about the genetic tests of an individual's family members; or information about the occurrence of a disease, or medical condition or disorder in family members of the individual." Id.
41. See id. at 6879 (carving out exceptions for employers who monitor harmful toxins, propose conditional employment offers, or provide employees with genetic or health care services).
government.

B. The United States Senate Makes Another Attempt at Regulation: The Genetic Information Nondiscrimination Act of 2003

The Genetic Information Nondiscrimination Act of 2003 would bar employers from using an individual’s genetic information in employment decisions. The bill prohibits employers, labor organizations, employment agencies, and joint labor-management committees from requesting, requiring, or purchasing genetic information of employees. The bill also limits the liability of employers to cases of intentional genetic biases, stating that those who learn of employee conditions inadvertently will not be subject to damages unless the information is used in an intentionally discriminatory manner. Finally, the bill prohibits any disclosure of genetic test results except to the employee, health researchers, or in compliance with federal and state law. The legislation is an admirable attempt to regulate a complicated area of employment law. While criticisms of the bill abound, the Senate should be applauded for preemptively addressing a problem that could have devastating effects for many Americans in the near future.

C. Efforts to Supplement the ADA Through State Legislation

Assuming the ADA is the proper venue to regulate genetic discrimination once it has occurred, the issue still remains that the ADA was designed to protect against discrimination; it was not designed to prohibit the gathering of the information in the first place. States have recognized that the predictive nature of genetic information creates the potential for employers to abuse it, and many have responded accordingly through various types of legislation.

Most state legislation specifically limiting the use of genetic information in the workplace began after the Human Genome Project started in the early 1990’s, although a few states regulated the sickle cell trait in the 1970’s and 80’s. Generally, states have adopted one of two approaches to legislation—"exceptional" or "inclusive." The "exceptional" view requires genetic information to be addressed separately from other

43. Id.
44. Id.
45. Id.
46. MAPPING PUBLIC POLICY FOR GENETIC TECHNOLOGIES, 8.4 (Brenda A. Trolin ed., 1998).
47. GENETICS POLICY REPORT: EMPLOYMENT ISSUES 2-3 (Cheye Calvo & Alissa Johnson eds., 2001).
types of health information because it is so unique. The "inclusive" view treats genetic information in the same way that any other health information is treated. The inclusive category can be further subdivided into two categories—the first seeks to incorporate standards for the use of genetic information into current workplace protections, while the second attempts to strengthen existing disability protections or create new protections based on current or future health status.

Federal lawmakers seem to have fallen behind in the race to legislate genetic discrimination. As of 2001, twenty-one states have passed laws which place special restrictions on employers wishing to acquire genetic information. Out of these states, employers are prohibited from requesting information in seventeen states, from performing genetic tests in thirteen states, and from obtaining genetic information from any source in nine states. Oftentimes, however, employers are exempted from onerous testing restrictions if tests are performed in limited "job-related" situations. These include measuring abilities that are essential to performing a job, monitoring employees for exposure to harmful toxins or chemicals, and testing for susceptibility to a disease if working in a position where exposure to certain toxins is likely.

Maryland, home to the NIH's Human Genome Project, is an example of a state with a thorough, "exceptional" policy. For one, it bars employers from requiring employees to submit to genetic testing as a condition for employment. Furthermore, it refuses to allow this type of information from being used in the calculus of wages, bonuses, and raises. Maryland also specifically makes it unlawful for an employer to discriminate because

48. Id. at 4.
49. Id. at 5.
50. Id. at 4. Illinois and Michigan are examples of two states which adopt the first type of inclusive approach, while California and Minnesota have implemented laws from the second type of inclusive category. Id.
52. GENETICS POLICY REPORT: EMPLOYMENT ISSUES, supra note 47, at 14.
53. Id. According to another source, the number may be even higher. Erin Heath suggests that as many as twenty-eight states have passed some form of legislation banning genetic discrimination by employers. Erin Heath, Zipping Up Genes Discrimination, NAT'L J. July 21, 2001; see also LAWRENCE O. GOSTIN ET AL., GENETICS POLICY AND LAW: A REPORT FOR POLICYMAKERS 26 (2001) (As of 2001, "[t]wenty-eight states forbid genetic discrimination in employment," twenty-two states "required informed consent of the individual for genetic testing" and third party disclosure, and four states "define genetic information as personal property.").
54. GENETICS POLICY AND LAW, supra note 47, at 14–15.
55. Hathaway, supra note 51, at 171.
56. Id.
of a predisposition for a disease or disorder. Similar to Federal ADA legislation, Maryland's laws apply only to companies with fifteen or more employees.

