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GENETIC SCREENING: AN EMPLOYER'S TOOL TO DIFFERENTIATE OR TO DISCRIMINATE?

Lorie M. Pesonen*

INTRODUCTION

"This is about who gets to decide if the job is too unsafe."

-Samuel Bagenstos¹

According to Mr. Samuel Bagenstos, the job applicant or employee should be the one to determine whether a job is unsafe.² It is also the opinion of many others, including the Ninth Circuit.³ In *Echazabal v. Chevron*, the Ninth Circuit held that an employer may not refuse to hire an applicant where the position would pose a direct threat to the

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1. *Court Considers Implications of Disabilities Act*, CNN.COM. (Feb. 27, 2002), at <http://www.cnn.com/2002/law/02/27/scotus.disability/index.html>. [hereinafter *Court Considers Implications of Disabilities Act*] (Mr. Bagenstos represented Mario Echazabal, the respondent, in *Echazabal v. Chevron U.S.A. Inc.*, 226 F.3d 1063 (9th Cir. 2000), *reversed and remanded* by 122 S. Ct. 2045 (2002)).

2. *Court Considers Implications of Disabilities Act*, *supra* note 1.

3. Brief of Amicus Curiae National Council on Disability at 14, *Chevron U.S.A., Inc. v. Echazabal*, 122 S. Ct. 2045 (2002) (no. 00-1406) ("The 'threat to self' defense fosters the view that people with disabilities need to be protected from themselves and from their choices. This case is about who is best able to make those personal decisions . . .").

applicant's health or safety.⁴ Subsequently, the Supreme Court overturned the Ninth Circuit's decision questioning the employer's authority to select, within the given statutory restrictions, the most qualified employees.⁵ By doing so, the Supreme Court reinforced the employer's authority to decline to hire applicants whose health and safety may be directly threatened by exposure to the chemicals resident in the workplace.⁶ This decision lays another support beam in a debate that has grown in volume over the past fifteen years as technology and medical research have begun to unravel the mysteries of human genetic composition.⁷ This debate involves employers whose work environments expose their employees to chemicals or toxins linked to the onset of specific illnesses. The argument focuses on whether the employer can use genetic screening to identify applicants with genetic predisposition to those illnesses and refuse to hire them. Similar to *Echazabal*, the underlying concerns are two fold (1) the employee's health and (2) the employer's requirement to ensure a safe work environment. However, unlike the employee in *Echazabal*, these employees may not have any symptoms. The issue here rests on the probability of an illness becoming symptomatic.

4. *Echazabal*, 226 F.3d at 1072 ("Congress concluded that disabled persons should be afforded the opportunity to decide for themselves which risks to undertake.").

5. *Chevron U.S.A., Inc.*, 122 S. Ct. at 2045. See also *Echazabal*, 226 F.3d at 1075. (Trott J., dissenting opinion.) ("Finally, and fortunately, we have created a conflict with the Eleventh Circuit, which held that 'an employer may fire a disabled employee if the disability renders the employee a 'direct threat' to his own health and safety.' I say 'fortunately' because this conflict will compel the Supreme Court –or Congress – to resolve this dispute. . .").

6. *Buskirk v. Apollo Metals*, 2002 U.S App. LEXIS 19730, at *18 (3d Cir. 2002) (citing 29 C.F.R. § 1630.15(b) (2002) and *Chevron U.S.A., Inc.*, 122 S.Ct. at 2049) ("For example, an employer is not required to provide a reasonable accommodation . . .if it would pose a 'direct threat' to the safety of the employee or others . . .").

7. See generally Edna Lee Sweltz, *Genetic Testing in the Workplace: An Analysis of the Legal Implications*, 19 FORUM 323 (1984) (discussing the "legal and medical implications of genetic testing in the workplace and proposing a testing framework which attempts to accommodate what the individual sees as a right to work with attainment of a safe and healthy workplace for as many people as possible."). See also *Genetic Screening in the Workplace*, Position Statement of American College of Occupational and Environmental Medicine, (Oct. 24, 1994) (recommending the use of genetic testing on employees where it directly affects job performance, or if the trait being screened for predisposes a worker to a significant adverse outcome following otherwise acceptable exposure.)

This comment will explore the employer's right to refuse to employ pre-symptomatic individuals. Part I will consider the employer's interest in a healthy workforce. Part II will provide a tutorial on genetic testing. Part III will discuss the two federal statutes that address the use of pre-employment examinations to assess the protections they afford to individuals with genetic predispositions to illnesses. More specifically, Part III will explore whether Title VII of the Civil Rights Act of 1964⁸ and the Americans with Disabilities Act (ADA)⁹ prohibit the use of pre-employment physical examinations. Based upon this discussion, Part IV will consider whether an employer should use genetic testing in the employment process. In conclusion, this comment will discuss the employer's use of genetic tests in making employment decisions.

I. CURRENT SITUATION: DISCRIMINATION OR COST OF DOING BUSINESS?

Early in the 1980s, scientists predicted they could unravel the genetic make-up of human beings. To advance that goal, scientists established causal links between specific genes and specific diseases.¹⁰ Once identified, these links could identify specific environmental properties that could be harmful to persons with a genetic predisposition to a specific illness.¹¹ Consumer groups and employee rights activists responded to this achievement with concerns about how this genetic information could be used.¹² Their concerns include the insurance industry's possible use of information predicting whether an individual would develop a debilitating disease, such as Alzheimer's Disease or Cystic Fibrosis, to raise that individual's insurance rates or refuse coverage.¹³ Others warn of the ease

8. 42 U.S.C. § 2000(c) (2000).

9. 42 U.S.C. § 12101 (2000).

10. Robert Bazell, *Scientists Map Human Chromosome*, MSNBC, (Dec. 1, 2001) at <http://stacks.msnbc.com/news>. ("Scientists already know that genes on chromosome 22 play a role in 35 diseases, including some cancers, schizophrenia, deafness and heart disease.")

11. Judith Richter, *Taking the Worker as You Find Him: The Quandary of Protecting the Rights as Well as the Health of the Worker With a Genetic Susceptibility to Occupational Disease*, 8 MD. J. CONTEMP. LEGAL ISSUES 189, 190 (1997).

12. Clarie Andre and Manuel Velasques, *Read My Genes: Genetic Screening in the Workplace*. ISSUES IN ETHICS (Fall 1991), available at <http://www.scu.edu/scu/ethics/publications/iie/v4n2/genes.html>.

13. See Marisa Anne Pagnattaro, *Genetic Discrimination and the Workplace: Employee's Right to Privacy v. Employer's Need to Know*, 39 AM. BUS. L.J. 139,

with which employers could use this information to discriminate among job applicants and deny promotion opportunities to employees with the intent of reducing the company's health insurance rates.¹⁴ These concerns are real. Surveys report instances in which individuals who disclosed genetic information have lost their jobs, promotion opportunities and insurance coverage.¹⁵ This information led to twenty-six states enacting statutes prohibiting private employers and insurance companies from using genetic information to discriminate against applicants and employees, as well as an Executive Order prohibiting such practice by the federal government.¹⁶

However, concerns about discriminatory uses of genetic information have overshadowed its benefits to both the employer and employees. Research has advanced identifying additional environmental factors as having a potential triggering effect on specific diseases. In some cases, it is now possible to identify individuals of a specific genetic make-up, or genetic predisposition, who will become ill after prolonged exposure to certain toxins or chemicals.¹⁷ Alarming, some illnesses can be contracted even if the level of exposure is safe by industry standards.¹⁸ In these instances, the use of genetic tests can directly benefit both the employee

148 (2001) (discussing the 1982 and 1989 Office of Technology Assessment (OTA) surveys of the 500 largest companies in the United States concerning their use and intention to use genetic medical information); *See also* Jerro S. Kotval, Ph.D., *Market-Driven Managed Care and the Confidentiality of Genetic Tests: The Institution as Double Agent*, 9 ALB L.J. SCI & TECH. 1, 16 (1998) ("Within the context of institutions such as market driven MCOs, special concerns are raised by genetic tests that provide predictive power about future health care costs. In particular, these tests would include those for adult onset disorders. . . especially those disorders with high associated costs. Such tests would pose serious temptations for intuitions preoccupied with saving money.").

14. Andre, *supra* note 12.

15. Pagnattaro, *supra* note 13, at 154-55. *See also* Denise K. Casey, *Genes, Dreams, and Realities: The Promise and Risks of the New Genetics*, 83 JUDICATURE 105 (1999) (discussing discriminatory practices of employer's use of genetic/medical information).

16. Joanne Seltzer, *The Cassandra Complex: An Employer's Dilemma in the Genetic Workplace*, 27 HOFSTRA L. REV. 411, 438 (1998); *See* Pagnattaro, *supra* note 13, at 156 (providing an overview of Exec. Order No. 13145, 65 Fed. Reg. 6,877 (2000) (prohibiting discrimination against employees based on protected genetic information)); *See also* Pagnattaro, *supra* note 13, at 173 (discussing statutory protection); *See also* Richter, *supra* note 11, at 218-20 (discussing statutory protection).

17. *See* Seltzer, *supra* note 16, at 440.

