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FIRST, DO NO HARM: WHY DOCTORS ARE NOT OMNIPOTENT UNDER THE AMERICANS WITH DISABILITIES ACT

Sharona Hoffman

I. INTRODUCTION

The Americans with Disabilities Act1 ("ADA") was designed to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,"2 as well as those who are wrongly regarded as having a disability.3 Under the ADA, employers are prohibited from discriminating against individuals with respect to hiring, firing, promotion, and other employment decisions.4

The statute, however, does not forbid employers from requiring applicants for employment to undergo physical examinations, nor from basing employment decisions upon the results of medical screening.5 The ADA provides no explicit guidance as to what responsibility the employer retains under the Act once it has sent the candidate to the physician. And therein lies the problem: if the physician concludes that

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2. Id. § 12101(b)(1).
3. See id. § 12102(2)(C).
4. See id. § 12112(a).
5. See id. § 12112(d)(3). The physical examination may be conducted only after an offer of employment has been extended to a candidate. The offer must be a bona fide offer which is conditioned only upon the results of the medical examination. See id. Moreover, if the physical examination reveals a physical or mental limitation which rises to the level of a disability in a candidate who is otherwise qualified for the job, the employer must offer the employee a reasonable accommodation unless it can show that the needed accommodation would impose an undue hardship upon the operation of its business. See id. § 12112(b)(5)(A).
the employer should not hire an individual, can the employer rely unquestioningly upon the doctor’s recommendation in making an adverse employment decision? What if the doctor’s conclusion is based upon prejudice and misconception rather than upon relevant medical data? What if the doctor disqualifies the individual not because he or she is physically incapable of performing the essential job duties with or without a reasonable accommodation, but because the individual is overweight, has a past history of cancer, or has some medical condition which requires expensive treatment and will raise the employer’s insurance costs? Must the employer then send all individuals who have received a negative evaluation from the physician to another doctor for a second opinion? Should the company attempt to assess on its own whether following the doctor’s advice would cause it to violate the anti-discrimination mandate of the ADA? If so, how should it go about doing so?

This article argues that employers are not shielded from liability under the ADA if they rely upon the advice of a doctor in making an adverse employment decision. The question of the extent to which employers can rely upon the opinion of a single doctor for purposes of avoiding liability under the ADA is a significant question of statutory interpretation. According to one study, approximately forty-nine percent of new employees surveyed were required to undergo pre-employment medical examinations. In rejecting an applicant, it is not uncommon for employers to rely exclusively upon the advice of a doctor without any further analysis as to whether the candidate could perform the job duties in question in light of the medical condition diagnosed by the physician. The ADA’s prohibition of disability discrimination would be rendered nearly meaningless if an employer could blindly accept the negative recommendation of its doctor, no matter how baseless or contrary to law the recommendation is.

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6. The arguments developed in this article can also be applied to situations in which an employer sends a current employee to a physician and subsequently decides to terminate the individual based upon the doctor’s recommendation. For the sake of simplicity, however, the author will refer in the text only to the more common scenario in which the individual is not yet an employee and the employer bases an adverse hiring decision upon the results of a pre-employment physical.
The author concludes that an employer's reliance upon the opinion of a doctor for purposes of rejecting an applicant does not establish a defense under the ADA. If the employer's refusal to hire an individual constitutes a violation of the ADA, the physician's involvement in the decision-making process does not alleviate the employer's responsibility for the discriminatory act and does not eliminate liability under the statute.

This thesis is bolstered by a recent case litigated by the Equal Employment Opportunity Commission ("EEOC") against a Houston bus company, Texas Bus Lines, Inc.9 In resolving the issues of liability on summary judgment, a district court determined the following:

If an employer's relationship with a physician who conducts a medical examination results in the discriminatory rejection of applicants protected by the ADA, the employer is liable for a violation of the statute despite the involvement of a third party, the doctor, with whom the employer had a professional arrangement.10

In formulating this argument, the article will analyze the Texas Bus Lines case and its implications. The relevant language of the ADA and its implementing regulations will also be examined. Finally, the paper will outline means by which employers who rely upon medical examinations in making hiring decisions may insure compliance with ADA requirements.

10. Id. at 982. The opinion granted the EEOC's motion for partial summary judgment only in part since the court ruled against the EEOC on one issue. See id. The court found that Texas Bus Lines did not violate the ADA when it included medical questions on its application form. See id. The EEOC had contended that this practice was contrary to the ADA's mandate that medical examinations could be conducted only after a conditional job offer is extended to a candidate and that no medical inquiries could be made of applicants prior to that time. See id.; see also 42 U.S.C. § 12112(d)(2)(A)-(3) (1994). The court held that because the Department of Transportation Regulations specify that particular medical conditions disqualify individuals from employment as drivers, Texas Bus Lines did not violate the ADA by including questions as to those conditions on its application form. See Texas Bus Lines, 923 F. Supp. at 981. The decision thus appears limited to medical questions asked by companies subject to DOT regulations. See id. It should also be noted that Texas Bus Lines voluntarily eliminated the medical inquiries from its application form in September of 1994, after being advised to do so by the EEOC. See id. at 968 n.2.
II. EEOC v. TEXAS BUS LINES: THE FACTS OF THE CASE AND ITS RULING

Ms. Arezella Manuel, an experienced bus driver, applied for employment at Texas Bus Lines in March of 1994. She was five feet seven inches tall and weighed 345 pounds.11

Ms. Manuel filled out an application for employment at Texas Bus Lines on March 2, 1994.12 On the application form she provided information about her full employment history and indicated that she had won a safety award at a previous job.13 She then had a personal interview with a manager named Larry Evans.14 Mr. Evans was impressed by Ms. Manuel’s job experience and by the references given by her former employers.15 During her half hour interview, Mr. Evans found Ms. Manuel to be very personable and concluded that she would be congenial and polite to passengers.16 Upon checking her credentials, Evans determined that Manuel’s driving record was “clean.”17 He testified that he did not believe that Ms. Manuel moved awkwardly when she entered the room and sat down and “did not think that she was heavier than any of the other drivers hired by Texas Bus Lines.”18

