No. 14-1012

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

v.

BEVERAGE DISTRIBUTORS COMPANY, LLC,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Colorado
Hon. Christine M. Arguello, United States District Judge
No.11-cv-2557

APPELLEE'S PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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Other Authority

Rule 35(b) Statement

In this appeal, the panel concluded that reversal of the jury's verdict was warranted. Relying on this Court's decision in *Jarvis v. Potter*, 500 F.3d 1113, 1122-23 (10th Cir. 2007), the panel held that the district court was required to state at the very outset of its "direct threat" instruction that Beverage Distributors Co. ("BDC") "could avoid liability by showing that it reasonably determined" that its employee posed a direct threat. The panel concluded that beginning by instructing the jury that BDC had to "prove" that the employee posed a direct threat tainted the entire instruction. Slip op. at 3-5.

The panel held, in essence, that a court commits reversible error when, in what the panel denoted the "first part" of the direct threat jury instruction, it gives an instruction that tracks the relevant statutory and regulatory language and then, in the "second part," provides the jury with the applicable standards developed in the case law for making a direct threat determination. That conclusion is inconsistent with this Court's recognition that what is critical in assessing jury instructions is whether "'the charge as a whole adequately states the law,'" *Lederman v. Frontier Fire Prot., Inc.*, 685 F.3d 1151, 1155 (10th Cir. 2012) (citation omitted), and "'[n]o particular form of words is essential if the instruction as a whole conveys the correct statement of the applicable law,'" *Webb v. ABF Freight Sys., Inc.*, 155 F.3d 1230, 1248 (10th Cir. 1998) (citation omitted).

The panel ruling also conflicts with the precedent of this Court interpreting the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, and the Equal Employment Opportunity Commission's ("Commission") ADA regulations, 29 C.F.R. § 1630.2(r). Not only is the panel's ruling not compelled by *Jarvis*, it conflicts with *McKenzie v. Benton*, 388 F.3d 1342 (10th Cir. 2004), a direct threat case in which this Court did not focus on "objective reasonableness" as the central issue. Instead, this Court repeatedly observed that the jury found that the plaintiff "posed a direct threat," *not* that the employer had reasonably reached that conclusion; this Court referred to the burden of proof as requiring proof that the plaintiff was a direct threat; and the direct threat instruction cited by this Court did not ask the jury to assess the objective reasonableness of the employer's direct threat determination. 388 F.3d at 1345, 1347, 1352 & n.3, 1356. By contrast, the panel deemed the instruction here to be flawed because, although it used the term "objectively reasonabl[e]" two times, it was insufficiently explanatory at the outset.

The panel's conclusion is also in conflict with three other courts of appeals that acknowledge the fact-finder's role as determining the objective reasonableness of the employer's direct threat determination, yet have model jury instructions that do not require stating at the outset that the jury must assess the objective reasonableness of the employer's direct threat determination. *See Branham v. Snow*, 392 F.3d 896, 906 (7th Cir. 2004); *Verzeni v. Potter*, 109 F. App'x 485, 491-92 (3d Cir. 2004) (unpubl.); *Echazabal v. Chevron USA, Inc.*, 336 F.3d 1023, 1033 (9th Cir. 2003); *see also* Model

Civ. Jury Instr. 3d Cir. 9.3.1 (2011) (attached at Addendum-1); Fed. Civ. Jury Instr. 7th Cir. 4.10 (2010) (attached at Addendum-3); Model Civ. Jury Instr. 9th Cir. 12.12 (2007) (attached at Addendum-4). And as with the instruction in *McKenzie*, these other courts' direct threat model jury instructions closely track the instruction given here. To our knowledge, no other court of appeals has adopted the approach to a direct threat jury instruction taken by the panel in this case. Accordingly, the panel decision conflicts with the decisions of this Court and is in tension with the treatment of the issue in other courts of appeals, and panel rehearing or consideration by the full Court is therefore necessary to secure and maintain uniformity of this Court's decisions.

Statement of Facts

In this ADA enforcement action, the Commission brought suit alleging that BDC refused to hire charging party Mike Sungaila because of his disability. As a child, Sungaila was diagnosed with achromatopsia, a non-progressive eye disease. Defendant/Appellant's Appendix ("App.") 636. As a result of this condition, Sungaila is unable to see detail "too well" from a distance. App.636. Sungaila can see better indoors than outdoors in sunlight, and has no problems with his peripheral vision. App.637.

BDC is a wholesale liquor distribution company. App.784-85. Sungaila began working for BDC in 2000, first as a "Lumper" preparing product for delivery, and then, starting in 2003, as a Driver's Helper. App.649-50, 657, 626. Sungaila was a safe, effective employee who was never injured on the job, did not have any safety incidents, and received safety awards and bonuses. App.403, 675; Supp.App.16-18. In March

2008, BDC eliminated the Driver's Helper position. App.596. Bob Pieron (BDC's Director of Safety and Security), John Johnson (Vice President of Operations), Tom Rogers (Delivery Manager), and Curt Eby (Night Shift Manager) all encouraged Sungaila to apply for a Night Warehouse Associate position. App.398, 412, 446, 461, 580, 594, 676. Sungaila was sure he could do the job despite his disability, as he had previously done many of the same tasks in the warehouse while working as a Driver's Helper and Lumper. App.677. BDC required only a short interview before making Sungaila a conditional job offer. App.678-79. While Sungaila was exempted from the standard pre-employment physical agility test, Sungaila was required to undergo a pre-employment medical examination. App.414, 418; Supp.App.28-29.