18. Richter, *supra* note 11, at 191-92.

and the employer in several ways. First, the tests personalize the workplace risk to an applicant's or employee's health. Second, the test results provide the employee with important information with which to base life-style choices. These choices may assist in delaying or preventing the onset of specific diseases and may assist the employee in making informed decisions regarding exposure to specific environments.¹⁹

For the employer, it is a sound business decision. Maintaining a healthy and productive workforce is cost effective, and employers have a legitimate interest in adopting policies that protect their employees and business.²⁰ They also have a justifiable interest in encouraging safety and efficiency.²¹ These laudable goals tend to reduce health care and worker's compensation costs.²² Cuts in these areas generally increase profitability and positively impact employee morale and employee efficiency.²³ For example, each day, 137 persons die from work-related diseases.²⁴ In 2000, the Bureau of Labor Statistics reported that over 5.7 million nonfatal

19. Andre, *supra* note 12.

20. *Id.* See also Brief of Amici Curiae for the United States and the Equal Employment Opportunity Commission at 10, *Chevron U.S.A. Inc.*, 122 S. Ct. 2045 (2002) (no. 00-1406) ("Maintaining a safe workplace is itself a business necessity.") [hereinafter EEOC Amici Curiae Brief].

21. *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 n. 31 (1979).

22. Richter, *supra* note 11, at 194. Workers' compensation claims also impact an employer's bottom line and therefore efforts serving to reduce these costs could play a factor in the employer's decision to conduct genetic screening. This is a strict liability system where employers assume responsibility for their employee's injuries arising out of its business without regard to fault. This system allows for a relatively inexpensive and prompt means for settling claims where, in exchange for smaller but certain compensation, injured workers waive their rights to sue in tort and the employer waives its possible defenses to tort claims. *Id.*

23. Haig Neville, *Workplace Safety Requires More than a Band-Aid*, SILICON VALLEY/SAN JOSE BUS. J. (Feb. 22, 1999), available at <http://sanjose.bizjournals.com/sanjose/stories/1999/02122/focus11.html> (on file with author). ("Investing in a safer workplace cuts the expense of treating injured workers and helps companies control insurance premiums and prevent workplace accidents. . . effective safety standards in the workplace boost employee morale by conveying the message that the company cares enough about its people to protect their health and safety."); See also EEOC Amici Curiae Brief, *supra* note 20, ("Likewise, serious workplace injuries pose other unique costs on employers in terms of the decreased morale and productivity of employees who may question the employer's commitment to workplace safety up hearing that an employee has suffered injury or even died, on the job.").

24. Centers for Disease Control and Prevention, *Healthy People 2010*, (on file with author) [hereinafter "*Healthy People 2010*"].

injuries and illnesses in private industry were reported in 1999, including 372,000 cases of work-related illness.²⁵ The National Safety Council reported in 1996 that on-the-job injuries alone cost society \$121 billion, representing the sum of lost wages, lost productivity, administrative expenses, health care and other costs.²⁶ The costs associated with sick leave, absenteeism, worker's compensation and loss of goodwill are all attributed to sick employees.²⁷ Efforts to reduce work-related diseases and illnesses are important to employees, business and society. Scientific evidence of casual links between genetic predispositions and environmental factors may play a substantial role in future efforts. Therefore, it is critical to understand how to use genetic testing as an effective tool to advance legitimate business objectives of safety and enhanced efficiency in the least discriminatory manner.

II. GENETIC TESTING: IS IT READY FOR PRIME TIME?

The Human Genome Project (HGP) has contributed to the advancements in genetic research in the United States.²⁸ The HGP is a joint effort between the United States Department of Energy (DOE) and the United States Department of Health and Human Services' National Institutes of Health (NIH).²⁹ In 1990, Congress challenged these agencies

25. Press Release, BUREAU OF LABOR STATISTICS, U.S. Dept. of Labor, *Workplace Injuries and Illnesses in 1999* (Dec. 12, 2000) available at [ftp://ftp.bls.gov/pub/news.release/history/osh.12122000.news](http://ftp.bls.gov/pub/news.release/history/osh.12122000.news). ("The survey measures the number of new work-related illness cases that are recognized, diagnosed, and reported during the year. Some conditions (for example, long-term latent illnesses caused by exposure to carcinogens) often are difficult to relate to the workplace and are not adequately recognized and reported. These long-term latent illnesses are believed to be understated in the survey's illness measures.")

26. *Healthy People 2010*, *supra* note 24, at 2. See also BUREAU OF LABOR STATISTICS, *supra* note 25 (in 1996 there were over 6.2 million nonfatal injuries and illnesses in private industry).

27. Seltzer, *supra* note 16, at 449; See also Andre *supra* note 12, at 2. (Litigation over illnesses associated with hazardous worksite substances pose heavy costs. By reducing occupational disease, genetic screening could reduce costs of lowered productivity, excess absenteeism and heavy employee turnover, as well as costs associated with workers compensation payments, and health insurance.)

28. U.S. DEPT. OF ENERGY, *Human Genome Project Information*, available at <http://www.ornl.gov>. (Last modified December 1999) [hereinafter "*HGP Information*"].

29. Casey, *supra* note 15, at 2 (the project also includes international research teams, including those from the United Kingdom, France, Germany and Japan).

to map the human genome³⁰ sequence by 2005.³¹ The human genome is the complete set of coded instructions, which the human body uses for making and maintaining itself.³² The HGP met this challenge in 2000, when it successfully developed the first working draft of the entire human genome sequence.³³

Understanding the human genome, and the DNA chemicals of which it is comprised, will allow scientists and doctors to develop new, more effective ways to treat, cure and even prevent the thousands of diseases that afflict humankind.³⁴ Moreover, particular conditions or physiological responses can be determined by the genetic make-up created or inherited at the formation of one's DNA.³⁵ For example, some conditions, such as Cystic Fibrosis and prostate cancer, can be inherited.³⁶ Even the particular ability to respond to environmental stresses, such as viruses, bacteria and

30. *Id.*

The complete human genome is packaged into 46 pieces of DNA called chromosomes. Humans receive a set of 23 chromosomes from each parent. A complete set of 46 chromosomes is found in almost every one of our trillions of cells. Most cell types—skin, bone, hair, brain, heart—contain a complete human genome. Exceptions are sperm and egg cells, which contain 23 chromosomes, half the amount of DNA found in other cells; and mature red blood cells, which lack DNA.

Id.

31. *HGP Information, supra* note 28 (project goals are to: 1) *identify* all the approximately 30,000 genes in human DNA, 2) *determine* the sequences of the 3 billion chemical base pairs that make up human DNA, 3) *store* this information in databases, 4) *improve* tools for data analysis, 5) *transfer* related technologies to the private sector, and 6) *address* the ethical, legal and social issues (ELSI) that may arise from the project). (emphasis in original)

32. *Id.*

33. *Id.* (stating that the human genome sequence was announced in June 2000 and its analysis was published in February 2001).

34. *Id.* See also Laura Murphy, *Alzheimer's-Screened Birth Fosters 'Designer Babies' Fear*, WASH. TIMES, Mar. 5, 2002, at A10 ("A test-tube baby girl was born free of her mother's early onset Alzheimer's disease after doctors performed a genetic screening of the woman's embryos for [the] unwanted gene."); See also Casey, *supra* note 15 (discussing gene therapy genetic enhancements, preventative medicine and customized therapies).

35. Seltzer, *supra* note 16, at 433-34 (discussing genetic discoveries associated with diseases, physical ailments, and human social disorders).

36. Press Release, National Human Genome Research Institute, *Researchers Link Gene to Hereditary Form of Prostate Cancer* (Jan. 20, 2002) available at <http://www.genome.gov/page.cpm?page10=10000475> (announcing a gene in chromosome 1 is associated with an inherited form of prostate cancer).

toxins that can lead to the onset of more complex disorders, are inherited.³⁷ Some 4000 diseases, including sickle cell anemia and Tay Sachs, are due to a single mutation in one gene.³⁸ Other diseases, such as heart disease, diabetes, cancers and Alzheimer's, are thought to be more complex. These complex diseases include a variety of gene mutations.³⁹ These gene mutations act in concert, or in combination, with environmental factors, like diet, radiation exposure or toxins, to trigger the disease.⁴⁰

A variety of genetic tests⁴¹ have been developed to screen for genetic disorders.⁴² While the majority of these tests are used strictly for research, approximately 100 are commercially available.⁴³ The cost for genetic tests can range from ten dollars to thousands of dollars, depending on the size of the genes examined and the number of mutations tested.⁴⁴ These commercially available tests identify mutations associated with those diseases in which just a single gene is involved, such as amyotrophic lateral sclerosis (ALS) (more commonly called Lou Gehrig's Disease), inherited breast, ovarian cancer and Cystic Fibrosis.⁴⁵ For example, a \$200 blood test can identify whether a person has a genetic disorder that doubles his chances of developing colon cancer.⁴⁶ However, not all genetic predispositions will manifest into the disease. These tests assist physicians in identifying appropriate treatments, clarifying a diagnosis and identifying individuals who are considered at high risk for diseases that may be

37. *Id.*

38. *Id.*

39. *Id.* See also Paul Steven Miller, *Is There a Pink Slip in My Genes? Genetic Discrimination in the Workplace*, 3 J. HEALTH CARE L. & POL'Y 225, 228 (2000).

40. *Id.*

41. Human Genome Project Information, *Gene Testing*, at <http://www.ornl.gov/hgmis/medicine/genetest.html> (last modified Feb. 18, 2002) [hereinafter *Gene Testing*, HGP Info]. (Uses of genetic tests include 1) carrier screening, which involves identifying unaffected individuals who carry one copy of a gene for a disease that requires two copies for the disease to be expressed; 2) prenatal diagnostic testing; 3) newborn screening; 4) presymptomatic testing for predicting adult-onset disorders such as Huntington's disease; 5) presymptomatic testing for estimating the risk of developing adult-onset cancers and Alzheimer's disease; 6) confirmational diagnosis of a symptomatic individual; and 7) forensic/identity testing.)

42. *Id.*

43. *Id.* See Casey, *supra* note 15.