Mr. Evans, a manager with 19 years of experience in the transportation industry, was not at all troubled by Manuel’s obesity and did not believe that it would impede her performance in any way. Evans, in fact, was so convinced by Ms. Manuel’s qualifications, that he extended a conditional offer of employment to her.19

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11. See Texas Bus Lines, 923 F. Supp. at 967 n.1. A person is considered to be “morbidly obese if she weighs either more than twice her optimal weight or more than 100 pounds over her optimal weight.” Cook v. Rhode Island, Dept. of Mental Health, Retardation & Hosp., 10 F.3d 17, 20 n.1 (1st Cir. 1993). The Texas Bus Lines court noted that according to medical charts, Ms. Manuel “should weigh between 122 and 154 pounds,” and that “[a]t 354 pounds,” she was “clearly over twice her optimal weight . . . .” Texas Bus Lines, 923 F. Supp. at 967 n.1.

12. Id. at 967.


15. See id.

16. Id.

17. Id.

18. Id.

19. See id.
Ms. Manuel's job offer was conditioned upon her passing a driving test, a medical examination, and a motor vehicle check.\textsuperscript{20} When she took her driving test on March 8, 1994, Ms. Manuel was deemed qualified with respect to all of the tasks which she performed and received no negative comments in the "remarks" section of the Certification of Road Test.\textsuperscript{21} The certification form indicates that she operated the vehicle controls well, had good driving posture, and correctly exited the vehicle to check before backing the van.\textsuperscript{22} The examiner signed the following statement on the certification form: "It is my considered opinion that this driver possesses sufficient driving skill to operate safely the type of commercial motor vehicle listed above [a van].\textsuperscript{23}

Later that day, Arezella Manuel underwent a medical examination, as required of all drivers who are to work for a company subject to the Federal Motor Carrier Safety Regulations ("DOT Regulations").\textsuperscript{24} Ms. Manuel's physical examination form reveals that she was assessed as being "normal" in all categories.\textsuperscript{25} The exam disclosed no medical problems of any kind.\textsuperscript{26} The doctor's certification, however, states the following: "Patient can't move around swiftly in case of an accident. (Does not meet DOT regulations)."\textsuperscript{27}

The examining physician, Dr. James Norwood Frierson, admitted that he examined Ms. Manuel for only five or six minutes.\textsuperscript{28}
concluded that Ms. Manuel was not sufficiently mobile based solely upon his observation that she had difficulty getting out of her seat in the waiting area and that she "waddled" slowly to the examining room, which was eight doors away. Dr. Frierson further testified that he had no specific training regarding the duties of bus drivers, motor vehicle safety, or the dynamics and consequences of various auto accidents. He based his decision concerning Ms. Manuel's effectiveness in case of an accident purely upon his observation of Ms. Manuel as she walked to the examining room and upon his personal experience as a bus passenger.

The DOT regulations do not establish any weight restrictions for bus drivers. The regulations mandate that a candidate must be "physically qualified to drive a commercial motor vehicle in accordance with subpart E-Physical Qualifications and Examinations of part 391." Subpart E, section 391.41 of the regulations, details the conditions which may disqualify a potential driver. These include thirteen categories of ailments, such as alcoholism, particular mental diseases, serious impairments of various limbs, etc. Obesity is not listed in any category as a disqualifying condition. Impaired mobility per se is also not listed as a disqualifying condition. Rather, the regulations specify that

29. Id.
30. See id. at 976-77.
31. See id. at 976-78.
32. See id. at 973.
34. See id. § 391.41.
35. See id.
36. See id. The relevant text of this provision is as follows:

(a) A person shall not drive a commercial motor vehicle unless he/she is physically qualified to do so and, except as provided in § 391.67, has on his/her person the original, or a photographic copy, of a medical examiner's certificate that he/she is physically qualified to drive a commercial motor vehicle.

(b) A person is physically qualified to drive a commercial motor vehicle if that person:

(1) Has no loss of a foot, a leg, a hand, or an arm, or has been granted a waiver pursuant to § 391.49,

(2) Has no impairment of:

(i) A hand or finger which interferes with prehension or power grasping; or

(ii) An arm, foot, or leg which interferes with the ability to perform normal tasks associated with operating a commercial motor vehicle; or any other significant limb defect or limitation which interferes with the ability to perform normal tasks associated with operating a commercial motor vehicle; or has been granted a waiver pursuant to § 391.49.

(3) Has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control;
a driver must not have an impairment of "[a]n arm, foot, or leg which interferes with the ability to perform normal tasks associated with operating a commercial motor vehicle; or any other significant limb defect or limitation which interferes with the ability to perform normal tasks associated with operating a commercial motor vehicle.""\(^{37}\) Thus, the regulations do not address the issue of a driver's ability to handle extreme emergency situations.

When its doctor refused to provide Manuel with a medical certification, Texas Bus Lines informed her that she would not be hired.

(4) Has no current clinical diagnosis of myocardial infarction, angina pectoris, coronary insufficiency, thrombosis, or any other cardiovascular disease of a variety known to be accompanied by syncope, dyspnea, collapse, or congestive cardiac failure.

(5) Has no established medical history or clinical diagnosis of a respiratory dysfunction likely to interfere with his/her ability to control and drive a commercial motor vehicle safely.

(6) Has no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial motor vehicle safely.

(7) Has no established medical history or clinical diagnosis of rheumatic, arthritic, orthopedic, muscular, neuromuscular, or vascular disease which interferes with his/her ability to control and operate a commercial motor vehicle safely.