Dr. Sanidas performed Sungaila's medical examination. App.419, 499, 518. Dr. Sanidas testified that when he asked Sungaila whether he has any disabilities, Sungaila responded simply that he was "legally blind." App.530. Dr. Sanidas did not ask Sungaila any follow-up questions about his vision, did not examine Sungaila's visual acuity—he simply "took [Sungaila] at his word"—and did not fail Sungaila on his exam. App.530-31, 544. Instead, "the only recommendation [Dr. Sanidas had] is that [Sungaila] should have work accommodations." App.544. Dr. Sanidas checked a box on the medical evaluation report indicating that "a medical condition exists which *may* be a direct threat to self or others unless reasonable accommodations are available." App.544. (emphasis added). Dr. Sanidas also noted that Sungaila was "legally blind. Should not

climb ladders. Cannot drive. Not to drive pallet jack, forklift, and avoid being in the way of these or hit by them." App.545.

After receiving Dr. Sanidas' report, Pieron, Johnson, and HR Director Linda Hollman decided to withdraw their offer of employment to Sungaila, based entirely on Dr. Sanidas' report. App.419-20. They made this decision even though none of the decisionmakers knew what "legally blind" meant, and without attempting to contact Dr. Sanidas to discuss his recommendation. App.848. BDC also did not present Sungaila with the opportunity to provide a vision report from his own doctor—an opportunity the company had provided to other employees or applicants after undergoing a pre-employment medical examination. App.407, 449, 451, 842-43, 903. Pieron and Rogers met briefly with Sungaila to tell him that they were revoking their job offer. App.597. They told Sungaila that he was a "liability," but did not ask questions about his vision or discuss potential accommodations. App.436, 657, 685.

The Direct Threat Instruction

The district court's direct threat jury instruction read as follows:

> If you find that the EEOC has proved [that BDC failed to hire Sungaila because of his disability], then you must determine whether Beverage Distributors has proved its affirmative defense that Mr. Sungaila's employment in a Night Warehouse position posed a direct threat to himself or other employees.
>
> To establish this defense, Beverage Distributors must prove both of the following by a preponderance of the evidence:
>
> 1. Mr. Sungaila's employment in a Night Warehouse position posed a significant risk of substantial harm to the health or safety of Mr. Sungaila and/or other employees; and

> 2. Such a risk could not have been eliminated or reduced by reasonable accommodation.
>
> A direct threat means a significant risk of substantial harm to the health or safety of the person or other persons that cannot be eliminated or reduced by reasonable accommodation. The determination that a direct threat exists must have been based on a specific personal assessment of Mr. Sungaila's ability to safely perform the essential functions of the job. This assessment of Mr. Sungaila's ability must have been based on either a reasonable medical judgment that relied on medical knowledge available at the time of the assessment, or on the best objective evidence available at the time of the assessment. For evidence to be "available" it must have been in existence at the time of the assessment. An employer's subjective belief that a direct threat exists, even if maintained in good faith, is not sufficient unless it is objectively reasonable.
> . . .
>
> In determining whether Beverage Distributors acted objectively reasonably when it determined that Mr. Sungaila was a direct threat, you must consider the following factors: (a) the duration of the risk; (b) the nature and severity of the potential harm; (c) the likelihood that the potential harm would occur; and (d) the imminence of the potential harm.

App.78.

Panel Decision

The panel concluded that the district court's direct threat instruction constituted reversible error because it "did not accurately convey the direct-threat standard." Slip op. at 5. The panel stated that "[a]ccording to the first part of the instruction, [BDC] had to prove that Mr. Sungaila posed a direct threat" but "[t]his was not accurate under our case law." *Id.* at 6. Instead, the panel stated, BDC "should have avoided liability if it had reasonably believed the job would entail a direct threat; proof of an actual threat should have been unnecessary" and the instruction "overstated [BDC's] burden." *Id.* at 6-7. The

panel added that the "second part of the instruction did not cure the error" because, while "stat[ing] that the jury was to consider the reasonableness of [BDC's] belief regarding the existence of a direct threat" "the jury was never told why it was to consider the reasonableness of what [BDC] thought." *Id.* at 7. The panel further stated that "[e]ven if the instruction had directed the jury to consider [BDC's] determination, that determination was about the 'existence' of a direct threat, not the objective reasonableness of the determination." *Id.* at 7 n.2. The panel ultimately determined that reversal was necessary because the jury might have relied upon the given direct threat instruction. *Id.* at 8.

Argument

While the panel determined that the district court's direct threat instruction "did not accurately convey the direct-threat standard," slip op. at 5, this is incorrect. The instruction tracked the legal standard for the direct threat defense, and so did not constitute reversible error. Because of the inter- and intra-circuit confusion caused by the panel's contrary conclusion, panel rehearing or rehearing en banc is required to clarify the proper legal standard for establishing the direct threat defense.

As an affirmative defense to a claim of disability discrimination, the ADA provides that employers may require "that an individual shall not pose a direct threat to the health or safety of other workers in the workplace." 42 U.S.C. § 12113(b). The ADA defines "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3). No statutory

language indicates that proof of direct threat is connected to the employer's reasonable belief.