44. Gene Testing, HGP Info, *supra* note 41.

45. *Id.*

46. See Pagnattaro, *supra* note 13, at 143.

treatable or preventable.⁴⁷ As a result, “aggressive monitoring for and removal of colon growths in those inheriting a gene for familial adenomatous polyposis has saved lives.”⁴⁸

Commercial gene tests are available for some of the complex disorders that usually manifest in adults, such as Alzheimer’s disease and some cancers.⁴⁹ Like the single gene tests, these tests can be conducted on healthy individuals who do not have any symptoms. However, adult-onset disorder tests are usually administered only on those considered at high risk due to their family medical history.⁵⁰ The complexity of adult-onset disorders also prevents an absolute diagnosis that one will contract the disorder.⁵¹ Scientists believe that the genetic mutations causing the disorder’s onset work together with other unknown mutations or environmental factors to cause disease.⁵² Approximately fifty genetic disorders that increase a person’s susceptibility to the toxic and carcinogenic effects of environmental agents have been identified.⁵³ For example, exposure to carbon monoxide and cyanide has been linked to an increased risk of developing symptoms of sickle cell anemia.⁵⁴ In many cases, scientists know the link between the cellular mutation and a specific disorder and understand the environmental triggers, such as radiation or exposure to copper.⁵⁵ However, the exact mechanism that triggers the disorder’s onset, such as duration or quantity of exposure, is not as clear.⁵⁶ In addition to this ambiguity, a question exists concerning test accuracy due to laboratory error and difficulty interpreting the results. As such, many in the medical research community recommend using these tests solely for research until technology sufficiently advances.⁵⁷

47. *Gene Testing*, HGP Info, *supra* note 41.

48. *Id.* (noting a new diagnostic test is in development that will turn a fatal iron-storage disease into a treatable one).

49. *Id.*

50. *Id.*

51. *Id.* See also Miller, *supra* note 39, at 231.

52. See *Gene Testing*, HGP Info, *supra* note 41.

53. Andre, *supra* note 12.

54. Pagnattaro, *supra* note 13, at 147.

55. Sweltz, *supra* note 7 (indicating a link has been established between exposure to copper and Wilson’s disease).

56. *Id.*

57. *Gene Testing*, HGP Info, *supra* note 41 (“One of the most serious limitations of these susceptibility tests is the difficulty in interpreting a positive result because some people who carry a disease-associated mutation never develop the disease.”).

Genetic testing is already used in the workplace and serves two important functions: monitoring and screening. First, genetic monitoring is the periodic examination of a group of workers for chromosomal changes and DNA damage.⁵⁸ This effort serves to identify hazardous environmental factors that can increase the workforce's risk of developing cancer or other disorders.⁵⁹ The Occupational Safety and Health Agency (OSHA) established monitoring programs within specific industries to collect this type of data.⁶⁰ For example, OSHA's lead testing programs evaluate the health risks posed by exposure to chemical agents through periodic blood tests and requires the employee's transfer if the exposure exceeds safety levels.⁶¹ Secondly, genetic screening is a one-time test used to identify an individual's susceptibility to a specific disease, based upon that individual's genetic composition.⁶² It is this latter function that is the subject of this comment.

III. TESTING: A METHOD TO DIFFERENTIATE, NOT DISCRIMINATE

If an employer determines that its interests are protected by the use of genetic screening, the issue becomes how to use these tests in a nondiscriminatory manner. The employment process is inherently subjective. Ensuring that the process is conducted fairly and in the least discriminatory manner, therefore, becomes a serious concern. This section discusses the protections afforded by federal statutes to applicants and employees subjected to genetic screening.

There is no federal statute directly addressing the possible discriminatory effects of genetic screening.⁶³ However, a combination of existing federal statutes can be interpreted to protect the rights of job applicants and employees. Specifically, Title VII of the Civil Rights Act of 1964 (Title VII)⁶⁴ and the Americans with Disabilities Act (ADA)⁶⁵ combine to provide protection for an employee subjected to genetic screening. Each statute specifically addresses the use of pre-employment

58. Pagnattaro, *supra* note 13, at 146.

59. *Id.*

60. Richter, *supra* note 11, at 210.

61. *Id.*

62. *Id.* See also Miller, *supra* note 39, at 230.

63. David J. Wukitsch, *New York's Legal Restrictions on the Employer's Collection and Use of An Employee's Genetic Information*, 9 ALB. L.J. SCI. & TECH. 39, 43 (1998).

64. 42 U.S.C. § 2000e (2000).

65. *Id.* § 12101.

testing of those individuals qualifying for protection under the statute. Title VII prohibits discrimination based on race, color, religion, sex and national origin.⁶⁶ This statute has direct application when employers are screening for illnesses that are linked to national origin, such as sickle cell anemia, or sex, such as ovarian cancer.⁶⁷ The ADA prohibits discrimination against qualified individuals with a disability. The ADA's implementing agency, the Equal Employment Opportunity Commission (EEOC), has extended the ADA's coverage to individuals with a genetic predisposition.⁶⁸ Therefore, the ADA directly relates to the genetic screening of applicants in an employment context.

A. Title VII of the Civil Rights Act of 1964

Title VII prohibits discrimination based on race, color, religion, sex and national origin.⁶⁹ Title VII also identifies unlawful employment practices, including intentional discrimination and disparate impacts.⁷⁰ Employment practices which classify, limit or segregate applicants and employees include employers failing or refusing to hire an individual because of their race, color, religion, sex or national origin.⁷¹ However, these employment practices which diminish the opportunities of applicants and employees are permitted under limited circumstances.⁷² It is also unlawful to discriminate on these grounds with respect to compensation or privileges,⁷³ or to limit, segregate or classify employees or applicants in a manner that "would deprive, or tend to deprive," employment opportunities.⁷⁴ Title VII applies because the use of genetic screening tends to deprive employment opportunities from applicants and employees whose tests screen positively for illnesses associated with national origin, race and sex.

66. See *id.* § 2000e-2.

67. See *e.g.*, *Norman Bloodsaw v. Regents of the Univ. of Cal.*, 135 F.3d 1260 (9th Cir. 1998) (one of the claims specified in this case is a violation of Title VII in that black applicants were screened for sickle cell trait and female applicant was screened for pregnancy).

68. EEOC COMPLIANCE MANUAL SECTION ON THE DEFINITION OF THE TERM "DISABILITY," 902.8, at <http://www.eeoc.gov/docs/902cm.html> (last modified Feb. 1, 2000) [hereinafter EEOC COMPLIANCE MANUAL].

69. 42 U.S.C. § 2000e-2 (2000).

70. See *id.* § 2000e-2(a)(2).

71. *Id.*

72. See *id.* § 2000e-2(a)(1).

73. *Id.*

74. *Id.* § 2000e-2(a)(2).

As the enforcing agency of Title VII, the EEOC has established specific guidelines concerning the use of employment selection criteria.⁷⁵ The EEOC's *Uniform Guidelines On Employee Selection Procedures* applies to pre-employment tests and other selection procedures that are used as a basis for employment decisions.⁷⁶ These guidelines consider employment decisions, including hiring and promotion.⁷⁷ Under these guidelines, employers must use the least discriminatory selection procedure serving the employer's legitimate interest in selecting an efficient and trustworthy workforce.⁷⁸ The selection process must have a valid purpose, be as closely related to the job as possible⁷⁹ and requires periodic review to ensure its currency.⁸⁰ In some cases, validity studies are required⁸¹ to evaluate alternative selection procedures and consider how best to use the intended procedures to the least discriminatory impact.⁸²

This section examines four cases that involve various issues related to Title VII and the use of pre-employment testing. Two Supreme Court cases, *Griggs v. Duke Power Co.*⁸³ and *Albermarle Paper Co. v. Moody*,⁸⁴ address the use of employment-related testing, pursuant to Title VII. *Griggs v. Duke Power Co.* established the parameters for employment testing.⁸⁵ This 1971 case was followed in 1975 by *Albermarle Paper Co. v. Moody*. In *Albermarle Paper*, the court defined the standard of proof for job-related testing.⁸⁶ The foundations established by these two cornerstone cases were later used by the Supreme Court in a third case, *International Union v. Johnson Controls, Inc.*⁸⁷ *Johnson Controls* dealt

75. Uniform Guidelines On Employee Selection Procedures (1978), 29 C.F.R. § 1607 (2002).

76. *See id.* § 1607.2(B).

77. *See id.*

78. *See id.* § 1607.3(B) ("Where two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact.").

79. *Id.*

80. *Id.* § 1607.3.

81. *See id.*

82. *See id.*

83. 401 U.S. 424 (1971).

84. 422 U.S. 405 (1975).

85. *Griggs*, 401 U.S. at 429-36.

86. *Albermarle Paper Co.*, 422 U.S. at 424-35.

87. 499 U.S. 187 (1990).

with a hazardous work environment and the management's discriminatory attempt to reduce its adverse medical impacts on a portion of the work force. Here, the Court held that where an employer's employment actions are facially discriminatory, the employer must prove that the requirement is a bona fide occupational qualification.⁸⁸ The fourth is a case from the Ninth Circuit, *Norman-Bloodsaw v. Regents of the University of California*, which addresses the privacy issues related to genetic screening.

1. Griggs v. Duke Power Co.: Better Qualified Workforce Defense is Insufficient

Griggs was a case of first impression⁸⁹ that considered whether Title VII prohibited an employer's requirement of a high school diploma and the passing of a standardized intelligence test as a condition of employment.⁹⁰ Until 1965, Duke Power's hiring policy limited black applicants to employment in its Labor department and required a high school diploma for initial assignment or transfer to its other four departments.⁹¹ In 1965, the company abandoned this policy,⁹² and later that same year, it upgraded its hiring requirements. The new policy required the applicant to obtain satisfactory scores on two professionally-prepared aptitude tests, as well as have a high school diploma for placement in any its departments, with the exception of Labor.⁹³ Black employees brought claims against the company for violations of Title VII. The company asserted that its 1965 employment policy was enacted to provide a better-qualified workforce,⁹⁴ and that its use of general intelligence tests were "specifically permitted by

88. *Johnson Controls*, 499 U.S. at 200.