If the ADA left any room for question as to whether it covers genetic discrimination, states with laws as broad as Maryland's certainly patch this ambiguity. Those who believe that genetic discrimination should be addressed at the state level laud this type of legislation. However, leaving this area to individual state regulation will inevitably lead to inconsistencies because each state will choose varying breadths of coverage. This means that employees and employers alike will have insufficient warning as to what is acceptable under the law, and the cost of determining what is permissible in each state will be a huge burden for companies operating across state lines.

III. THE SUPREME COURT EXTENDS THE SCOPE OF THE DIRECT THREAT DEFENSE UNDER ECHAZABAL

A direct threat is defined as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." It is an affirmative defense, clearly stated in the language of the ADA, which employers can assert in defending their decision to not hire or to fire individuals. Several factors have been traditionally weighed to determine if an individual presents a "direct threat" to others: first, the duration of the risk; second, the nature and severity of the potential harm; third, the likelihood that the potential harm will occur; and fourth, the imminence of the potential harm. The EEOC, however, has gone a step further in its

57. Id.
58. Id.
59. See, e.g., Candice Hoke, Is There a Pink Slip in your Genes? Genetic Discrimination in Employment and in Health Insurance: Reasons to Eschew Federal Lawmaking and Embrace Common Law Approaches to Genetic Discrimination, 16 J.L. & HEALTH 53, 55 (2001-2002) (suggesting states regulate the arena of genetic discrimination since we are still in the infant stages of dealing with the issue of genetic discrimination, we have not had time to evaluate the initiatives taken by states in dealing with it, and federal legislation oftentimes is an inefficient way of expressing political power).
62. Section 12,113(a) of the ADA creates an affirmative defense for employers who make employment decisions under a qualification standard which is "shown to be job-related and consistent with business necessity." Under § 12,113(b), this standard may include a requirement that the individual in question "not pose a direct threat to the health or safety of other individuals in the workplace" if the individual cannot perform the job with reasonable accommodation, under § 12,113(a).
63. See E.E.O.C. v. Kinney Shoe Corp., 917 F. Supp. 419, 429 (W.D. Va. 1996) (citing 29 C.F.R. 1630.2(r)) (holding that, based on an analysis of the four-factor test under the
interpretation of the statutory language of the ADA. Specifically, the term "qualification standard" includes a threat to the individual himself as well as a "threat to others." The interpretation of the direct threat defense to include a threat to the individual's health and safety creates a loophole for employers making hiring decisions: this makes it possible for presymptomatic individuals who are at risk for developing a certain disease to be denied employment because of the future risk of injury they pose to themselves. Under the EEOC's interpretation, the applicant may legally be denied a position if the employer decides that the future risk of harm is too great. Giving the power of decision to the employer poses many problems. In 2002, this controversial interpretation was addressed by the Supreme Court in the case of Chevron USA Inc. v. Echazabal.

Mario Echazabal had worked in oil refineries owned by Chevron since the early 1970's. He initially worked for independent contractors of Chevron's oil refinery, mainly in the coker unit. In 1992, Echazabal decided to apply to work directly for Chevron, and he received an offer for employment contingent on his passing a physical examination. Chevron's doctors conducted the preemployment physical exam and discovered that he was producing enzymes in his liver at an abnormally high rate. Consequently, Echazabal failed the test and was not offered the job. Following this first exam, he sought medical treatment with several ADA, a shoe salesman's epileptic seizures did not rise to the level of "high probability of substantial harm" necessary for the employer to successfully assert the direct threat defense.

64. See 29 CFR § 1630.15(b)(2) (2001) ("The term 'qualification standard' may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace.").

65. See Amanda J. Wong, Distinguishing Speculative and Substantial Risk in the Presymptomatic Job Applicant: Interpreting the Interpretation of the Americans with Disabilities Act Direct Threat Defense, 47 UCLA L. REV. 1135, 1145 (2000) (predicting the problems that could be encountered by presymptomatic individuals under this interpretation, and arguing that "[a]dverse employment decisions based on speculation and future risk of injury are illegal under the ADA; but if an employer is able to characterize speculation regarding future risk of injury as a direct threat to self, then it becomes a valid reason for disqualification.").

66. See id. at 1146 ("The grant of such power to employers also creates a greater incentive to find that a presymptomatic individual poses a direct threat to himself and, based on that assumption, to screen him out. . . . [P]lacing the decision in the hands of employers provides them with a means of avoiding compliance with the ADA, reducing the incentive to work to accommodate the disabled and to reduce environmental hazards overall in the workplace.").