(8) Has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a commercial motor vehicle;

(9) Has no mental, nervous, organic, or functional disease or psychiatric disorder likely to interfere with his/her ability to drive a commercial motor vehicle safely;

(10) Has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70 degrees in the horizontal Meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber;

(11) First perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5—1951.

(12) Does not use a Schedule I drug or other substance identified in appendix D to this subchapter, an amphetamine, a narcotic, or any other habit-forming drug, except that a driver may use such a substance or drug if the substance or drug is prescribed by a licensed medical practitioner who is familiar with the driver's medical history and assigned duties and who has advised the driver that the prescribed substance or drug will not adversely affect the driver's ability to safely operate a commercial motor vehicle; and

(13) Has no current clinical diagnosis of alcoholism.

\(^{37}\) Id. § 391.41(b)(2)(ii) (emphasis added).
by the company. The Court found that the company “impermissibly discriminated against Arezella Manuel on the basis of a perceived disability in violation of 42 U.S.C. § 12101 et seq.” Specifically, the Court ruled as follows:

Because Texas Bus Lines could determine from Dr. Frierson’s examination report that his opinion was not supported by any objective medical findings and because Texas Bus Lines knew or should have known that Dr. Frierson’s conclusion that Manuel was not physically qualified for the driver position was not based on the DOT Regulations, Texas Bus Lines’ reliance on Dr. Frierson’s opinion was unreasonable. Texas Bus Lines knew or should have known that its refusal to hire Manuel on the basis of Dr. Frierson’s faulty opinion was both improper and violative of the ADA.

Since DOT regulations require that drivers possess a medical examiner’s certificate, the Court recognized that the bus company could not hire Manuel without the appropriate documentation. However, the opinion advised that Texas Bus Lines could have sent Manuel to a second doctor to obtain the necessary certification. The Court concluded that “[b]ecause Texas Bus Lines’ relationship with Dr. Frierson resulted in the discriminatory rejection of Manuel, an individual protected by the ADA, Texas Bus Lines is liable for a violation of the ADA.”

The company’s reliance upon the opinion of a medical expert in making its adverse employment decision did not shield it from liability under the statute. The Court’s unprecedented ruling may well have far reaching implications for similar cases in the future.

38. See Texas Bus Lines, 923 F. Supp. at 967-68.
39. Id. at 981.
40. Id. at 973.
41. See id. at 967.
42. See id. at 978.
43. Id. at 974.
44. See id. at 973-74. The damages aspect of the case was settled pursuant to a consent decree, which awarded damages to Manuel and provided the injunctive relief requested by the EEOC. See Consent Order Decree at 2-3, EEOC v. Texas Bus Lines, 923 F. Supp. 965 (S.D. Tex. 1996) (No. H-95-3981). Texas Bus Lines agreed to provide ADA training to its examining physicians and management employees. Id. at 3. It also agreed to designate a manager who would review all negative hiring recommendations made by its doctor to ensure that the company’s employment decisions remain consistent with the requirements of DOT regulations and the ADA. Id.
III. THE “REGARDED AS” THEORY: WHY INDIVIDUALS WHO ARE NOT DISABLED ARE COVERED BY THE ADA

In Texas Bus Lines, the Court found that the examining physician erroneously deemed an applicant for employment to be incapable of performing a job even though the individual had no medical condition which would in any way impede her job performance. While Ms. Manuel was an experienced, qualified driver who was in good health, the doctor disqualified her based on a hypothetical concern that she would not be able to move quickly to assist passengers in case of an accident. One might assume that individuals such as Ms. Manuel, who are not in fact disabled but are disqualified due to a doctor’s error or misconception, are not protected under the Americans with Disabilities Act. The statute and its implementing regulations, however, establish otherwise. The Act provides:

No 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.

For an impairment to rise to the level of a disability, it must substantially limit one or more of a person’s major life activities. The regulations promulgated pursuant to the ADA define the term “major life activities” to mean “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” The regulations further explain that

(3) With respect to the major life activity of working -

(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular

46. See id. at 980.
47. 42 U.S.C. § 12112(a) (1994).
48. See id. § 12102(2)(A).
job does not constitute a substantial limitation in the major life activity of working.50

An individual can thus be “disabled” for purposes of protection under the ADA due solely to his or her inability to perform a particular category of work, such as professional driving, or a variety of jobs of different types. If, however, a medical condition prevents an individual from performing only the specialized tasks of a single, unique job or a small category of jobs, the individual will not be covered by the ADA.51 The Act applies only to persons who are unemployable in a larger sense of the word.

In order to fall within the statutory scope, an individual need not be actually disabled. Rather, the ADA also covers individuals who have a “record of” a disability or who are “regarded as” having a disability.52 Consequently, if an employer makes an adverse employment decision concerning an individual whom it wrongly regards as substantially limited in his or her ability to perform a major life function, including working, that employer may be guilty of a violation of the ADA.53

The regulations promulgated pursuant to the ADA further elucidate this concept:

Is regarded as having such an impairment means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraph (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.54

Claims based upon the “regarded as” component of the definition of a disabled individual have been evaluated and discussed by several courts. In Milton v. Bob Maddox Chrysler Plymouth, Inc.55, for exam-

50. Id. § 1630.2(j)(3)(i).
52. Id. § 12102(2)(B)-(C).
53. See id.
pie, the court denied defendant's motion for summary judgment, stating the following:

Finally, Milton may qualify for ADA coverage via another route. If he can demonstrate that he was simply regarded by his colleagues as having a physical impairment substantially limiting a major life activity, and that this perception led to his dismissal, the ADA applies.56

In assessing the disability discrimination claim brought by an obese woman under section 504 of the Rehabilitation Act of 1973,57 the First Circuit, in Cook v. Rhode Island, Department of Mental Health, Retardation, & Hospitals,58 stated that “[a]n unfounded assumption that an applicant is unqualified for a particular job, even if arrived at in good faith, is not sufficient to forestall liability” under the Act.59 The Court found that defendant’s articulated reasons for refusing to hire the plaintiff, including its concern that “Cook’s limited mobility impeded her ability to evacuate patients in case of an emergency . . . show conclusively that MHRH treated plaintiff’s obesity as if it actually affected her musculoskeletal and cardiovascular systems.”60