89. *Griggs*, 401 U.S. at 429.

90. *Id.* at 427.

91. *Id.*

92. *Id.* at 428. The two professionally prepared aptitude tests were the:

Wonderlic Personnel Test, which purports to measure general intelligence, and the Bennett Mechanical Comprehension Test. Neither was directed or intended to measure the ability to learn to perform a particular job or category of jobs. The requisite scores used for both initial hiring and transfer approximated the national median for high school graduates," which were "more stringent than the high school requirement, since they would screen out approximately half of all high school graduates.

Id.

93. *Id.*

94. *Id.* at 431 (indicating a company vice president testified that the requirements were instituted on the Company's judgment that they would generally would improve the overall quality of the work force).

Title VII as a ‘professionally developed ability test,’” and not “designed, intended or used to discriminate because of race.”⁹⁵

In considering the claim, the Supreme Court noted the Congressional objective of Title VII was to “[a]rchive equality of employment opportunities and remove barriers” that in the past favored identifiable groups.⁹⁶ While pre-employment testing was authorized,⁹⁷ Congress placed the burden on the employer to show that any given requirement did not serve to “‘freeze’ the status quo of prior discriminatory employment practices.”⁹⁸ The requirements also needed to demonstrate “a manifest relationship to the employment in question.”⁹⁹ The EEOC procedures interpreting the Act, required employers to provide data demonstrating the employment test was “predictive of or significantly correlated with important elements of work behavior, which comprise or are relevant to the job or jobs for which the applicants are being evaluated.”¹⁰⁰ Therefore, the company’s employment requirements had to relate to a specific business necessity, be tailored to the specific position being sought and could not be discriminatory.

The Court found that the company’s interest in a better-qualified workforce was too broad and therefore, lacked a specific business necessity.¹⁰¹ The Court could not find a “demonstratable relationship” between the company’s hiring requirements and successful job performance,¹⁰² though it indicated that the company’s policy lacked

95. *Griggs*, 401 U.S. at 433.

96. *Id.* at 429-30.

97. *Id.*

98. *Id.* at 431.

99. *Id.* at 432.

100. *Id.* at 433.

101. *Id.* (“The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.”). *See also* *Regents of University of California v. Bakke*, 438 U.S. 265, 308 n.44 (1978) (Brennan, White, Marshall, and Blackmun, J., dissenting) (n.44; “. . . disparate impact is a basis for relief under Title VII only if the practice in question is not founded on ‘business necessity’ . . .”).

102. *Griggs*, 401 U.S. at 431-32 (Company adopted employment requirements “without meaningful study of their relationship to job-performance ability” but rather “on the Company’s judgment that they generally would improve the overall quality of the work force”. Evidence demonstrated that employees who have not completed high school or taken the intelligence tests perform satisfactorily and made progress in departments for which the high school and test criteria are now used.)

discriminatory intent.¹⁰³ The Court noted that neither “good intent or absence of discriminatory intent” will “redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.”¹⁰⁴ Accordingly, the Court held that nothing in the Act precluded the use of employment testing or other measuring procedures. However, “these devices and mechanisms [are without] controlling force unless they are demonstrably a reasonable measure of job performance.”¹⁰⁵

The *Griggs* holding began to shape the employer’s requirements for the use of pre-employment testing, including genetic screening. *Griggs* indicates that pre-employment screening techniques may be used if they have a direct correlation to the job being sought – even if there is a discriminatory impact.¹⁰⁶ Therefore, an employer using genetic screening must ensure that there is a link between the disease being screened for and the work environment in which the job is performed. For example, where the work environment is composed of high levels of copper, the employer would be justified to screen applicants for the genetic predisposition to Wilson’s disease.¹⁰⁷ However, the employer in this example would be unable to justify the use of tests that screen for diseases unrelated to copper exposure, such as Alzheimer’s or breast cancer.

103. *Id.* at 432. (finding the Company’s lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training.)

104. *Id.* at 432.

105. *Id.* at 436.

106. *Id.* at 431 (holding where an employment practice operates to exclude a set of employees, the practice is prohibited if it cannot be shown to be related to job performance).

107. See Sweltz, *supra* note 55, at 324 (suggesting link has been established between exposure to copper and Wilson’s disease). National Digestive Diseases Information Clearing House, *Wilson’s Disease*, at <http://www.niddk.nih.gov/health/digest/summary/wilson/wilson.htm> (last modified Feb. 2001.) (Wilson’s disease is hereditary. It causes the body to retain copper, which disrupts the liver’s functioning. Overtime, a copper buildup will be created that leads to damage in the kidneys, brain and eyes. If not treated, Wilson’s disease can cause severe brain damage, liver failure and death. Symptoms usually appear between the ages of six and twenty years, but can begin as late as age forty. The disease is treated with lifelong use of D-penicillamine or trientine hydrochloride, drugs that help remove copper from tissue. Patients will also need to take vitamin B6 and follow a low-copper diet, which means avoiding mushrooms, nuts, chocolate, dried fruit, liver and shellfish.).

2. *Albemarle Paper Co. v. Moody: Job-Relatedness—Measuring Potential Job Performance*

Four years later, the Supreme Court addressed pre-employment testing in *Albemarle Paper Co. v. Moody*.¹⁰⁸ Here, the Court specifically considered what the employer, who used pre-employment tests that were racially discriminating in effect but not in intent, had to establish in order to survive a Title VII challenge. Albemarle Paper Company's employment process required applicants for employment in its skilled labor categories to pass two standardized tests.¹⁰⁹ Because of the *Griggs*¹¹⁰ decision, the company employed an industrial psychologist in an effort to professionally verify the job relatedness of its testing program.¹¹¹ However, employees brought suit under Title VII claiming that the tests were discriminatory. The Supreme Court considered whether the criteria considered in the pre-employment tests were sufficiently related to petitioner's "legitimate interest in job-specific ability to justify a testing system with a racially discriminatory impact."¹¹²

Noting its decision in *Griggs*, the Supreme Court reemphasized, "Title VII forbids the use of employment tests that are discriminatory in effect, unless the employer meets the burden of showing that any given requirement [has] a manifest relationship to the employment in question."¹¹³ The Court held that to consider "the question of job relatedness, the tests must be viewed in the context of the plant's

108. 422 U.S. 405 (1975).

109. *Id.* at 426 (The Revised Beta Examination, allegedly a measure of nonverbal intelligence, and the Wonderlic Personnel Test, allegedly a measure of verbal facility.).

110. *Id.* at 425 (In *Griggs*, the Court was construing 42 U.S.C. § 2000e-2(h), which provides in pertinent part that it shall not:

be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.).

111. *Id.* at 411 (The study compared the test scores of current employees with supervisory judgments of their competence in ten job groupings selected from the middle or top of the plant's skilled lines of progression. The study showed a statistically significant correlation with supervisory ratings in three job groupings for the Beta Test, in seven job groupings for either Form A or Form B of the Wonderlic Test, and in two job groupings for the required battery of both the Beta and the Wonderlic Tests).

112. *Id.*

113. *Id.* at 425 (quoting *Griggs*, 401 U.S. at 432).

operation and the history of the testing program.”¹¹⁴ It looked to the EEOC Guidelines, as it had in *Griggs*, for the test to determine whether Albemarle’s employment tests were job related.¹¹⁵ The Court noted that even though the EEOC guidelines were not promulgated through the formal procedures established by Congress, as the Act’s agency tasked with its interpretation, its guidelines were “entitled to great deference.”¹¹⁶

The Court then established whether the company’s employment testing policy was “predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.”¹¹⁷ The Court determined that the company was unable to substantiate that the tests measured potential job performance.¹¹⁸ Specifically, the company’s validity study did not involve an analysis of the attributes of, or the particular skills needed in the studied job groups.¹¹⁹ Nor did the study correctly compare test scores with subjective supervisory rankings,¹²⁰ or use test subjects that were the same age, or similarly situated as to education and vocation as the potential new employees.¹²¹ The Court held that the company’s test failed to meet the job-relatedness test and remanded for further consideration.¹²²

Albemarle Paper establishes the job-relatedness standard for the use of pre-employment testing requiring that the tests be predictive of or significantly correlated to the important elements of work behavior

114. *Albermarle Paper Co.*, 422 U.S. at 425.

115. *Id.* at 431.

116. *Id.*

117. *Id.* (quoting 29 CFR § 1607.4(c)).

118. *Id.* (“Even if it had been otherwise adequate, the study would not have “validated” the Beta and Wonderlic test battery for all of the skilled lines. . . .”).

119. *Id.* at 433 (quoting the EEOC Guidelines, 29 CFR §§ 1607.5 (b)(3)):

The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques, the appraisal form(s) and instructions to the rater(s) must be included as a part of the validation evidence. Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses.).

120. *Id.* at 432.

121. *Id.* at 435 (noting validation studies only dealt with job-experienced, white workers, though the pre-employment tests were to be given to new job applicants, who are younger, largely inexperienced, and in many instances nonwhite).

122. *Id.* at 436.

relating to the job or jobs for which the applicant is being considered.”¹²³ The Court found *Albemarle*’s quantitative data lacking because it did not accurately evaluate the position and it did not accurately reflect the characteristics of the applicants. *Griggs* indicates that a “better qualified workforce” is insufficient where the screening technique has a discriminatory impact.¹²⁴ Therefore, the employer must justify the use of genetic screening based upon the characteristics of the position being sought, its unique environmental factors and how it relates monetarily and numerically to the applicant, the employer and the population.