The direct threat instruction in the instant case was substantively identical to both this statutory language, and to language in the Commission's ADA regulations and this Court's precedent, explaining the direct threat defense. The instruction first directed the jury to "determine whether Beverage Distributors has proved its affirmative defense that Mr. Sungaila's employment in a Night Warehouse position posed a direct threat to himself or other employees." App.78. *See* 42 U.S.C. § 12113(b) (providing that employers may require "that an individual shall not pose a direct threat to the health or safety of other workers in the workplace"). The instruction next stated:

> To establish this defense, Beverage Distributors must prove both of the following by a preponderance of the evidence:
>
> 1. Mr. Sungaila's employment in a Night Warehouse position posed a significant risk of substantial harm to the health or safety of Mr. Sungaila and/or other employees; and
>
> 2. Such a risk could not have been eliminated or reduced by reasonable accommodation.

App.78. *See* 29 C.F.R. § 1630.2(r) (ADA regulations defining "direct threat" as "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation"); *Jarvis*, 500 F.3d at 1121 (same). The instruction then repeated this definition of direct threat, and continued:

> A direct threat means a significant risk of substantial harm to the health or safety of the person or other persons that cannot be

> eliminated or reduced by reasonable accommodation. The determination that a direct threat exists must have been based on a specific personal assessment of Mr. Sungaila's ability to safely perform the essential functions of the job. This assessment of Mr. Sungaila's ability must have been based on either a reasonable medical judgment that relied on medical knowledge available at the time of the assessment, or on the best objective evidence available at the time of the assessment.

App.78. *See* 29 C.F.R. § 1630.2(r) ("The determination that an individual poses a 'direct threat' shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence."); *Jarvis*, 500 F.3d at 1122 (same). Later, the instruction stated:

> In determining whether Beverage Distributors acted objectively reasonably when it determined that Mr. Sungaila was a direct threat, you must consider the following factors: (a) the duration of the risk; (b) the nature and severity of the potential harm; (c) the likelihood that the potential harm would occur; and (d) the imminence of the potential harm.

App.78. *See* 29 C.F.R. § 1630.2(r) ("[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."); *Jarvis*, 500 F.3d at 1122 (same).

The instruction thus was substantially identical to the statutory and regulatory language that this Court recognizes as describing the requirements of the direct threat defense. In addition, the instruction twice referred to assessing the objective reasonableness of BDC's direct threat determination:

> An employer's subjective belief that a direct threat exists, even if maintained in good faith, is not sufficient unless it is objectively reasonable.
> . . .
>
> In determining whether Beverage Distributors acted objectively reasonably when it determined that Mr. Sungaila was a direct threat, you must consider the following factors . . . .

App.78. Accordingly, reading the charge as a whole reveals that the district court's direct threat instruction correctly stated the standard of proof BDC was required to meet in order to establish its direct threat defense, and so provided the jury with an ample understanding of the applicable principles of law and factual issues confronting them. *See Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 660 (10th Cir. 2006) ("We review *de novo* whether, as a whole, the district court's jury instructions correctly stated the governing law and provided the jury with an ample understanding of the issues and applicable standards.").

To parse out the instructions into two parts walled off from each other, as the panel did here, is at odds with *Grace United*. The panel's focus on the reasonableness of the employer's determination, as opposed to the evidentiary support for its determination, would make sense if, for example, the employer had mistakenly but reasonably relied on false information or an outdated medical analysis. But that is not this case. The jury's application of the direct threat factors to the evidence BDC submitted is necessarily the same as its assessment of the reasonableness of BDC's conclusion about whether Sungaila posed a direct threat. Thus, the panel's belief that it was error not to focus the

jury's attention initially on the reasonableness of BDC's belief cannot be squared with BDC's theory of the case or the evidence it presented.

Furthermore, the panel's conclusion conflicts with the standard for direct threat jury instructions recognized previously by this Court, and with other circuits' treatment of direct threat jury instructions. Until now, no court of appeals—including this Court—has required that a jury instruction on the direct threat defense state explicitly at the outset that the jury is to assess the "objective reasonableness" of the employer's direct threat determination. To the contrary, this Court implicitly has approved of direct threat jury instructions that do not mention the objective reasonableness of the employer at all, but instead simply lay out the proper factors to consider. In *McKenzie*, an ADA failure-to-hire case, the employer asserted the direct threat defense at a jury trial. 388 F.3d at 1345. This Court described certain trial testimony as relevant to "the jury's examination of whether [plaintiff] was a direct threat to herself and others," not whether the employer's determination of such was reasonable. *Id.* This Court quoted the instruction, which listed the relevant factors and noted, as did the instructions here, that "'the determination . . . may be based on valued medical analyses and/or on other objective evidence.'" *Id.* at 1352 n.3.

This Court then held that "the district court did not err by instructing the jury that the burden rested on the plaintiff to prove that she did not pose a 'direct threat' to others in the workplace." *Id.* at 1356 (emphasis added). While this holding is focused primarily

on the question of which party bears the burden of proof, [1] it also indicates that explaining the "objective" evidence on which a direct threat determination may be based adequately instructs the jury. As such, *McKenzie* is at odds with the panel holding in the instant case.

Nor did *Jarvis*—the jurisprudential basis for the instant panel decision—suggest that the instruction in *McKenzie* was erroneous. In *Jarvis*, this Court mentioned *McKenzie* in its direct threat analysis, but did not address the jury instruction in *McKenzie* or otherwise discuss how a jury should be instructed on the direct threat defense.[2] *Jarvis*, 500 F.3d at 1121-23. This Court stated that "[t]he fact-finder's role is to determine whether the employer's decision was objectively reasonable," but it did not require, contrary to the panel's interpretation of *Jarvis*, that to make such an assessment the jury must be instructed at the outset to assess not only whether the employer's determination was properly based on the requisite criteria, but also, separately, whether the employer's determination was "reasonable." *Id.* at 1122-23.