The rationale for including individuals regarded as disabled within the ADA’s definition of “disabled” was articulated by the Supreme Court in School Board of Nassau County v. Arline61 in the context of the Rehabilitation Act. The Court explained:

By amending the definition of “handicapped individual” to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in

56. Id. at 325; see 42 U.S.C. § 12102(2)(C) (1994) (defining disability); 29 C.F.R. § 1630.2(g)(3) (1995) (defining “is regarded as having such impairment”); see also Pritchard v. Southern Co. Servs., 4 AD Cas. 465 (BNA) 473 (N.D. Ala. 1995) (holding that the plaintiff failed to show that the defendant regarded her as disabled).

57. See 29 U.S.C. § 794 (1994). Cases interpreting the Rehabilitation Act are often applied to the ADA, a much newer law for which only a limited body of interpretive case law exists. The C.F.R. establishes that, in general, the regulations promulgated to implement the ADA do not apply a lesser standard “than the standards applied under [Title V of] the Rehabilitation Act of 1973,” or the regulations issued by federal agencies pursuant to that title. 29 C.F.R. § 1630.1(b)-(c) (1995). Furthermore, the Rehabilitation Act itself provides that “[t]he standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under Title I of the Americans with Disabilities Act of 1990 . . . .” 29 U.S.C. § 791(g) (1994) (citation omitted).

58. 10 F.3d 17 (1st Cir. 1993).

59. Id. at 27.

60. Id. at 23.

a major life activity, Congress acknowledged that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.\textsuperscript{62}

In addition, the Code of Federal Regulations states that:

if an individual can show that an employer or other covered entity made an employment decision based on “myth, fear or stereotype,” the individual will satisfy the “regarded as” part of the definition of disability. If the employer cannot articulate a nondiscriminatory reason for the employment action, an inference that the employer is acting on the basis of “myth, fear or stereotype” can be drawn.\textsuperscript{63}

If an individual is not in actuality substantially limited in performing any major life activity but is deemed disqualified for a job by a doctor due to a particular physical condition, the individual may nonetheless enjoy the protection of the ADA.\textsuperscript{64} An applicant who has been found qualified and been offered a job may not be rejected solely due to myths or unsubstantiated fears regarding conditions such as epilepsy, HIV, diabetes, etc., of which the employer learns via a pre-employment medical examination.\textsuperscript{65}

IV. \textbf{WHY IS AN EMPLOYER RESPONSIBLE FOR THE RECOMMENDATION OF ITS MEDICAL EXPERT WHO ERRS IN ASSESSING A CANDIDATE?}

It may seem that if a physician mistakenly deems an applicant to be unqualified for a particular job, the doctor rather than the employer should be held liable for the harm suffered by the rejected candidate. Under the ADA, only “an employer, employment agency, labor organization or joint labor-management committee” can be sued for a violation of the statute.\textsuperscript{66} In 	extit{Carparts Distribution Center Inc. v.

\textsuperscript{62} Id. at 284.
\textsuperscript{65} See id.
\textsuperscript{66} Id. § 12111(2). Section 102 of the Act mandates 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.” Id. § 12112(a). Section 101 of the Act defines a “covered entity” as “an employer, employment agency, labor organization, or joint labor-management committee.” Id. § 12111(2).
Automotive Wholesaler's Ass'n, the First Circuit ruled that third parties could be considered "employers" under certain circumstances. The Court determined that defendants, members of an administering trust for a health benefit plan, would be considered employers "if they exercised control over an important aspect of... [the employee's] employment." Furthermore, the Court determined that defendants could be deemed employers if "defendants are 'agents' of a 'covered entity,' who act on behalf of the entity in the matter of providing and administering employee health benefits." By analogy, therefore, doctors who are entrusted with the responsibility of certifying employees as medically qualified for a particular job could be considered "employers" due to their exercise of control over the hiring decision. However, no court has extended the Carparts ruling to physicians, and it is unknown whether any other circuits will follow the First Circuit's precedent.

Regardless of the liability of physicians under the statute, the ADA holds the employer itself responsible for discrimination which results from its association with other entities or individuals, such as medical experts. The Act prohibits employers from "participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to... discrimination." Thus, if an employer's relationship with a physician who conducts medical examinations results in the discriminatory rejection of applicants protected by the ADA, the employer is liable for a violation of the statute despite the involvement of a third party, the

67. 37 F.3d 12 (1st Cir. 1994).
68. Id. at 17-18.
69. Id. at 17.
70. Id.
71. Rejected applicants may also have private rights of action under state law relating to financial harms caused by a doctor's negligent fitness evaluation. See, e.g., Armstrong v. Morgan, 545 S.W.2d 45 (Tex. Ct. App. 1977); Lashlee v. Sumner, 570 F.2d 107 (6th Cir. 1978). In Armstrong, an employee who was required to pass a physical examination upon being promoted lost his job because the physician's report indicated that the employee was in very poor health. Armstrong, 545 S.W.2d at 46. According to the Texas Court of Civil Appeals, the plaintiff's negligence action against the physician stated a valid claim: "Dr. Morgan owed Appellant Armstrong a duty not to injure him physically or otherwise. If Dr. Morgan negligently performed the examination and as a result gave an inaccurate report of the state of appellant's health, and appellant was injured as a proximate result thereof, actionable negligence would be shown." Id. Similarly, in Lashlee, an employee sued the employer's consulting psychologist, for "libel, negligence or malpractice, interference with contractual relations, and intentional infliction of emotional distress ...." Lashlee, 570 F.2d at 107.
doctor, with whom the employer had a professional arrangement. That is, if a qualified individual protected by the ADA is rejected by an employer because the doctor erroneously deemed him or her incapable of performing job duties for medical reasons, the employer is liable for the decision under the ADA. 73

The regulations promulgated under the ADA specifically provide that “[t]he results of such [medical] examination shall not be used for any purpose inconsistent with ... [the ADA].” 74 Consequently, the employer's responsibility for compliance with the statute does not end once it refers a candidate to a physician for a pre-employment medical examination. It is the employer's duty to insure that the ultimate decision as to whether to hire an individual in light of the doctor's findings does not defy federal law.