Considerations, such as how many employees are at risk, would provide justification for the use of genetic screening. For example, if the disease effects only three percent of every ten million in the human population, chances are the illness will not be considered predictive or significantly correlated to a position with a company of 500 employees. However, it could be a different outcome with a corporation the size of Wal-Mart Stores with its 1,383,000 employees,¹²⁵ if the disease affected one in every 10,000 in the population. Secondly, the number of employees who have contracted the disease in the past could be indicative of future illnesses. This could be persuasive if the total were higher than the national average or the employer could prove these employees were genetically disposed to the disease. This would help to personalize the employer’s analysis to the work environment with the positions being sought. It would also help to individualize the comparison of the applicant to the workplace. Where the workforce is affected to a greater degree than the population, the employer has a better ability to justify the use of genetic screening when challenged because the work environment poses a threat to the health of individuals with genetic predispositions. Therefore, *Albemarle* gives the employer its second important element needed to justify the use of genetic screening: the need to provide data demonstrating the use of genetic screening is predictive of or significantly correlated with important elements of work behavior.

123. *Id.* (quoting 29 CFR § 1607.4(c)). See also *Griggs*, 401 U.S. at 434.

124. *Griggs*, 401 U.S. at 431.

125. *The 2002 Global 500*, FORTUNE MAGAZINE (JULY 22, 2002), available at <http://www.fortune.com/lists/G500> (providing the number of people Wal-Mart employs as part of its investment data).

3. *International Union v. Johnson Controls, Inc: Test All: Sex, Race Are Not Indicative*

In *Johnson Controls*, the Supreme Court considered whether an employer, seeking to protect potential fetuses, may discriminate against women because of their ability to become pregnant.¹²⁶ Johnson Controls, Inc., was a battery manufacturer. The primary ingredient used in the manufacturing of batteries is lead.¹²⁷ "Occupational exposure to lead entails health risks, including the risk of harm to any fetus being carried by a female employee."¹²⁸ Johnson Controls did not employ women prior to the passage of the Civil Rights Act of 1964.¹²⁹ In 1977, it issued its first official policy warning female employees about the risks of carrying a child while employed in lead-exposure work.¹³⁰ This policy required any woman who wished to be considered for employment to sign a statement that she had been advised of the risks associated with having a child after being exposed to lead.¹³¹ In 1982, the company shifted its policy to one of exclusion when eight employees became pregnant.¹³² Each of these women was found to have excessive levels of lead in their blood.¹³³ In 1984, a class action was brought challenging the company's fetal-protection policy as sex discrimination that violated Title VII.¹³⁴

126. *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 190 (1990).

127. *See id.*

128. *See id.*

129. *Id.* at 191. The 1977 policy read in part:

Protection of the health of the unborn child is the immediate and direct responsibility of the prospective parents. While the medical profession and the company can support them in the exercise of this responsibility, it cannot assume it for them without simultaneously infringing their rights as persons. . . . [s]ince not all women who can become mothers wish to become mothers (or will become mothers), it would appear to be illegal discrimination to treat all who are capable of pregnancy as though they will become pregnant.

Id.

130. *Id.*

131. *Id.*

132. *Id.* (1982 policy: "It is [Johnson Controls'] policy that women who are pregnant or who are capable of bearing children will not be placed into jobs involving lead exposure or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights.").

133. *Id.* at 191-92.

134. *Id.* at 192-93 (Petitioners included an individual who had chosen to be sterilized in order to avoid losing her job, one who suffered a loss in compensation when she was transferred out of a job where she was exposed to lead and a man

Upon review, the Supreme Court found that the lower courts had erroneously assumed that “sex-specific fetal-protection policies did not involve facial discrimination.”¹³⁵ As such, the lower courts had applied the more lenient business necessity rule to the case, rather than a bona fide occupation qualification (BFOQ) defense to uphold the company’s policy.¹³⁶ Upon review of Johnson Controls’ policy, the Court found it “classifies on the basis of gender and childbearing capacity, rather than fertility alone.”¹³⁷ The Court noted that the company disregarded evidence that lead exposure was equally as debilitating on the male reproductive system as it is on women.¹³⁸ The Court found Johnson Controls’ policy was “not neutral because it does not apply to the reproductive capacity of the company’s male employees in the same way as it applies to that of the females.”¹³⁹ In examining the company’s motive, it found the policy was not applied with a malevolent motive.¹⁴⁰ However, the Court stated that this benign motive would not “convert a facially discriminatory policy into a neutral policy with a discriminatory effect.”¹⁴¹ The Court found that “Johnson Controls’ fetal-protection policy was sex discrimination forbidden under Title VII unless [the company could] establish that sex is a “bona fide occupational qualification.”¹⁴²

who had been denied a request for a leave of absence for the purpose of lowering his lead level because he intended to become a father. The certified class consisted of “all past, present and future production and maintenance employees” in United Auto Workers bargaining units at nine of Johnson Controls’ plants “who have been and continue to be affected by [the employer’s] Fetal Protection Policy implemented in 1982.”).

135. *Id.* at 197-99.

136. *Id.* at 193-96 (The Eleventh and Fourth Circuits used the three step business necessity inquiry established in *Hayes v. Shelby Memorial Hospital*, 726 F. 2d 1543 (11th Cir. 1984), and *Wright v. Olin Corp.*, 697 F. 2d 1172 (4th Cir. 1982) which asks “whether there is a substantial health risk to the fetus; whether transmission of the hazard to the fetus occurs only through women; and whether there is a less discriminatory alternative equally capable of preventing the health hazard to the fetus.”).

137. *International Union*, 499 U.S. at 198.

138. *Id.*

139. *Id.*

140. *Id.* at 199.

141. *Id.*

142. *Id.* at 200 (citing 42 U.S.C. § 2000e-2(e)(1)), “Under § 703(e)(1) of Title VII, an employer may discriminate on the basis of “religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification.”).

A bona fide occupational qualification, the Court explained, is written and applied narrowly.¹⁴³ The company argued that its fetal-protection policy fell within the so-called safety exception to the BFOQ. However, the Court noted that the safety exception applied to cases that discriminate on the basis of sex because of safety concerns, meaning the concerns had to be more than just a danger to a woman herself to justify discrimination.¹⁴⁴ Such discrimination had only been allowed where there was a high correlation between sex and the ability to perform the job, and where a third party was endangered.¹⁴⁵ The Court emphasized that these cases did not classify the fetus as a third party, and found its welfare best left to its mother.¹⁴⁶ Therefore, the Court held that “the safety exception is limited to instances in which sex or pregnancy actually interferes with the employee’s ability to perform the job.”¹⁴⁷ Because of the company’s “professed moral and ethical concerns about the welfare of the next generation do not suffice to establish a BFOQ of female sterility,” the fetal-protection policy was held to be an illegal sex-based discrimination, prohibited under Title VII.¹⁴⁸

Johnson Controls contributes an additional guideline for employers using genetic screening. Where an employer’s actions are facially discriminatory, the employer must prove that the requirement is a BFOQ.¹⁴⁹ A BFOQ defense puts a greater burden on the employer than does the business necessity rule of *Griggs*.¹⁵⁰ As with the employer in *Johnson Controls* whose work environment adversely affected the employees’ reproductive systems, the employer using genetic screening

143. *Id.* at 201 (The wording of the BFOQ defense contains restrictive terms indicating that the “exception reaches only special situations.” It is thus limited to the situations in which discrimination is permissible to ‘certain instances’ where sex discrimination is reasonably necessary “to the ‘normal operation’ of the ‘particular’ business.” The court asserted, “the most telling term is ‘occupational’; [that] indicates that these objective, verifiable requirements must concern job-related skills and aptitudes.”).

144. *Id.* at 202.

145. *Id.* (citing *Dothard v. Rawlinson*, 433 U.S. 321, 332-37 (1977) (In *Dothard*, the Court allowed the employer to hire only male guards in contact areas of maximum-security male penitentiaries. The Court also reviewed a series of cases approving airline layoffs of pregnant flight attendants on the ground that the employers’ policy was necessary to ensure the safety of passengers’ flight).)

146. *Id.*

147. *Id.* at 204.

148. *Id.* at 206.

149. *Id.* at 193-98.

150. *Id.* at 198.

has established a direct link between the hazardous work environment and the harm that it could inflict upon individuals with a specific genetic predisposition. Where the employer is screening for a genetic predisposition to an illness that affects predominately one sex, or is common among a specific race or national origin, the employer must screen all applicants. If the employer does not screen all applicants, the employer becomes vulnerable to discrimination charges under Title VII. *Johnson Controls* illustrates this because the employer ignored the health risks to both sexes and focused its restrictive fetal policy only on its female employees.

Another example would involve a situation where a company is concerned about its employees' exposure to high levels of carbon monoxide in their work environment.¹⁵¹ Upon being advised that the work environment could be particularly harmful to those with sickle cell anemia, the employer begins to screen all African American applicants. This testing would be facially discriminatory because sickle cell anemia also affects those of Arabic, Greek, Italian and Latin American descent, as well as Caucasians and those from India.¹⁵² Therefore, where the employer chooses to screen for genetic predispositions to an illness related to the work environment, the employer must not make assumptions about its applicants' ancestry and must screen all applicants.

4. *Norman-Bloodsaw v. the Regents of the University of California: Privacy Protection and Consent*

In *Norman-Bloodsaw v. the Regents of the University of California*, the issue considered was "whether a clerical or administrative worker who undergoes a general employee health examination may, without his knowledge, be tested for highly private and sensitive medical and genetic information such as syphilis, sickle cell trait and pregnancy."¹⁵³ Lawrence Berkeley Laboratory required its contractors to perform mandatory pre-placement medical examinations on applicants.¹⁵⁴ These exams were

151. *Carbon Monoxide Poisoning*, OSHA Fact Sheet, 1 (Identifies specific professions and industries at risk to high exposure to carbon monoxide).