The panel decision is also inconsistent with how other circuits have treated this question. Three other courts of appeals have recognized, as has this Court, that an employer's direct threat determination must be objectively reasonable—but this

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[1] In *McKenzie*, this Court concluded that the plaintiff bore the burden of proof on the direct threat question because the parties agreed the occupation at issue was "inherently dangerous." 388 F.3d at 1355-56. While BDC bore the burden of proof on its direct threat defense here, the relevant considerations are the same whichever party bears the burden of proof.

[2] Similarly, the panel cited *McKenzie* but only for the proposition that direct threat is an affirmative defense. Slip op. at 4.

assessment is linked to whether the employer considered the proper criteria. *See Jarvis*, 500 F.3d at 1122-23 (recognizing that "the fact-finder's role is to determine whether the employer's decision was objectively reasonable," and citing the direct threat criteria described at 29 C.F.R. § 1630.2(r)); *Branham*, 392 F.3d at 906 ("The assessment of risk 'must be based on medical or other objective evidence' and the determination that a significant risk exists must be objectively reasonable.") (quoting in part *Bragdon v. Abbott*, 524 U.S. 624, 649-50 (1998)); *Echazabal*, 336 F.3d at 1033 (stating that courts must assess "whether the opinion that a direct threat existed was *objectively reasonable*" and adding in a parenthetical that "analysis of direct threat 'requires the employer to gather "substantial information" about the employee's work history and medical status, and disallows reliance on subjective evaluations by the employer'") (citation omitted) (emphasis in original); *Verzeni*, 109 F. App'x at 491-92 ("Any jury considering this defense should be instructed not to base its determination on unfounded fears, but only on medically accurate facts. . . . [T]he jury should 'assess the objective reasonableness of the views of health care professionals without deferring to their individual judgments.' Not providing these warnings to the jury takes the risk that the jury's determination will be based on the same 'archaic attitudes' Congress was trying to prevent.") (citation omitted). As in these cases, here too the district court's jury charge directed the jury to evaluate BDC's determination of Sungaila's safety threat in light of the relevant factors.

Consistent with this precedent, the Third and Ninth Circuits' pattern jury instructions provide the same type of instruction that the district court provided here—

both start by stating that the employer "must prove" the individual posed a direct threat. *Compare* App.78 *with* Model Civ. Jury Instr. 3d Cir. 9.3.1 (2011) (attached at Addendum-1) ("Your verdict must be for [defendant] if [defendant] has proved both of the following by a preponderance of the evidence: First: [Defendant] [specify actions taken with respect to plaintiff] because [plaintiff] posed a direct threat to the health or safety of [plaintiff][others in the workplace]; and Second: This direct threat could not be eliminated by providing a reasonable accommodation."), *and* Model Civ. Jury Instr. 9th Cir. 12.12 (2007) (attached at Addendum-4) ("The defendant claiming the direct threat defense must prove by a preponderance of the evidence that plaintiff posed a direct threat to the health or safety of [[others][himself][herself]] that could not be eliminated by a reasonable accommodation.").[3] Again, like the instruction here, the model instructions list the relevant factors to consider. *Id.*

The Seventh Circuit's direct threat pattern jury instruction reads slightly differently, but instructs the jury to consider the defendant's assessment of direct threat in the same way the district court here instructed the jury. *See* Fed. Civ. Jury Instr. 7th Cir. 4.10 (2010) (attached at Addendum-3) ("In this case, Defendant says that it [*did not accommodate/did not hire/fired*] Plaintiff because [*accommodating/hiring/retaining*] him would have created a significant risk of substantial harm to [plaintiff and/or others in the workplace]. [Defendant must have based this decision on a reasonable medical judgment that relied on [*the most current medical knowledge*][*the best available objective*

[3] The brackets and emphases used in all these model jury instructions were provided by the drafters of the instructions.

evidence] about whether Plaintiff could safely perform the essential functions of the job at the time.] If Defendant proves this to you by a preponderance of the evidence, you must find for Defendant. . . . [Defendant must prove that there was no reasonable accommodation that it could make which would eliminate the risk or reduce it so that it was no longer a significant risk of substantial harm.]").

Despite holding a similar understanding of the direct threat defense, no other court of appeals has required that a direct threat jury instruction explicitly direct the jury to assess the objective reasonableness of the employer's determination at the outset, and the panel's ruling creates a conflict with the direct threat jury instructions approved in those other jurisdictions.

Conclusion

For the foregoing reasons, the Commission respectfully requests that the Court grant this petition for panel rehearing and/or rehearing en banc.

Respectfully submitted,

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Addendum

Federal Jury Practice And Instructions

Model Civil Jury Instructions for the District Courts of the Third Circuit
Prepared by Committee on Model Civil Jury Instructions Third Circuit

Federal Claims Instructions
Chapter
9. Instructions for Employment Claims Under the Americans With Disabilities Act

9.3.1 ADA Defenses—Direct Threat

In this case, [defendant] claims that it [describe employment action] [plaintiff] because [plaintiff] would have created a significant risk of substantial harm to [plaintiff] [others in the workplace].

Your verdict must be for [defendant] if [defendant] has proved both of the following by a preponderance of the evidence:

First: [Defendant] [specify actions taken with respect to plaintiff] because [plaintiff] posed a direct threat to the health or safety of [plaintiff] [others in the workplace]; and

Second: This direct threat could not be eliminated by providing a reasonable accommodation, as I have previously defined that term for you.