In Piquard v. City of East Peoria, 75 the court explained that “[s]ection 12112(b)(2) was ... intended to prohibit an entity from doing through a contractual relationship what it may not do directly.” 76 In some cases discrimination might result not from an employer's innocent reliance upon the erroneous opinion of a doctor whom it trusts, but rather from far more malicious conduct. Some employers may attempt to circumvent the statute via use of a medical examination. An employer may extend conditional offers of employment to qualified individuals and then ask its physician to identify and disqualify on "medical grounds" any candidate who may cause the company to incur the cost of making an accommodation, 77 who may generate increased medical insurance costs due to treatment of an existing medical condition, 78 or who may file a worker's compensation claim due to the aggravation of past injuries. 79 Since it is unlawful for the employer itself to reject a candidate because of a disability or perceived disability if the individual

73. Id.
76. Id. at 1124 (holding that "[a]n entity may not contract with organizations which provide employee fringe benefits if the relationship subjects the disabled employee" to discrimination prohibited by the ADA); see H.R. REP. No. 101-485(III), at 36 (1990).
77. Cf. 42 U.S.C. § 12112(b)(5)(B) (1994) ("[D]enying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant.").
78. Cf. id. § 12112(a) (stating that it is unlawful to discriminate in the hiring of "a qualified individual with a disability because of the disability ... ").
79. See 29 C.F.R. pt. 1630 app. § 1630.2(m) (1995) (providing that the determination of whether a disabled individual is qualified "should not be based on speculation that the employee ... may cause increased health insurance premiums or workers' compensation costs.").
can do the job with or without a reasonable accommodation,\textsuperscript{80} the employer cannot utilize a doctor to achieve illicit goals.\textsuperscript{81}

V. WHEN IS IT PROPER FOR AN EMPLOYER TO REJECT A CANDIDATE BASED ON A DOCTOR’S ASSESSMENT OF HIS OR HER MEDICAL CONDITION?

Although an employer must be cautious in accepting a doctor’s advice not to hire an applicant due to a disability, physicians may nonetheless provide valuable information to an employer, and the utilization of medical exams in the hiring process is not discouraged by the ADA.\textsuperscript{82} Doctors can be trusted to make accurate diagnoses of the clinical conditions of applicants, to evaluate the risks characteristic of various ailments, and to predict the course that certain diseases will take. Doctors, however, do not possess legal expertise relating to the ADA and other federal regulations and often have little, if any, knowledge of the duties and requirements of the job to which the applicant would be assigned. Because doctors are ill equipped to decide whether rejection of an individual would constitute an ADA violation, it is the employer who must scrutinize the medical data received from the doctor and determine its legal obligations with respect to the individual in question.

However, in some instances a doctor may in fact detect a disability which precludes an individual from performing the job duties in question. In such cases employers would be fully justified in relying upon the doctor’s diagnosis to make a negative hiring decision.

First, the doctor may discover that an individual has a disabling medical condition which cannot be accommodated by the employer without undue hardship.\textsuperscript{83} The determination of whether an accommodation such as job restructuring, purchase of equipment, a change in work schedule, or modification of facilities would impose an undue hardship

\textsuperscript{80} See 42 U.S.C. §§ 12112(a), 12112(5)(B) (1994).

\textsuperscript{81} See Patrick G. Derr, Ethical Considerations in Fitness and Risk Evaluations; 3 OCCUPATIONAL MED.: ST. ART REVIEWS, 193, 207 (1988). The author notes the following:

"Unethical employers, sadly, can present honest and conscientious physicians with insoluble [sic] problems concerning the ethical handling of information about employees and applicants. Personnel directors who refuse to hire any individual recommended “with accommodations,” or who demand the results of drug tests that they are plainly incompetent to interpret, can put physicians into a position where professional honesty is used to serve corporate irresponsibility."

\textit{Id.}

\textsuperscript{82} 42 U.S.C. § 12112(b)(3) (1994).

\textsuperscript{83} See id; §§ 12112(b)(5)(A), 12113(a).
upon an employer is made on a case-by-case basis and is dependant upon
the cost of the accommodation and the resources of the entity in
question.84

In one case, for example, a court determined that the Voice of
America was not required to hire a severe diabetic for assignment
overseas as a radio engineer, since most of the foreign appointments were
hardship posts that were not near adequate medical facilities.85 Due to
the minimal distribution of personnel overseas and the employer's need
for operational flexibility, the court ruled that promising the diabetic
individual that he would work only in nonhardship posts would impose
an undue hardship upon the employer.86 In the context of the Rehabili-
tation Act, one court held that it was proper for the Army Corps of
Engineers to refuse to hire an individual with a heart condition for the