68. Chevron USA Inc. v. Echazabal, 226 F.3d 1063, 1065 (9th Cir. 2000).
69. Id.
70. Id.
71. Id.
72. Id.
doctors of his own choosing, and discovered that he had asymptomatic, chronic active hepatitis C. Although Echazabal informed each doctor of the conditions at the plant where he worked, and even provided one with a document which detailed the specific environmental toxins that were present at the coker unit, none advised him to discontinue working at his job.

In 1995, Echazabal tried again to get a position with Chevron. Chevron gave him a conditional offer, contingent, once again, on his passing a physical examination, and again he failed. This time, Chevron wrote to the independent contractor employing Echazabal to “immediately remove Mr. Echazabal from the refinery or place him in a position that eliminates his exposure to solvents/chemicals.” Echazabal then filed suit, removed to federal court, and alleged that Chevron had discriminated against him by not hiring him or even allowing him to continue working at the coker unit because of his liver condition.

The district court granted summary judgment for Chevron, relying on the EEOC’s regulation that an employer can defend against a discrimination claim if allowing the employee to work at the particular job would cause a direct threat to that individual’s health or safety. The Ninth Circuit Court of Appeals reversed, relying on the limitations stated in the ADA, which do not include threats to an individual’s own health or safety in its statutory language.

The Supreme Court, disagreeing with the Ninth Circuit Appeals Court, addressed the issue of paternalism in its Echazabal decision, stating:

It is true that Congress had paternalism in its sights when it passed the ADA, see § 12,101(a)(5) (recognizing “overprotective rules and policies” as a form of discrimination). . . . The direct threat defense must be “based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence,” and upon an expressly “individualized assessment of the individual’s present ability to safely perform the essential functions of the job” reached after considering, among other things, the imminence of the risk and the severity of the harm portended. 29 CFR §1630.2(r) (2001). The EEOC was certainly acting within the reasonable zone when

73. Id.
74. Id.
75. Id.
76. Id.
78. Id. at 77.
79. Id.
it saw a difference between rejecting workplace paternalism and ignoring specific and documented risks to the employee himself, even if the employee would take his chances for the sake of getting a job. 80

The Court went on to distinguish other paternalistic decisions that were concerned with “the broad category of gender” from the EEOC’s requirement that judgments to determine direct threat be “made on the basis of individualized risk assessments.” 81 The Court refers to these other decisions as “beside the point.” 82 Yet through Echazabal, the justices of the Supreme Court have written a decision anchored in what they recognized the ADA was designed to prevent against: paternalism towards the disabled. 83

IV. POTENTIAL PROBLEMS LIKELY TO BE ENCOUNTERED BY WORKERS AS A RESULT OF DECISIONS LIKE ECHAZABAL WHEN GENETIC DISCRIMINATION IS NOT REGULATED UNDER A CONSISTENT AND STRONG POLICY

Echazabal was denied a conditional offer because the results of his physical examination revealed that he had a liver condition that could be exacerbated over time. However, under the ADA, it is unlawful to withdraw a conditional offer of employment for any medical reason except that the individual is unable, even with a reasonable accommodation, to perform the essential functions of the job. 84 Echazabal was certainly physically able to perform the essential functions of his job. Having a disease like Hepatitis C does not prevent one from being able to work at a coker factory in any imaginable way. Yet Chevron was legally able, under

80. Id. at 85–86. For an example of a post-Echazabal case that balances these factors in order to make a determination of whether an applicant would be posing a direct threat to his health or safety by performing his job, see Collins v. Raytheon Aircraft Co., No. 01-1415-JTM, 2003 U.S. Dist. LEXIS 1148, at *1 (D. Kan. Jan. 16, 2003). In Collins, the employee’s physical condition (fused disk and metal rodding to stabilize his spine) was permanent and the potential for injury while working as an airplane assembly worker was “substantial and severe.” Id. at *15. A doctor testified that he would have an inherently increased risk of additional injury, and that the risk would be “constant and ongoing” because of the nature of the job. Id. at *15–16.

81. 536 U.S. at 86.

82. Id.

83. Lacy, supra note 20, at 89 (“[T]he ADA’s direct threat defense ... should be limited to those instances where a person with a disability cannot perform the functions of the job or puts others at harm in doing the job. If the particular harm is only to oneself, the person is not unable to do the job and cannot be barred from doing so. Any other result contravenes the anti-paternalistic purpose of the ADA.”).

the EEOC’s interpretation of ADA language, to rescind its conditional offer based on the “future risk” that Echazabal’s disease presented to his own health.