A direct threat means a significant risk of substantial harm to the health or safety of the person or other persons that cannot be eliminated by reasonable accommodation. The determination that a direct threat exists must have been based on a specific personal assessment of [plaintiff's] ability to safely perform the essential functions of the job. This assessment of [plaintiff's] ability must have been based on either a reasonable medical judgment that relied on the most current medical knowledge, or on the best available objective evidence.

In determining whether [plaintiff] would have created a significant risk of substantial harm, you should consider the following factors:

1) How long any risk would have lasted;

2) The nature of the potential harm and how severe the harm would be if it occurred;

3) The likelihood the harm would have occurred; and

4) Whether the harm would be likely to recur.

Comment

The ADA provides an affirmative defense where accommodation of, hiring or retaining an employee would constitute a "direct threat." 42 U.S.C. § 12113(b). "Direct threat" is defined as "a significant risk to the health or

safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C.§ 12111(3). The regulations extend this definition to include a direct threat to the health or safety of the plaintiff as well. In Chevron U.S.A., Inc., v. Echazabal, 536 U.S. 73, 79 (2002), the Court upheld those regulations and held that the "direct threat" defense applied to a direct threat of harm to the plaintiff as well as to others. The Court specifically noted that direct threat is an "affirmative defense" to the ADA qualification standards. Thus a plaintiff does not have the burden of proving that she did not pose a direct threat to the health and safety of herself or others in the work- place.

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Federal Jury Practice And Instructions
Federal Jury Instructions: Seventh Circuit, Civil Cases
Prepared by the Committee on Pattern Civil Jury Instructions of the Seventh Circuit

4. Employment Discrimination: Americans with Disabilities Act

4.10 Direct Threat Defense

In this case, Defendant says that it *[did not accommodate/did not hire/fired]* Plaintiff because *[accommodating/hiring/retaining]* him would have created a significant risk of substantial harm to *[Plaintiff and/or others in the workplace]*. [Defendant must have based this decision on a reasonable medical judgment that relied on *[the most current medical knowledge] [the best available objective evidence]* about whether Plaintiff could safely perform the essential functions of the job at the time.] If Defendant proves this to you by a preponderance of the evidence, you must find for Defendant.

In deciding if this is true, you should consider the following factors: (1) how long the risk will last; (2) the nature and severity of the potential harm; (3) how likely it is that the harm will occur; and (4) whether the potential harm is likely to occur in the near future.

[Defendant must prove that there was no reasonable accommodation that it could make which would eliminate the risk or reduce it so that it was no longer a significant risk of substantial harm.]

Committee Comments

The format of the instruction is taken from EIGHTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 5.53B (2001) ("'Direct Threat'—Statutory Defense") and NINTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 15.12 (2001) ("Defenses—Direct Threat"). The instruction conforms with 42 U.S.C. § 12111(3) (definition of direct threat), 42 U.S.C. § 12113(b) (a qualification standard can include a condition that a person not pose a direct threat), and Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002) ("direct threat" includes a threat to the employee himself); School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987) (criteria for direct threat under analogous Rehabilitation Act of 1973); Emerson v. Northern States Power Co., 256 F.3d 506, 513–514 (7th Cir. 2001); Bekker v. Humana Health Plan, Inc., 229 F.3d 662, 671–672 (7th Cir. 2000); and EEOC v. AIC Security Investigations, Ltd., 55 F.3d 1276, 1283–1284 (7th Cir. 1995).

As to the burden of proof, see Branham v. Snow, 392 F.3d 896, 905–907 (7th Cir. 2004).

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Federal Jury Practice And Instructions
Current through May 2007

Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit
Prepared by Committee on Model Civil Jury Instructions Within the Ninth Circuit

12. Americans With Disabilities Act

12.12 ADA—Defenses—Direct Threat

It is a defense to the plaintiff's ADA claim if the plaintiff posed a direct threat to the health and safety of others [or if the requirements of the job would pose a direct threat to the plaintiff]. The defendant may require, as a qualification for the position, that an individual not pose a "direct threat" to the health or safety of [[others] [himself] [herself]] in the workplace. A health or safety risk can only be considered if it is a significant risk of substantial harm. Assessment of the existence of a direct threat must be based on valid and objective evidence and not speculation.

The defendant claiming the direct threat defense must prove by a preponderance of the evidence that the plaintiff posed a direct threat to the health or safety of [[others] [himself] [herself]] that could not be eliminated by a reasonable accommodation.

Factors that may be considered in determining whether an individual poses a direct threat to the health and safety of [[others] [himself] [herself]] are:

(1) the nature and severity of the potential harm;

(2) the duration of the potential harm;

(3) the imminence of the potential harm; and

(4) the probability of the harm occurring.

If you find that each of the elements on which the plaintiff has the burden of proof has been proved, your verdict should be for the plaintiff, unless you also find that the defendant has proved this affirmative defense, in which event your verdict should be for the defendant.

Comment

See 42 U.S.C. §§ 12111(3) (defines direct threat), 12113(b) (provides that a qualification standard can include a condition that a person not pose a direct threat); *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987) (claim under the Rehabilitation Act of 1973), provides the criteria for what is considered a direct threat.

This defense does apply when the direct threat is to the disabled individual. *See Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 76–77 (2002) (recognizing the availability of the "direct threat" defense where toxins at

an oil refinery would exacerbate plaintiff's liver condition).