84. The relevant provisions of the ADA establish the following:
(9) Reasonable accommodation
The term "reasonable accommodation" may include-
(A) making existing facilities used by employees readily accessible to and usable
by individuals with disabilities; and
(B) job restructuring, part-time or modified work schedules, reassignment to a
vacant position, acquisition or modification of equipment or devices, appropriate
adjustment or modification of examinations, training materials or policies, the
 provision of qualified readers or interpreters, and other similar accommodations for
individuals with disabilities.
(10) Undue hardship
(A) In general
The term "undue hardship" means an action requiring significant difficulty or
expense, when considered in light of the factors set forth in subparagraph (B).
(B) Factors to be considered
In determining whether an accommodation would impose an undue hardship on a
covered entity, factors to be considered include
(i) the nature and cost of the accommodation needed under this chapter;
(ii) the overall financial resources of the facility or facilities involved in the
provision of the reasonable accommodation; the number of persons employed
at such facility; the effect on expenses and resources, or the impact otherwise
of such accommodation upon the operation of the facility;
(iii) the overall financial resources of the covered entity; the overall
size of the business of a covered entity with respect to the number of its employees;
the number, type, and location of its facilities; and
(iv) the type of operation or operations of the covered entity, including the
composition, structure, and functions of the workforce of such entity; the
geographic separation, administrative, or fiscal relationship of the facility or
facilities in question to the covered entity.
Id. § 12111(9)-(10).
85. See Barth v. Gelb, 2 F.3d 1180, 1187-88 (D.C. Cir. 1993), cert. denied, 114 S. Ct. 1538
(1994).
86. See id. at 1188.
arduous job of park technician. The court reasoned, "[g]iven that only two to four other workers are available at any given time to patrol the 150,000 acres at Clark's Hill Lake and in light of the agency's limited resources," the employer could not accommodate the applicant without undue hardship. Likewise, the federal regulations explain that a nightclub would not be required to hire an applicant with a disabling visual impairment which forced the individual to work only in brightly lit areas if the nightclub could establish that bright lighting would destroy its ambience and/or make it difficult for customers to view a stage show.

In addition, certain conditions cannot be accommodated at all due either to their nature or to the nature of the job at issue. For example, DOT regulations preclude individuals with particular conditions, including epilepsy and insulin-dependent diabetes mellitus, from serving as drivers for companies governed by those regulations. Thus, if a doctor learned that an individual had one of the conditions that by law precludes the candidate from employment, the employer would be fully justified in rejecting that applicant based on the doctor's determination.

The ADA also allows employers to refuse to hire a candidate whose employment in a particular job would "pose a direct threat to the health or safety of other individuals in the workplace" or to his or her own physical welfare. The regulations promulgated pursuant to the ADA provide that "[i]n determining whether an individual would pose a direct threat, the factors to be considered include: 1) The duration of the risk; 2) The nature and severity of the potential harm; 3) The likelihood that the potential harm will occur; and 4) The imminence of the potential harm."

In *Department of Labor v. Texas Industries*, the Department of Labor, Employment Standards Division cautioned that an employer cannot assert a direct threat defense under the Rehabilitation Act unless it makes a showing of a "reasonable probability of substantial harm." The court held that the employer had failed to show a sufficient risk of

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88. *Id.* at 478.
89. *See 29 C.F.R. 1630 app. § 1630.2(p) (1995).*
90. *See id.* § 391.41(b).
92. *See 29 C.F.R. 1630 app. § 1630.2(r) (1995).*
93. *Id.*
95. *Id.* at 27.
future injury to justify the rejection of an otherwise qualified cement truck driver where a physician testified that her transitional vertebra and prior back surgery made her more likely to suffer sudden pain or back spasm than individuals who did not have her medical history.96

Similarly, in the Texas Bus Lines case, the defendant contended that Ms. Manuel posed a direct threat to the safety of passengers because she would be unable to move quickly in case of an accident.97 The Court rejected the company's argument, finding the following:

[The likelihood of potential harm as a result of Manuel's weight impeding her service to her passengers is too remote and does not constitute grounds for a viable defense under the ADA. Despite Texas Bus Lines' assertions that Manuel posed a "direct threat" to the "men, women and children passengers" that it transports, such theoretical concerns do not serve as a basis for the direct threat defense. An employer cannot assert a direct threat defense unless it makes a showing of a reasonable probability of substantial harm.98

Thus, if a doctor detects a back condition or other medical symptoms which might affect an individual’s performance in a way that would endanger the employee, coworkers, or customers, the doctor must evaluate both the kind of harm that could occur, and the likelihood that it will occur.

To illustrate with greater specificity, let us focus upon the phenomena of back injuries and low back pain, which have been extensively analyzed by physicians specializing in occupational medicine.99 One article notes that "[s]tudies indicate that 21% of all compensable work injuries and 33% of workers’ compensation costs are attributable to low back pain, resulting in some 400,000 back injuries in the United States per year."100 Scholars have concluded, however, that "[d]espite extensive research and a large number of publications, scientific understanding of the etiology and prevention of low back pain remains weak and frequently speculative."101

96. See id. at 28.
98. Id. at 980.
100. Id. (citations omitted).
101. Id.
Research has shown that up to seventy percent of X-rays taken during pre-employment examinations show abnormalities.\textsuperscript{102} Similarly, a study concluded that only fifty percent of patients between the ages of forty and seventy who complained of low back pain had X-ray abnormalities, while twenty-two patients who did not suffer any back distress showed abnormalities.\textsuperscript{103} Therefore, researchers have concluded that “low back x-rays have low sensitivity and low specificity, and consequently a low predictive value.”\textsuperscript{104} Likewise, physical strength and endurance tests, designed to determine the likelihood of future back injury, were found to have a predictive value of only twenty-two percent.\textsuperscript{105} Since “there are few degenerative or developmental criteria that can be applied to an individual to reasonably predict the risk of low back disability,”\textsuperscript{106} employers should not utilize predictive screening techniques for back problems as an exclusive basis for negative hiring decisions.\textsuperscript{107}

Nevertheless, it is possible for employers to establish a “direct threat” defense based on a doctor’s findings, and such defenses have been accepted by the courts. In \textit{Bradley v. University of Texas M.D. Anderson Cancer Center},\textsuperscript{108} the Fifth Circuit affirmed a lower court’s decision granting summary judgment to a hospital that had terminated an HIV-positive surgical technician.\textsuperscript{109} The court determined that the nature of the technician’s work created some risk of disease transmittal, since he “often [came] within inches of open wounds and plac[ed] his hand in the body cavity roughly once a day.”\textsuperscript{110} The court acknowledged that the risk of transmitting the virus was very small but found that due to the potentially catastrophic consequences of an accident, the technician posed a direct threat to the health and safety of patients and thus was not protected by the ADA.\textsuperscript{111} Similarly, an employer would not be required to hire an applicant with narcolepsy for a carpentry job involving the frequent handling of power saws and other dangerous