152. The Sickle Cell Information Center, *Sickle Cell Anemia*, at <http://www.emory.edu/PEDS/SICKLE> (last modified June 11, 2002).

153. *Norman - Bloodsaw*, 135 F.3d at 1264.

154. *Id.* at 1264-65 (As one of the Department of Energy's (DOE) contractors, Lawrence Berkeley Laboratory performed preplacement examinations from 1981 to 1995 as expressed conditions of employment. The mandatory preplacement examination occurred after the offer of employment but prior to the assumption of

conducted after a conditional offer of employment was made but before the assumption of duties.¹⁵⁵ The exams required the employees to complete a detailed medical history questionnaire and provide urine and blood samples.¹⁵⁶ These samples were tested for syphilis.¹⁵⁷ Samples taken from female applicants were also subjected to a pregnancy test,¹⁵⁸ while samples received from African-American applicants were tested for the sickle cell trait.¹⁵⁹ Lawrence stopped these tests in the early 1990s.¹⁶⁰ While applicants consented to the pre-employment medical examine, the specific tests to which the applicant's samples would be submitted were not.¹⁶¹ Several former and current employees¹⁶² challenged these pre-employment medical exams under several claims. The two claims germane to this discussion are the asserted violation of Title VII of the Civil Rights Act of 1964 and the implied right to privacy as guaranteed by the United States' Constitution.¹⁶³ Lawrence contended that it had a legitimate interest in conducting the exams and, further, that the employees had consented.¹⁶⁴

In reviewing the district court's grant of summary judgment for the defendant, the Ninth Circuit found the district court erred in dismissing the claim.¹⁶⁵ The Ninth Circuit explained that Title VII applies where employers discriminate with respect to the 'terms' or 'conditions' by establishing illicit classifications for ongoing employment and where

job duties. Prior to 1992, the preplacement exam required syphilis testing as part of the preplacement examination.).

155. *Id.* at 1265 ("In the course of these examinations, plaintiffs completed medical history questionnaires and provided blood and urine samples. The questionnaires asked, inter alia, whether the patient had ever had any of sixty-one medical conditions, including sickle cell anemia, 'venereal disease,' and, in the case of women, 'menstrual disorders.'").

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 1265 (Syphilis testing was discontinued in April 1993 because of its limited usefulness in screening healthy populations. Pregnancy testing became optional in December 1994. Sickle cell trait testing was discontinued in June 1995 because, by that time, most African-American adults had already been tested at birth.).

161. *Id.* at 1268.

162. *Id.* at 1264.

163. *Id.*

164. *See id.* at 1266-70.

165. *Id.* at 1275.

individuals may obtain employment.¹⁶⁶ The Ninth Circuit found that the claims fell “neatly within the Title VII framework.”¹⁶⁷ Specifically, the employment of women and blacks at Lawrence was “conditioned in part on allegedly unconstitutional invasions of privacy to which white and/or male employees were not subjected.”¹⁶⁸ The Ninth Circuit held that where a “‘term or condition’ requiring unconstitutional invasion of privacy is, without doubt, actionable under Title VII,” and even if they were not unconstitutional, this term or condition would still be “based on an illicit category as described by the statute and thus a proper basis for a Title VII action.”¹⁶⁹

In considering the privacy issue, the Ninth Circuit noted there is a constitutionally protected privacy interest in avoiding disclosure of personal matters that clearly encompasses medical information and its confidentiality.¹⁷⁰ Violations of privacy that include the collection of medical information are examined “under the rubric of the Fourth Amendment.”¹⁷¹ Therefore, Lawrence’s interest in conducting these tests was balanced “against the plaintiffs’ expectations of privacy.”¹⁷² This balancing test must include consideration of the tests’ intrusiveness, the state’s interests in requiring that intrusion and the efficacy of the state’s means for meeting its needs. However, the Ninth Circuit could “think of few subject areas more personal and more likely to implicate privacy interests than that of one’s health or genetic make-up.”¹⁷³ Furthermore,

166. *Id.* at 1271 (citing 42 U.S.C. § 2000e-2(a)), (The Ninth Circuit also found support in the Pregnancy Discrimination Act, which precludes discrimination on account of sex, including pregnancy, childbirth and related medical conditions.). See also *id.* § 2000e(k).

167. *Norman - Bloodsaw*, 135 F.3d at 1272.

168. *Id.*

169. *Id.*

170. *Id.* at 1269. The Supreme Court has recognized that while the taking of a bodily fluid sample implicates one’s privacy interests, “the ensuing chemical analysis of the sample to obtain physiological data is a further intrusion of the tested employee’s privacy interests.” *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 616 (1989).

171. *Id.* at 1269. “These tests may also be viewed as searches in violation of Fourth Amendment rights that require Fourth Amendment scrutiny. The tests at issue in this case thus implicate rights protected under both the Fourth Amendment and the Due Process Clause of the Fifth or Fourteenth Amendments.” *Yin v. California*, 95 F.3d 864, 870 (9th Cir. 1996).

172. *Norman - Bloodsaw*, 135 F.3d at 1269.

173. *Id.* See also *Doe v. City of New York*, 15 F.3d 264, 267 (S.D.N.Y. 1994) (“Extension of the right to confidentiality to personal medical information

the Ninth Circuit found the medical conditions screened for by the tests were highly sensitive and constitutionally prohibited where “employer inquiries into personal sexual matters that have no bearing on job performance.”¹⁷⁴

Norman-Bloodsaw reiterates that the employer bears a heavy burden in justifying the use of sensitive medical information in employment decisions. This burden is imposed because of the privacy rights of the applicants. Genetic screening is a direct examination of a tissue sample, usually blood, which is scanned for a specific genetic mutation in the DNA.¹⁷⁵ Because the test results provide highly personal information, the employer must ensure that the applicant understands and consents to the procedure. As the Ninth Circuit noted, there “would, of course, be no violation if the testing were authorized.”¹⁷⁶ The privacy issues involved with genetic screening also require the employer to respect and protect that privacy by ensuring effective safeguards for the protection of the information.

In summary, these four cases illustrate how an employer may conduct a genetic screening program without violating Title VII. *Griggs* offers the rule that where employment testing is used it must have a manifest relationship to the employment in question.¹⁷⁷ This means the tests must relate to a specific business necessity, be tailored to the specific position being sought and not be discriminatory. *Albemarle* places the burden on the employer to provide data demonstrating the employment test is “predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which

recognizes there are few matters that are quite so personal as the status of one’s health”); see also *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 at 658 (D. Or. 1995) (noting under Fourth Amendment analysis that “it is significant that the tests at issue here look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic.”).

174. *Norman-Bloodsaw*, 135 F.3d at 1269. See also *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1336 (9th Cir. 1987) (citing *Thorne v. City of El Segundo*, 726 F.2d 459, 470 (9th Cir. 1983) The Ninth circuit stated, “syphilis is an intimate matter that pertains to one’s sexual history and may invite tremendous amounts of social stigma.” Pregnancy is likewise, for many, an intensely private matter, which also may pertain to one’s sexual history and often carries far-reaching societal implications. Finally, “the carrying of sickle cell trait can pertain to sensitive information about family history and reproductive decisionmaking.”).

175. See *Norman-Bloodsaw*, 135 F.3d at 1269. See also *Casey*, *supra* note 15.

176. *Norman-Bloodsaw*, 135 F.3d at 1270.

177. *Griggs*, 401 U.S. at 432.

candidates are being evaluated.”¹⁷⁸ *Johnson Controls* establishes the need to test all applicants and not interject personal perceptions into the testing process. *Norman-Bloodsaw* illustrates the importance for careful consideration of testing policies and procedures to protect the applicant’s privacy. While each of these Title VII cases finds fault with the application of the employment policies, they did not ban the use of employment tests and policies when they are conducted in a nondiscriminatory manner.

B. The Americans with Disabilities Act (ADA)

In addition to Title VII, the American with Disabilities Act of 1990 (ADA)¹⁷⁹ extends protection to individuals with a genetic predisposition to an illness.¹⁸⁰ This is based upon two foundations. The first is the ADA’s definition of a *disability*, which covers those individuals who are discriminated against because they are regarded as having an impairment.¹⁸¹ The second is the 1995 EEOC Compliance Manual that expands the definition of “disability” to include “individuals who are subjected to discrimination on the basis of genetic information relating to illness, disease, or other disorders.”¹⁸² This section will review the ADA’s protection and how it extends to the individuals with genetic predispositions. First, this section reviews the terms of the Act itself to define its protections and understand how it may apply to individuals with genetic predispositions. Second, this section considers the restrictions placed upon employment practices. Together, these two sections will provide a roadmap with which to consider the extent of any ADA prohibition against the use of genetic screening in the employment process.

178. *Albermarle*, 422 U.S. at 431 (The message of these Guidelines is the same as that of the *Griggs* case -- that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be “predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.”).

179. Americans with Disabilities Act, 42 USC §§12101-213 (1994).

180. *See generally* Seltzer, *supra* note 16.

181. 42 U.S.C. § 12102(2)(c) (2000). *See also* 29 C.F.R. § 1630.2(g).