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Panel Decision

FILED
United States Court of Appeals
Tenth Circuit

March 16, 2015

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Equal Employment Opportunity Commission, Plaintiff-Appellee, v. Beverage Distributors Company, LLC, Defendant-Appellant.	No. 14-1012

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:11-cv-02557-CMA-CBS)

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Before **TYMKOVICH**, **HOLMES**, and **BACHARACH**, Circuit Judges.

BACHARACH, Circuit Judge.

This case involves a claim of employment discrimination. Mr. Michael Sungaila, who is legally blind, worked for Beverage Distributors Company. When his position was eliminated, Mr. Sungaila obtained a higher-paying job in the company's warehouse. But, Mr. Sungaila's employment was conditioned on passing a physical examination.

Mr. Sungaila passed the physical. But, the examining doctor stated that Mr. Sungaila would require workplace accommodations to mitigate the risks from his impaired vision. Beverage Distributors concluded that it could not reasonably accommodate Mr. Sungaila's condition and rescinded the offer of a job in the warehouse. Shortly thereafter, Mr. Sungaila found a lower-paying position with another company.

Mr. Sungaila filed a discrimination claim with the Equal Employment Opportunity Commission, which then sued Beverage Distributors on Mr. Sungaila's behalf under the Americans with Disabilities Act.

At trial, Beverage Distributors asserted two defenses.

1. *Direct Threat*. Beverage Distributors stated that Mr. Sungaila's impaired vision would create a significant risk of harm to himself and others and no reasonable accommodations could reduce or eliminate that risk.

2. *Failure to Mitigate Damages*. Beverage Distributors added that if Mr. Sungaila were to prevail, the fact-finder should reduce the award because of a failure to mitigate damages.

The jury found that Beverage Distributors was liable for discrimination and that Mr. Sungaila was not a direct threat. But, the jury

also found that Mr. Sungaila had failed to mitigate his damages. Based on these findings, the jury awarded Mr. Sungaila a reduced back pay award because of his failure to mitigate.

The EEOC filed two post-trial motions. In the first motion, the EEOC invoked Federal Rule of Civil Procedure 50(a) and argued that Beverage Distributors had not proven as a matter of law that Mr. Sungaila failed to mitigate his damages. The court agreed and reinstated the full damage award. In the second motion, the EEOC sought a tax-penalty offset to compensate Mr. Sungaila for the additional tax liability resulting from the lump-sum award of back pay. The court granted that motion and awarded the tax offset.

Beverage Distributors appeals, arguing in part:

1. The direct-threat instruction constitutes reversible error; and
2. the district court abused its discretion in awarding the tax offset.

We reverse because the direct-threat jury instruction constituted error. But, if the EEOC prevails upon retrial, Mr. Sungaila may be entitled to a tax offset.

I. Direct-Threat Instruction

Beverage Distributors argues that the direct-threat instruction constituted reversible error. We agree, concluding that the instruction inaccurately conveyed the direct-threat standard.

A. Standard of Review

We first consider whether the direct-threat instruction is erroneous. In doing so, we review the entire instruction de novo[1] to determine whether it accurately states the governing law. *Gardetto v. Mason*, 100 F.3d 803, 816 (10th Cir. 1996).

B. Direct-Threat Defense

The direct-threat defense stems from the Americans with Disabilities Act. Under the Act, an employer cannot discriminate on the basis of a disability. *See* 42 U.S.C. § 12112(a). But, an employer may decide not to hire disabled individuals if they pose a "direct threat to the health or safety" of themselves or others. 29 C.F.R. § 1630.15(b)(2). A "direct threat" involves "a significant risk of substantial harm to the health or safety of the [person] or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. § 1630.2(r).

The existence of a direct threat is an affirmative defense to a statutory claim of discrimination. *McKenzie v. Benton*, 388 F.3d 1342, 1353-54 (10th Cir. 2004). For this defense, Beverage Distributors had to

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[1] The EEOC urges an abuse-of-discretion standard. We disagree. That standard is appropriate only when we are reviewing a district court's decision to give (or not to give) a specific instruction. *See Lederman v. Frontier Fire Prot., Inc.*, 685 F.3d 1151, 1154 (10th Cir. 2012) (stating that appellate courts "review a district court's decision to give a particular jury instruction for abuse of discretion"). Here, we are reviewing the legal sufficiency of an instruction, which is a question we review de novo. *Townsend v. Lumbermens Mut. Cas. Co.*, 294 F.3d 1232, 1237 (10th Cir. 2002); *Sherouse v. Ratchner*, 573 F.3d 1055, 1059 (10th Cir. 2009).

show that it reasonably determined that Mr. Sungaila had posed a direct threat. *See Jarvis v. Potter*, 500 F.3d 1113, 1122 (10th Cir. 2007) (stating that "the fact-finder does not independently assess whether it believes that the employee posed a direct threat," but "determine[s] [instead] whether the employer's decision was objectively reasonable").

In sum, Beverage Distributors could avoid liability by showing that it reasonably determined:

1. Mr. Sungaila posed a significant risk of substantial harm to the health or safety of himself or others, and

2. that risk could not be eliminated or reduced by reasonable accommodation.

C. The Direct-Threat Instruction

We consider these elements to determine whether the district court correctly instructed the jury. Doing so, we conclude that the instruction did not accurately convey the direct-threat standard.

The direct-threat instruction contained two parts. The first part explained what Beverage Distributors had to "prove" to establish the defense:

> To establish this defense, Beverage Distributors must prove both of the following by a preponderance of the evidence:
>
> 1. Mr. Sungaila's employment in a Night Warehouse position posed a significant risk of substantial harm to the health or safety of Mr. Sungaila and/or other employees; and

> 2. Such a risk could not have been eliminated or reduced by reasonable accommodation.