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102. See id. at 261.
103. See id. at 261-62.
104. Id. at 261 (citation omitted).
105. See id. at 265.
106. Id. at 263-64.
107. See id. at 266-67.
108. 3 F.3d 922 (5th Cir. 1993), cert. denied, 114 S. Ct. 1071 (1994).
109. See id. at 922, 935.
110. Id. at 924.
111. See id. (citing Doe v. Washington Univ., 780 F. Supp. 628, 632-34 (E.D. Mo. 1991) (deciding that an HIV-positive dental student is not otherwise qualified to perform invasive procedures because the risks defy the axiom [of the medical profession] to at least do no harm)).
\end{flushright}
equipment, if the individual often and unexpectedly loses consciousness and no accommodation exists that would reduce or eliminate the risk.\textsuperscript{112}

Some applicants who do not constitute a "direct threat" under the statutory definition but who learn of a potentially dangerous medical condition through a pre-employment physical, may choose voluntarily to decline the job offer in question and not to assume the risk of injury.\textsuperscript{113} In some instances a doctor may inform the employer that a particular applicant's back impairment or other condition presents only a very small risk of injury to himself or others in light of the job duties to be performed. In such a case, the employer would be prohibited from withdrawing the candidate's conditional offer of employment.\textsuperscript{114} Nevertheless, the applicant, upon learning of the diagnosis, may decide to seek other employment which would not similarly jeopardize his or her health.

VI. WHAT STEPS SHOULD BE TAKEN BY EMPLOYERS TO INSURE COMPLIANCE WITH THE ADA WHEN UTILIZING PRE-EMPLOYMENT PHYSICAL EXAMINATIONS?

Employers are not free to blindly accept a doctor's recommendation not to hire an individual based upon a particular diagnosed physical condition.\textsuperscript{115} If the applicant's rejection is deemed by a judge or a jury to violate the ADA, the involvement of a medical specialist in the decision-making process will not serve as a defense for the employer.\textsuperscript{116}

Employers would be well advised to take several steps to insure that acceptance of a doctor's negative hiring recommendation will not contravene the anti-discrimination mandate of the ADA. Employers should provide their examining physicians with extensive information regarding the jobs to which applicants will be assigned as well as instruction regarding the ADA and any other applicable law, such as DOT Regulations. In addition, the employer must independently analyze any negative medical report received from the physician in order to

\textsuperscript{112}See 29 C.F.R. Pt. 1630 app. § 1630.2(r) (1995).
\textsuperscript{113}See generally Patrick G. Derr, Ethical Considerations in Fitness and Risk Evaluations, 3 OCCUPATIONAL MED.: ST. ART REVIEWS 193, 200-01 (1988) (discussing such a scenario).
\textsuperscript{114}See 29 C.F.R. 1630 app. § 1630.2(r) (1995).
\textsuperscript{115}See Texas Bus Lines, 923 F. Supp. at 973.
\textsuperscript{116}See id. at 982.
determine its responsibilities under the law with respect to the applicant in question.

First, the employer should furnish the doctor with a detailed job description for each applicant examined. If available, a variety of other informational sources can also be provided to the physician to increase his or her understanding of the jobs for which candidates are being evaluated. These include “task analyses done by industrial engineering or labor relations specialists to determine compensation rates, job task inventories made by trainers, and functional job descriptions done by nurses and physical and occupational therapists to assess the stresses on muscles and joints and the skills needed to perform the work.”117

In addition, the physician should be given an opportunity to visit the job site in order to observe employees engaged in the tasks implicated in each job. If all tasks cannot be observed at one time, the doctor might be supplied with videotapes of individuals performing their various job duties.118

In order to accurately assess each candidate's ability to perform his or her designated job, the physician should analyze a plethora of information about both the individual’s physical condition and the actual work duties required. A physician, for example, may find that a patient has a particular back problem which requires a lifting restriction. Without knowing exactly what lifting requirements the particular job entails, the physician cannot intelligently judge whether or not to recommend disqualification of the individual.

Secondly, doctors conducting pre-employment examinations should be given intensive training with respect to the ADA. They must be instructed that if they diagnose a physical condition that may limit the applicant's ability to perform particular job duties, they cannot automatically deem the individual in question disqualified for that reason.119

Rather, if the applicant is a qualified individual with a disability,120 the

118. See id. at 222.
120. See id. § 1630.2(m). If the applicant does not fit within the definition of a “qualified individual with a disability,” the person is not protected by the ADA and need not be accommodated by the employer. See id. Thus, if the person is suffering from a temporary condition such as a broken bone, which prevents hiring at a particular time, the employer may advise the individual to reapply at a later time without violating the law. See id. § 1630.2(f). Similarly, if the condition does not significantly impair the individual in any way other than preventing him or her from performing the specialized work duties of one unique job, the candidate will fall outside the purview of the ADA. See id. § 1630.2(j)(3)(i).
employer and the candidate must first discuss what reasonable accommodations could be provided to enhance job performance. The doctor may facilitate such discussions by suggesting possible accommodations. Furthermore, doctors must learn that if a candidate is diagnosed with a condition that might impede his or her ability to function safely at work, the doctor must assess all of the factors relevant to the "direct threat" defense discussed above. A doctor, for example, cannot declare an individual unfit to work if there is only a minimal chance of injury to himself or others or if the condition is a degenerative one and no harm is likely to occur for many years.