*Echazabal* is a troubling decision for many reasons, but for the purpose of this Comment, it is the most recent evidence that genetic discrimination simply cannot be addressed solely by the regulations of the ADA. It has been suggested that “employers may deny employment opportunities on the ground that work site conditions or job responsibilities could make workers’ own biological anomalies develop into pathologies or disabilities,” and that the potential is great for use of the direct threat defense in this area.\(^{85}\) While ADA case law purports to require a “high probability of substantial harm” before an employer can assert the direct threat defense,\(^{86}\) the Supreme Court’s decision in *Echazabal* contravenes the wisdom of such precedent. Echazabal’s current condition did not prevent him from performing the essential functions of his job, just as the current condition of an employee with a genetic predisposition for multiple sclerosis would not prevent that employee from performing at their job. Instead of making the determination of the direct threat based on the current condition of the applicant or employee, *Echazabal* requires a consideration of the possible effect that the condition will have on that individual’s “future health.” Then the employer has the power to decide whether the individual should take that risk.

*Echazabal*’s expansion of the direct threat defense is the most recent wake-up call for a comprehensive legislative policy to regulate genetic information separately from the sub-par coverage it would receive under the ADA. We simply cannot have employers gaining access to predictive health information, especially when the Supreme Court has given employers the go-ahead to decide which risks their employees should take with their own lives. While some states have proceeded with such legislation, others have not even addressed the issue. *Echazabal* represents the problems that could arise if a genetic discrimination case is heard under the ADA. Without additional legislation, employees that litigate under the ADA with no success may have no other protective legislation if they live in a state which has little or no additional safeguards for genetic discrimination. The potential for a lack of protection in an area that is

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86. See, e.g., Lovejoy-Wilson v. NOCO Motor Fuel, Inc. 263 F.3d 208, 220 (2d Cir. 2001) (refusing employer’s attempt to assert the direct threat defense when it could not provide any evidence that the plaintiff could not perform the essential functions of her job because of a seizure disorder); Hamlin v. Charter Township, 165 F.3d 426, 432 (6th Cir. 1999) (refusing to allow employer to assert direct threat defense in a case with a firechief who was unable to fight fires because of a heart condition when the alleged risk was “speculative or remote.”).
likely to affect large numbers of individuals is simply unacceptable.

V. WHAT HAS HAPPENED TO THE DIRECT THREAT DEFENSE SINCE ECHAZABAL WAS DECIDED?

The impact of *Echazabal* on discrimination suits brought under the ADA has recently begun. Evidently, *Echazabal* has given judges the go-ahead to seize decisions of whether a risk to employee health or safety should preclude that individual from remaining at his or her job.

In an Administrative Board decision, an employee who worked in the Department of Treasury for the Internal Revenue Service brought action against her employer for disability discrimination under the ADA. The employee had a respiratory condition, symptoms of which included sensitivity to chemicals and intolerance to irritants and neurotoxins (among others), and resulted in impairments in her ability to think, breathe, walk, eat, and make use of her hands. After requesting medical opinions, the agency determined that it was unlikely to find a position for her where she would be safe, given her degree of dysfunction. The court, however, went on to rely on *Echazabal*, stating that even if reasonable accommodations could have provided her with sufficient protection from workplace toxins, the employee “failed to demonstrate that the accommodations would provide sufficient protection such that she could ‘safely’ perform the duties of her position as required by 29 C.F.R. [section] 1614.203(a)(6).” After further discussing the medical opinions issued regarding her condition and the likelihood that it would worsen even given some accommodations, the court paternalistically concluded that “although the appellant’s willingness to work is admirable, we find that the consequences resulting from an accidental exposure could prove irreversibly catastrophic to her health.” *Echazabal* gave the green light to courts to make these private health determinations for employees, but the question remains whether this kind of paternalism is misplaced.

In *Orr v. Wal-Mart Stores, Inc.*, a pharmacist alleged disability discrimination under the ADA because he was an insulin-dependent diabetic and could not perform certain major life activities as a result of his condition. The district court found that his condition was not covered by

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88. *Id.* at 127–28, 133. Thus, the employee was a qualified individual under the definition of the ADA. *Id.* at 134.
89. *Id.* at 128–29.
90. *Id.* at 140.
91. *Id.* at 140–41.
92. 297 F.3d 720 (8th Cir. 2002).
93. *Id.* at 722–23.
the ADA, and the Eighth Circuit Court of Appeals affirmed. Interesting to note, however, was the Circuit Court’s suggestion in footnote five:

Had Orr established a prima facie case of actual disability under the ADA, Wal-Mart could have raised the threat-to-self defense. Wal-Mart could have argued that, accepting Orr’s contentions at face value, working in a single-pharmacist pharmacy, which did not provide for uninterrupted meal breaks, posed a direct threat to Orr’s health and that Wal-Mart was justified in not continuing his employment.