Appellant's App. at 78. The second part of the instruction elaborated on the standard:

> The determination that a direct threat exists must have been based on a specific personal assessment of Mr. Sungaila's ability to safely perform the essential functions of the job. This assessment of Mr. Sungaila's ability must have been based on either a reasonable medical judgment that relied on medical knowledge [or best objective evidence] available at the time of assessment . . . . An employer's subjective belief that a direct threat exists, even if maintained in good faith, is not sufficient unless it is objectively reasonable.
>
> . . . .
>
> In determining whether Beverage Distributors acted objectively reasonably when it determined that Mr. Sungaila was a direct threat, you must consider the following factors: (a) the duration of the risk; (b) the nature and severity of the potential harm; (c) the likelihood that the potential harm would occur; and (d) the imminence of the potential harm.

Id. The instruction did not accurately convey the direct-threat standard.

The first part of the instruction required Beverage Distributors to prove more than what was legally necessary. According to the first part, Beverage Distributors had to prove that Mr. Sungaila posed a direct threat. That was not accurate under our case law. Beverage Distributors should have avoided liability if it had reasonably believed the job would entail a direct threat; proof of an actual threat should have been unnecessary. *See Jarvis v. Potter*, 500 F.3d 1113, 1122 (10th Cir. 2007) ("[T]he fact-finder does not independently assess whether it believes that the employee posed

a direct threat."). Thus, the instruction overstated Beverage Distributors' burden. *See Menne v. Celotex Corp.*, 861 F.2d 1453, 1470-71 (10th Cir. 1988) (concluding that jury instructions were erroneous because they confused the burden of proof).

The second part of the instruction did not cure the error. This part stated that the jury was to consider the reasonableness of Beverage Distributors' belief regarding the existence of a direct threat. But, the jury was never told why it was to consider the reasonableness of what Beverage Distributors thought. Thus, the error was not cured by a reference in the instruction to the reasonableness of the company's subjective belief.[2]

In sum, the instruction was erroneous. The first part of the instruction inaccurately stated that Beverage Distributors had to prove that Mr. Sungaila posed a direct threat. And the second part of the instruction did not cure the error by directing the jury, without explanation, to consider the reasonableness of Beverage Distributors' belief.

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[2] The EEOC suggests that the instruction directed the jury to consider Beverage Distributors' subjective determination by referring to that determination in the past tense. For instance, the instruction stated that "[t]he determination that a direct threat exist[ed] *must have been based* on a specific personal assessment of Mr. Sungaila's ability to safely perform the essential functions of the job." Appellant's App. at 78 (emphasis added). We reject this argument. Even if the instruction had directed the jury to consider Beverage Distributors' determination, that determination was about the "existence" of a direct threat, not the objective reasonableness of the determination.

D. Need for Reversal

We must reverse if the jury might have relied on an erroneous jury instruction. *Level 3 Commc'n, LLC v. Liebert Corp.*, 535 F.3d 1146, 1158 (10th Cir. 2008). Thus, reversal is warranted even if it is "very unlikely" that the jury relied on the erroneous standard. *Id.*

We conclude that the jury might have relied on the erroneous direct-threat standard; thus, reversal is warranted. The inaccurate standard appeared prominently in the instruction, and the verdict form directed the jury to consider that erroneous standard. *See* Appellant's App. at 91 ("Did Defendant Beverage Distributors prove . . . *both elements* of its affirmative defense that Mr. Sungaila's employment in the Night Warehouse position *posed a direct threat* to himself or other employees . . . ?" (emphasis added)). Because the instruction and verdict form could have misled the jury on the standard, we must reverse.

II. Mitigation of Damages

Beverage Distributors also argues that the district court erroneously granted the EEOC's Rule 50(a) motion, arguing that the evidence could have allowed the jury to find a failure to mitigate damages. We need not decide this issue. The sufficiency of the evidence entails a fact-intensive inquiry, and the mitigation evidence may be different on remand. Thus, we

decline to address the sufficiency of the mitigation evidence.[3] *See Doering ex rel. Barrett v. Copper Mountain, Inc.*, 259 F.3d 1202, 1216 (10th Cir. 2001) (declining to address the award of punitive damages when the Court reversed the judgment based on error in the jury instructions).

III. Tax Offset

Beverage Distributors argues that the district court abused its discretion in awarding Mr. Sungaila a tax penalty offset.[4] This issue is affected by our reversal of the EEOC's award. On remand, this issue might or might not recur. But, unlike mitigation of damages, the tax offset issue is primarily legal rather than factual. Thus, we will address the issue. Doing so, we conclude that the district court did not err in awarding a tax offset.

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[3] The EEOC has suggested that we might lack jurisdiction over this part of the appeal. Appellee's Supp. Resp. Br. at 12 n.5 (Feb. 5, 2015). Because we are declining to address the issue on other grounds, we need not address the EEOC's suggestion that we lack jurisdiction.

[4] Beverage Distributors also asserts that the offset award constituted unlawful additur in violation of the Seventh Amendment. But, the company did not raise this argument in district court. *See* Appellee's Supp. App. at 7-8. Thus, this argument has been forfeited. *See Cummings v. Norton*, 393 F.3d 1186, 1190 (10th Cir. 2005). Though we can consider forfeited arguments under the plain-error standard, Beverage Distributors has not argued plain error. *See Bishop v. Smith*, 760 F.3d 1070, 1095 (10th Cir. 2014) (stating that we will not consider the possibility of plain error on a forfeited theory when the claimant fails to argue for plain error), *cert. denied*, __ U.S. __, 135 S. Ct. 271 (2014).