182. EEOC COMPLIANCE MANUAL, *supra* note 68, at 902.8.

*1. Provisions Protecting Individuals with Genetic Predispositions:
Perceptions Count*

Congress established the ADA “to combat societal discrimination against individuals with disabilities.”¹⁸³ The ADA prohibits employers from “discriminating against qualified individuals” regarding disability in job application procedures, promotions, discharging employees, employee compensation, job training and conditions and privileges of employment.¹⁸⁴ Only truly ‘qualified individuals with a disability’ are protected by ADA.¹⁸⁵ A qualified individual is a person “with a disability, who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires.”¹⁸⁶ The term “disability”, as defined by the ADA, means: “(1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment.”¹⁸⁷ Therefore, a person must meet at least one of these criteria to be considered disabled under the Act. The ADA does not define ‘major life activities.’ However, the Act has incorporated by reference regulations issued under the Rehabilitation Act¹⁸⁸ that specifically define major life activities and contain a non-exhaustive list of tasks “repetitively performed and essential in the day-to-day existence.”¹⁸⁹ This list includes activities of daily living such as caring for one’s self, walking, seeing, and speaking.¹⁹⁰

Within its regulations, the EEOC defines how genetic screening is treated under the ADA.¹⁹¹ The regulations state that employers “that

183. Amanda J. Wong, *Distinguishing Speculative and Substantial Risk in the Presymptomatic Job Applicant: Interpreting the Interpretation of the Americans with Disabilities Act Direct Threat Defense*, 47 UCLA L. REV. 1135, 1140 (2000).

184. 42 U.S.C. § 12112 (2000).

185. Miller, *supra* note 39, at 238.

186. 42 U.S.C. §12111(8) (2002) (These individuals either work for or are applying for positions with employers who are engaged in an industry affecting commerce and employ more than fifteen full time employees, or their agents. However, the ADA does not apply to the United States’ Government, or those corporations wholly owned by the United States’ Government.). *See also* Wong, *supra* note 183, at 1142-43.

187. 42 U.S.C. § 12102(2) (2000); *See also* 29 C.F.R. § 1630.2(g).

188. 42 U.S.C. §12201(a) (2000). 45 CFR § 84.3(j)(2)(ii)(1997).

189. *Bragdon v. Abbot*, 524 U.S. 624, 660 (1998) (Rehnquist, C.J., dissenting opinion.).

190. *Id.* at 659.

191. EEOC COMPLIANCE MANUAL, *supra* note 68, at 902.8.

discriminate against individuals on the basis of such genetic information are regarding the individual as having impairments that substantially limit a major life activity” and therefore is regarded as having such an impairment.¹⁹² The regulation provides an illustrative example that is very similar to our discussion here. In this case, an applicant is determined to have an increased susceptibility to colon cancer.¹⁹³ The cancer is asymptomatic and may never develop into colon cancer. However, in this example the employer rescinds their conditional offer of employment upon learning about the test because of “concerns about matters such as [the applicant’s] productivity, insurance costs, and attendance.”¹⁹⁴ The EEOC would find the applicant was treated as having “an impairment that substantially limits a major life activity.”¹⁹⁵ As such, the applicant is considered to have a “disability.”¹⁹⁶ An individual refused employment because of a genetic predisposition to an illness is considered disabled under the act. However, this does not complete the analysis for a finding of discrimination. While the Act itself establishes restrictions upon the employer’s employment practices, it also provides the employer with specific defenses to claims of discrimination.

2. Restrictions on Employment Practices and Defined Limited Defenses: Direct Threat

The ADA limits employers’ discriminatory employment practices. Simply, an employer is prohibited from discriminating against a qualified individual with a disability.¹⁹⁷ The EEOC defines discrimination to include “using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability, or a class of individuals with disabilities, unless the standard, test or selection criteria . . . is shown to be job-related for the position in question and is consistent with business necessity.”¹⁹⁸ Employers are prohibited from “limiting, segregating, or classifying a job applicant or employee in a way that adversely affects their opportunities.”¹⁹⁹ Employers may not use

192. *Id.* at 902 (referencing 136 CONG. REC. H4623 (daily ed. July 12, 1990) (statement of Rep. Owens); *Id.* at H4624-25 (statement of Rep. Edwards); *Id.* at H4627 (statement of Rep. Waxman)).

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. 42 U.S.C. § 12112(a) (2000).

198. *See id.* § 12112(b)(6).

199. *See id.* § 12112.

qualification standards, employment tests or other selection criteria that screen out, or tend to screen out, an individual with a disability or a class of individuals with disabilities “unless it is shown to be job-related for the position in question and consistent with business necessity.”²⁰⁰ However, an employer is not required to hire or promote an individual “if such action would create a ‘direct threat,’” meaning a significant risk, to the health or safety of others that cannot be eliminated by reasonable accommodation.²⁰¹ EEOC regulations have interpreted this clause to include a significant risk to one’s own health or safety, as well as that of third parties.²⁰²

The ADA limits pre-employment inquiries to the applicant’s ability to perform job-related functions.²⁰³ An employer may not ask whether the applicant has a disability or question the nature or severity of such disability.²⁰⁴ Pre-employment medical examinations are prohibited unless it is job-related and consistent with business necessity.²⁰⁵ A medical examination may be conducted after an offer of employment has been made but before commencement of employment.²⁰⁶ Such an offer may be a condition of an employment if all entering employees are subjected to an examination regardless of disability and information obtained concerning the medical condition or history is treated as a confidential medical record and appropriately safeguarded.²⁰⁷

The ADA provides the employer with several defenses, two of which are germane to this discussion.²⁰⁸ The first defense states that an employer may counter a claim of discrimination by proving that the qualification

200. *See id.* § 12112(d)(4)(A).

201. *See id.* § 12111(3).

202. 29 C.F.R. § 1630.2(r) (2002):

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. In 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.

203. 42 U.S.C. § 12112(d)(2)(B) (2000).

204. *See id.* § 12112(d)(2)(A).

205. *See id.* § 12112(d)(4)(A).

206. *See id.* § 12112(d)(3)(A)&(B).

207. *See id.* § 12112(d)(3)(B).

208. *See id.* § 12113(a).

standards, tests or selection criteria used in the employment process are job-related, consistent with business necessity and such performance cannot be accomplished by a reasonable accommodation.²⁰⁹ Secondly, the ADA establishes the so-called 'direct threat' defense by requiring "that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."²¹⁰ In interpreting the ADA, the EEOC has expanded the scope of the direct threat defense by stating that qualification standards may include a requirement that "an individual not pose a direct threat to the health or safety of other individuals in the workplace."²¹¹ However, there is no direct threat defense if the employer could have made a reasonable accommodation.²¹²

3. *Divining Reality: Discriminatory or Not*

In the EEOC's example of the applicant with the susceptibility, or genetic predisposition, to colon cancer, the EEOC directs that such applicants are considered disabled within the terms of the ADA because of their perceived disability.²¹³ This establishes a solid foundation upon which applicants, who are refused employment because of their genetic predisposition, can bring an ADA discrimination suit against the offending employer. In order to prevail against such a claim, the employer must use the ADA's defense clauses to their advantage.²¹⁴ Where an employer can prove that the qualification standards are job-related, consistent with business necessity and that a reasonable accommodation cannot be provided, the employer will prevail.²¹⁵ Additionally, the EEOC regulations allow an employer not to hire an individual who will be harmed by the work environment.²¹⁶

In comparing the EEOC's scenario to the employer, business necessity becomes important. Unlike the employer in the EEOC's example, our employer has identified a specific business necessity: to maintain a safe work environment. Secondly, there is a job-related element: the unique properties of the work environment will have a harmful effect on the

209. *Id.*

210. *See id.* § 12113(b).

211. 29 C.F.R § 1630.2(r).

212. 42 U.S.C. § 12113(a). *See Moses v. American Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996).

213. *See id.* § 12102(2)(c).

214. *See id.* § 12113(a).

215. *Id.*

216. 29 C.F.R § 1630.2(r).

applicant. The employer is screening only for those illnesses that relate to the chemicals and toxins in the company's work environment, not for illnesses related to high costs and absenteeism. Unlike the EEOC employer, this employer is screening applicants for a predisposition for Wilson's disease since, as employees, they would be exposed to high levels of copper. As such, the employer has established a qualification standard that prevents the applicant from being placed in an environment in which he will most likely suffer harm.²¹⁷ If our employer was able to accommodate the applicant through some means of reasonable accommodation, then the employer loses his defense.²¹⁸ However, if the employer does not have the ability to protect the applicant from the workplace exposure, he is unable to provide the applicant with a reasonable accommodation. Therefore, the employer's actions would not be considered discriminatory. By narrowly defining an objective that relates specifically to the work environment and is applied consistently with the terms of the ADA and Title VII, including appropriate privacy safeguards and the application of the testing to all applicants, an employer can use genetic screening within the employment process. This conclusion is supported by the Supreme Court's unanimous decision in *Chevron U.S.A., Inc. v. Echazabal*.²¹⁹

4. *Chevron USA, Inc. v. Echazabal: The Employer Decides Acceptable Risk?*

The direct threat defense, with its subset – the threat-to-self defense, is at the heart of *Chevron U.S.A., Inc. v. Echazabal*.²²⁰ This case involved Chevron's refusal to hire Mr. Echazabal because he had Hepatitis C.²²¹ Mr. Echazabal applied for a position in Chevron's California oil refinery that would expose him to toxins that would aggravate his illness.²²² The illness was identified during Mr. Echazabal's pre-employment physical.²²³ Chevron's physicians, after consulting with Mr. Echazabal's treating physician, determined that "exposure to hepatotoxic chemicals involved in the job 'would further damage [Mr. Echazabal's] already reduced liver capacity,' . . . 'seriously endanger[ing] his health,' and 'potentially causing

217. See *id.* § 1630.2(r). See also Wong, *supra* note 183, at 1135.

218. *Id.*

219. *Chevron U.S.A. Inc.*, 122 S. Ct. at 2045 (2002).

220. *Id.* at 2047. See also *Echazabal*, 226 F.3d at 1064.

221. *Chevron U.S.A. Inc.*, 122 S.Ct. at 2048.