Similarly, the employer must discuss with the doctor the accuracy and predictive value of the testing done for each individual who receives a negative hiring recommendation. If the tests generally do not effectively predict the eventual course of the patient's condition or the symptoms to be suffered by the individual in the future, the employer must be cognizant of these uncertainties.

A tension may exist between the ADA standard and the doctor's professional training and inclination to take every precaution with each patient to minimize if not eliminate the risk of any harm. While doctors may be inclined to disqualify all individuals who have any risk of injury, no matter how small, under federal law, individuals with disabilities cannot be deprived of the opportunity to work and support themselves unless serious and specific hazards are imminent. Thus it is up to the employer to scrutinize the medical data garnered by the physician and to critically evaluate the doctor's assessment of the individual's ability to work in light of the strictures of the ADA.

Consequently, in addition to educating its examining physicians, the employer itself should designate a management level employee to serve

123. See id.
125. The Hippocratic Oath includes the following affirmation: "[I]nto whatsoever house you shall enter, it shall be for the good of the sick to the utmost of your power, you holding yourselves far aloof from wrong...you will exercise your art solely for the cure of your patients..." THE NEW COLUMBIA ENCYCLOPEDIA 1246 (William H. Harris & Judith S. Levey eds., 4th ed. 1975); see Patrick O' Derr, Ethical Considerations in Fitness and Risk Evaluations, 3 OCCUPATIONAL MED.: ST. ART REVIEWS 193, 194 (1988) (quoting that "a physician who is indifferent to health and life (or worse, who knowingly causes death, disease, or disability) abandons medicine as an ethical profession").
as its ADA expert and to review all negative hiring recommendations made by the doctors. This specialist should review the results of the pre-employment physical to determine whether the doctor’s opinion is based upon valid clinical data established as a result of thorough, accurate, and reliable medical testing or is based upon the doctor’s subjective and unfounded assumptions, myths, stereotypes, or fears.

In the Texas Bus Lines case, the court determined that Defendant was liable for discrimination because the doctor’s examination report clearly indicated “that his opinion was not supported by any objective medical findings.” The doctor conducted no agility tests and based his conclusion about the applicant’s inability to respond properly to emergency situations purely on his observation that “she had some difficulty getting out of her seat in the waiting area and that she ‘waddled’ slowly to the examining room, eight doors away.” Had Texas Bus Lines analyzed the doctor’s conclusion and questioned his reasoning rather than blindly accepted his decision, it would have very likely avoided violating the law.

Thus, it would be wise for employers to question examining physicians regarding the extent of testing they have conducted and the basis for their medical conclusions. If, for example, a doctor deems an applicant unqualified due to a back condition or other limb impairment, the employer must inquire as to the doctor’s assessment of the likelihood and nature of the potential harm and the predictive value of the medical procedures conducted. In cases where the employer retains lingering questions regarding the validity of the doctor’s evaluation after an extensive discussion of the examination and its results, it would be prudent to send the applicant to a different physician for a second opinion.

The steps outlined above will not guarantee compliance with the ADA in all instances. It is possible that an employer who educates its examining physicians and conscientiously analyzes the doctor’s recommendation may still be found by a judge or a jury to have reached the wrong conclusion in refusing to hire a specific candidate. Such efforts, however, will vastly reduce the likelihood of a violation, and at the very least, should enable the employer to eschew the award of punitive damages to the plaintiff.129

128. Id. at 978.
129. Punitive damages are appropriate when a plaintiff proves that the employer engaged in discrimination “with malice or with reckless indifference to the federally protected rights of an
VII. CONCLUSION

The ADA seeks to protect individuals who have been "subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." In an effort to combat the discrimination to which individuals with real or perceived disabilities have historically been subjected, the law endeavors "to provide clear, strong, consistent, enforceable standards." In an effort to effectuate the anti-discrimination mandate of the ADA, the courts must hold employers responsible for all of their hiring decisions, including those based upon the advice of a physician. The statute would have little meaning if employers could escape liability by referring applicants to doctors whose hiring recommendations are subject to no scrutiny. If reliance upon a doctor's opinion, no matter how incompetent or ignorant, served as a defense under the ADA, employers might routinely circumvent the requirements of the law, and countless individuals would lose the benefits of its protection. If doctors were omnipotent under the statute, some employers might even be tempted to utilize physical examinations in a manipulative and deliberate fashion to exclude from employment applicants who are protected by the ADA but are deemed undesirable by the employer. Thus, individuals fully capable of performing the job in question could be rejected merely because they might cost the company some money due to a history of cancer, a disability requiring an accommodation, or a genetic mutation which might increase the likelihood of a person's suffering a devastating illness in the future. If not held accountable by law, employers could merely instruct their examining physicians to disqualify all individuals who

aggrieved individual." 42 U.S.C. § 1981a(b)(1) (1994). The purpose of punitive damages is to punish the defendant for its unlawful conduct and to deter other employers from behaving similarly. See BLACK'S LAW DICTIONARY 352 (5th ed. 1979). An employer that makes every effort to ascertain that its hiring decisions are consistent with the ADA is unlikely to be judged to have acted with malice or reckless indifference to the rights of the victim of a mistaken employment decision. See EEOC v. Texas Bus Lines, 923 F. Supp. 965 (S.D. Tex. 1996).

131. Id. § 12111(b)(2).


might pose a financial risk to the company and to attribute the rejection on official documents to some fabricated medical reason.

Since, under the ADA, the employer itself cannot refuse to hire a candidate due to a disability or perceived disability, it is senseless to deem a protected individual's rejection acceptable solely because of the participation of a doctor in the decision-making process. Employers must independently assess the negative hiring recommendations of their examining physicians to ascertain that they are based on valid medical data and consistent with the requirements of the law. Only in this way might we progress towards the goal of assuring "equality of opportunity, full participation, independent living, and economic self-sufficiency"\textsuperscript{132}

for all individuals covered by the Americans with Disabilities Act.

\textsuperscript{132} Id. § 12101(a)(8).