A. Jurisdiction

The EEOC argues that we lack jurisdiction because the notice of appeal preceded the district court's entry of judgment and computation of the amount. *See EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1250 (10th Cir. 1999) (discussing prematurity of an appeal involving a post-judgment award of attorneys' fees). But, we conclude that we have jurisdiction on the tax offset issue.

Even if the notice of appeal had been premature, Beverage Distributors filed a post-judgment motion for a stay pending appeal. This motion (1) specified that Beverage Distributors was taking the appeal, (2) stated that the company was appealing the "monetary components" of the district court's amended order, which would necessarily include the tax offset award, and (3) stated that the appeal was to our court. Def.'s Mot. for Stay Pending Appeal at 1, *EEOC v. Beverage Distributs. Co., LLC,* No. 1:11-cv-02557-CBA-CBS (filed May 13, 2014), Doc. No. 137. Thus, the motion for a stay served as the "functional equivalent" of a notice of appeal under Federal Rule of Appellate Procedure 3. *See Smith v. Barry*, 502 U.S. 244, 248-49 (1992) ("If a document . . . gives the notice required by Rule 3, it is effective as a notice of appeal."). In these circumstances, we have appellate jurisdiction.

B. Merits

Courts have broad discretion in prescribing remedies for victims of discrimination. *See Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976). One such remedy is a tax penalty offset, which compensates victims for additional tax liabilities they would incur as a result of a lump-sum payment. *See Sears v. Atchison Topeka & Santa Fe Ry., Co.*, 749 F.2d 1451, 1456 (10th Cir. 1984) (awarding a tax offset for victims of discrimination).

The district court determined that Mr. Sungaila was entitled to a tax penalty offset. Mr. Sungaila obtained a lump-sum damage award, which would increase his tax liability.[5] Given this result, the court concluded that an offset would compensate Mr. Sungaila for the added liability and "restore [him] to the position he would have been but for his wrongful separation from Beverage Distributors." *EEOC v. Beverage Distribs. Co.*, LLC, No. 11-cv-02557, 2013 WL 6458735, at *8 (D. Colo. Dec. 9, 2013).

This award fell within the district court's discretion. Mr. Sungaila obtained a lump-sum damage award that would increase his tax liability. And the court acted within its discretion in compensating Mr. Sungaila for the added burden.

[5] The parties do not dispute that the lump-sum award would increase Mr. Sungaila's tax liability.

Beverage Distributors disagrees. In its view, Mr. Sungaila is not entitled to the offset because his added tax burden would not be "significant." Appellant's Opening Br. at 39. This argument is based on *Blim v. W. Elec. Co.*, 731 F.2d 1473 (10th Cir. 1984). We are not persuaded.

In *Blim*, we concluded that a tax offset award was improper because the plaintiffs would "suffer no significant tax penalty." 731 F.2d at 1480. The penalty would not have been "significant" because the plaintiffs could eliminate "nearly all" of their additional tax liability by using the tax code's averaging provisions. *Id.*

That reasoning is inapplicable here. Unlike the plaintiffs in *Blim*, Mr. Sungaila cannot lighten his additional tax liability because Congress repealed the averaging provisions in 1986. *See* Tax Reform Act of 1986, Pub. L. No. 99-514, § 141(a), 100 Stat. 2117 (repealing 26 U.S.C. §§ 1302-1305). Without other ways of reducing the added tax liability, Mr. Sungaila would experience a tax disadvantage that the *Blim* plaintiffs were able to avoid.

Beverage Distributors also contends that Mr. Sungaila is not entitled to an offset because his case is "typical." Appellant's Opening Br. at 39. This contention is based on our opinion in *Sears v. Atchison, Topeka & Santa Fe Ry., Co.*, where we affirmed an offset award while suggesting that such an award "may not be appropriate in a typical [discrimination] case."

749 F.2d 1451, 1456 (10th Cir. 1984). But, we did not hold that tax offsets were limited to atypical cases. In our view, the district court acted within its discretion even if Mr. Sungaila's situation might be considered "typical." *See, e.g.*, *EEOC v. N. Star Hospitality, Inc.*, __ F.3d __, No. 14-1660, 2015 WL 363997, at *5 (7th Cir. Jan. 29, 2015) (upholding an award of a tax offset in an EEOC claim on behalf of a single plaintiff in order to make the plaintiff "whole").

Accordingly, we conclude that the district court did not err in awarding a tax offset.

IV. Conclusion

We conclude that (1) the direct-threat jury instruction constituted reversible error, and (2) the district court did not err in awarding a tax offset.

Certificate of Compliance and Digital Submission

I certify that all required privacy redactions (in this document, none) have been made to this document, that this digital submission is an exact copy of the petition filed in hard copy with the Court, and that this digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, Trend Micro OfficeScan, version 10.6.5495 Service Pack 3 (updated April 30, 2015) and, according to that program, is free of viruses.

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Certificate of Service

I hereby certify that on April 30, 2015, I electronically filed the foregoing petition with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

I further certify that on this same date, twelve hard copies of the foregoing petition were submitted to the Clerk of Court, United States Court of Appeals for the Tenth Circuit, Byron White U.S. Courthouse, 1823 Stout St., Denver, CO 80257.

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