While not indicating how the argument would have fared under Eighth Circuit precedent, the fact that the court suggests this argument shows that it is open to the threat-to-self defense outlined in Echazabal, and implies that the Court encourages more employers to assert the defense. Wal-Mart probably could not have raised much of an argument under the direct threat-to-others defense before Echazabal. Yet, post-Echazabal, Wal-Mart can apparently claim that the possibility that an (adult) diabetic could fail to regulate his blood sugar properly could be a great enough threat to the employee’s own health and safety at a pharmacy to justify firing that employee—a rather absurd result, since most diabetics can easily regulate their blood sugar. The result is particularly daunting for those with genetic predispositions: if an employer can defend by asserting that the chance that a diabetic may not be able to regulate his blood sugar is enough of a threat to his health or safety, perhaps the employer can claim the same thing for those who have genetic dispositions that might arise at some time in the future. If employers are allowed to see predictive genetic information, they may now be able to argue that the possibility that an applicant may exhibit symptoms of the condition sometime in the future is a great enough threat to the individual’s safety so as to justify not hiring that individual.

Whether it is pretextual or an exhibition of “true concern” for the employee, it is certainly discriminatory in nature and should not be allowed.

Somewhat encouraging, however, is the recent case of Knutson v. AG Processing, Inc. Knutson was a boiler operator with some back impairment from a repaired hernia which prevented him from operating the boilers only if the system was not working as it should. However, if the system was working correctly, his condition would not prevent him from

94. Id. at 724–25.
95. Id. at 725 n.5.
97. Id. at 976–77.
doing the essential functions of his job. Yet, Knutson’s employer continued to assign him to light duty tasks against the recommendations of medical experts that he was fully capable of performing the tasks of a boiler operator. Eventually, AG Processing terminated Knutson’s employment. The court upheld a jury verdict which determined that Knutson was a qualified individual who was perceived as being disabled as per the ADA. Further, the jury found that Mr. Knutson could perform the essential components of his job with or without accommodation, and the court upheld this aspect of the verdict as well.

AG Processing claimed that Mr. Knutson was similar to Mr. Echazabal, and that the threat-to-self defense should have been available to them as it was in Echazabal. The court rightly made the distinction that in Echazabal, the employer relied on medical opinions that indicated Echazabal’s condition would worsen if he were to continue at his job. However, if AG had correctly interpreted Knutson’s medical reports, it would have come to quite the opposite opinion. The medical reports stated that Knutson could, in fact, perform all of the essential duties of a boiler operator, yet AG continued to place him on light duty tasks. This led the jury to conclude that the employer perceived Knutson as having a disability, qualifying him under the ADA, and further, that the threat-to-self defense could not be asserted, since the medical reports indicated that he could have performed the essential functions of the job without exposing him to additional health risks.

This case points out the importance of medical reports when a disability is involved. If genetic tests could predict the probability that an individual would come down with a certain disorder, perhaps a well-written medical report could portray this information to the employer while maintaining that the employee was still fully capable of performing the essential tasks of the employee’s job. The best solution, however, would prevent employers from becoming biased by absolutely prohibiting them from seeing the results of the predictive tests in the first place, thereby eliminating the risk of added discrimination altogether.

98. Id. at 979.
99. Id. at 990.
100. Id. “The inquiry into whether an employee is a ‘qualified individual’ within the meaning of the ADA has two prongs: the individual must (1) possess the requisite skill, education, experience, and training for the position; and (2) be able to perform the essential job functions, with or without reasonable accommodation.” Id.
101. Id. at 994.
102. Id. at 989.
103. Id.
104. Id.
105. Id. at 989–90.
VI. CONCLUSION

Allowing employers to be privy to genetic information presents another opportunity for discrimination in the workplace. The ADA was passed in 1990, and is insufficient to deal with a problem that was hardly conceivable when it was enacted. The better alternative is to base employment decisions only on the present state of the employee's abilities. Employers should be allowed to assert the "direct threat" defense only when the threat is definite and significant. Predictive genetic tests are not definite and the threat certainly does not rise to the level of "direct" if there is no manifested condition. Only when the individual evidences behaviors associated with his condition which prevent him from performing his job does a threat arise. Consistent state or federal legislation is increasingly becoming a necessity as we rely more heavily on genetic technologies. Only by enacting a more comprehensive legislative policy will employees be able to face the future without impending fears of discrimination based on genetic abnormalities that may never even manifest themselves symptomatically.