222. *Id.*

223. *Echazabal*, 226 F.3d at 1065.

his death.”²²⁴ As such, Chevron withdrew its employment offer.²²⁵ Mr. Echazabal filed suit claiming that Chevron had violated the ADA in refusing to hire him to work at the refinery or to continue his current employment with Chevron’s contractor.²²⁶ Chevron argued that its decision not to hire Mr. Echazabal was in compliance with EEOC regulations allowing employers to decline to hire individuals where the work environment poses a direct threat to the applicant’s health and safety.²²⁷ Mr. Echazabal appealed the District Court’s grant of Chevron’s request for summary judgment to the Ninth Circuit.²²⁸ The Ninth Circuit looked to the text of the ADA and determined that Congress had intended the ADA’s direct threat defense to limit the employer’s ability to decline to hire an applicant where the applicant posed a threat to other individuals, but that this did not extend to the applicants themselves.²²⁹ The Ninth Circuit discounted Chevron’s argument that the applicant’s ability to work in the environment, without posing a threat to the applicant’s health, was an essential function of the job.²³⁰ Therefore, the Ninth Circuit reversed the trial court’s award of summary judgment and limited the meaning of the direct threat defense.²³¹ This placed the Ninth Circuit in direct opposition to the Eleventh Circuit.²³² The Supreme Court granted certiorari to resolve the conflict.²³³

The Court considered whether the ADA permits employers to refuse “to hire an individual because his performance on the job would endanger

224. Petition for a Writ of Certiorari at 2-7, *Chevron U.S.A., Inc. v. Echazabal*, 122 S. Ct. 456 (2001).

225. *Chevron U.S.A., Inc.*, 122 S. Ct. at 2048.

226. *Id.*

227. *Echazabal*, 226 F.3d at 1065-1066 (citing 29 C.F.R. § 1630.15(b)(2)(2001)).

228. *Chevron U.S.A. Inc.*, 122 S. Ct. at 2048.

229. *Echazabal*, 226 F.3d at 1066-1068.

230. *Id.* at 1070.

231. *Id.* at 1070-71.

232. *Id.* at 1075 (In *Moses v. American Nonwovens, Inc.* 97 F.3d 446 (11th Cir. 1996), the Eleventh Circuit held that an employer may fire a disabled employee if the disability renders the employee a direct threat to his or her own health or safety. In *Moses*, the employee had epilepsy and had seizures on the job. Because his assigned tasks presented grave risks to an employee with a seizure disorder, and the employee did not prove he did not pose such a risk, the court upheld the discharge.). See also *Chevron U.S.A. Inc.*, 122 S. Ct. at 2048, that raised “. . . tension with the Seventh Circuit case of *Kosciusko v. Decatur Foundry, Inc.*, 177 F.3d 599, 603 (1999).”

233. *Echazabal*, 226 F.3d at 1075.

his own health, owing to a disability.”²³⁴ The Court noted that federal law allows employers an affirmative defense to claims of discrimination under specific qualification standards that are “shown to be job-related . . . and consistent with business necessity.”²³⁵ This standard may also include “a requirement that an individual shall not pose a direct threat to other individuals in the workplace.”²³⁶ Additionally, the EEOC regulations interpreting this affirmative defense, expanded its coverage to include the employer’s refusal to hire disabled applicants who may be harmed by the work environment.²³⁷ It is the EEOC regulation, with its ‘threat-to-self’ provision, upon which Chevron relied.²³⁸

Mr. Echazabal argued the canon *expressio unius exclusio alterius* in an attempt to prove that the ADA’s direct threat defense did not include the ‘threat-to-self’ provision.²³⁹ This canon allows the exclusion of an unmentioned item of an associated group if one item is expressed.²⁴⁰ Mr. Echazabal argued that because ‘threat to others’ was included within the statute, the EEOC could not expand the meaning to include a ‘threat to self.’²⁴¹ The Court was not persuaded for three reasons. First, the Court determined that Congress defined the defensive categories spaciously enough to give an agency or court “a good deal of discretion in setting the limits of permissible qualification standards.”²⁴² Additionally, by using the phrase ‘may include,’ the meaning “points directly away” from the exclusivity Mr. Echazabal advocated.²⁴³ Secondly, the canon requires a

234. *Chevron U.S.A. Inc.*, 122 S.Ct. at 2047 n.1. The Court left unanswered “the further issue passed upon by the Ninth Circuit, which held that the respondent is a “‘qualified individual’” who “can perform the essential functions of the employment position.” The Court stated that:

the issue will only resurface if the Circuit concludes that the decision of respondent’s employer to exclude him was not based on the sort of individualized medical enquiry required by the regulation, an issue on which the District Court granted summary judgment for petitioner and which we leave to the Ninth Circuit for initial appellate consideration if warranted.

Id.

235. *Id.* at 2049 (citing 42 U.S.C. § 12113(b) (2000)).

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.* at 2050.

243. *Id.*

defined grouping.²⁴⁴ However, there is no uniform interpretation among the Federal Agencies interpreting the categories.²⁴⁵ Lastly, the Court found that there “was no deliberate stopping point” to Mr. Echazabal’s limited interpretation.²⁴⁶ As such, the ‘threat to self’ defense is not only available to the employer, but the employer would be unable to defend a refusal to hire an applicant who’s disability would threaten others outside the workplace.²⁴⁷ This would mean that an employer would have “been defenseless if [Typhoid] Mary had sued after being turned away[.]”²⁴⁸

The Court found that since Congress had not spoken exhaustively on threats to workers’ health, that the EEOC’s regulation can “claim adherence . . . so long as it makes sense of the statutory defense for qualification standards that are ‘job related and consistent with business necessity.’”²⁴⁹ The Court found that Chevron’s “reasons for calling the regulation reasonable” included moral concerns, and an interest in “avoid[ing] time lost to sickness, excessive turnover from medical retirement or death, litigation under state tort law, and the risk of violating the national Occupational Safety and Health Act.”²⁵⁰ Over Mr. Echazabal’s arguments to the contrary, the Court found these considerations legitimate and sufficient to “show that the regulation is entitled to survive.”²⁵¹

Overall, the Court’s decision has validated the EEOC’s interpretation that an employer may refuse to hire an applicant when the applicant may pose a direct threat to the health and safety of others and where the work environment may pose a direct threat to the health of the applicant. Here Mr. Echazabal had Hepatitis C.²⁵² Therefore; this case specifically applies to applicants who are symptomatic. Whether the case could apply to presymptomatic applicants who are seeking employment in environments with toxins and chemicals that could trigger a disease to which they have a

244. *Id.* (quoting E. Crawford, *Construction of Statutes* 337 (1940). “The canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which are abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded.”).

245. *Id.* at 2050.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* at 2052.

250. *Id.* (citing to Occupational Safety and Health Act of 1970, 84 Stat. 1590, as amended, 29 U.S.C. § 651 (2002)).

251. *Chevron U.S.A. Inc.* 122 S. Ct. at 2052.

252. *Id.* at 2048.

specific predisposition remains unanswered. However, this case supports the employer's use of genetic screening where it is reasonable, job-related, and a business necessity.

IV. EMPLOYER'S REQUIREMENTS FOR TESTING

We have considered Title VII, along with its supporting case law, and the ADA to determine what protections exist for the employee. Title VII protects employees who are subjected to genetic screening relating to race, sex or national origin.²⁵³ This protection, however, does not prohibit the use of such tests.²⁵⁴ It only requires that employment tests and screening criteria, of which genetic screening is a subset, be related to the position to which the applicant is applying and have a business necessity. These requirements are mirrored in the wording of the ADA, which offers its protections to those with genetic predispositions that have been denied employment. Additionally, the employer must be able to justify the use of the exam by proving its results cannot be achieved by less discriminatory means. Title VII would require the employer to conduct genetic screening in a non-discriminatory manner. This requirement to conduct these tests in a nondiscriminatory manner is also contained in the ADA.²⁵⁵ Specifically, the employer must ensure that *all applicants* are screened. Title VII prohibits screening decisions based on perceptions about gender, race or national origin.²⁵⁶ The ADA further prohibits screening and screening decisions based upon stereotypes, patronizing assumptions or generalized fear.²⁵⁷ While Title VII applies to a subset of applicants, only those where sex, national origin or race were factors, the ADA applies to all applicants who are subjected to genetic screening and have been refused employment because of a genetic predisposition.²⁵⁸

However, simply because an employee falls within the protection of the ADA, does not prohibit the use of genetic screening techniques. As the Supreme Court demonstrated in *Chevron*, the direct threat defense will allow the employer to decline to hire symptomatic applicants where the work environment poses a direct threat to the health of the applicant.

253. 42 U.S.C. § 2000e-2 (2000).

254. *Griggs*, 401 U.S. at 430-31.

255. 42 U.S.C. §12112(a) (2000).

256. *See id.* § 2000e-3.

257. 29 C.F.R. 1630.2(r). *See also* School Board v. Arline, 480 U.S. 173, 187 (1987) (individualized inquiry necessary to protect individual from unfounded prejudice or stereo types).

258. 42 U.S.C. § 12111(8) (2000).

Such a condition establishes a business necessity and job-relatedness elements of the ADA's affirmative defense to discrimination claims. Whether the holding of *Chevron* will extend to the use of genetic screening of presymptomatic applicants remains to be seen. However, *Chevron* does support the employer's authority to determine job qualifications based upon the environment's effects on employee health.

For all of this, a question remains—should an employer test? This question is different than the one presented at the beginning of this text. 'Can' and 'should' are quite different. Within the given parameters of the federal statutes, an employer can use genetic screening to identify applicants with genetic predispositions and decline to hire them. But the answer to the 'should' question is far more complex. The decision to test is a business decision that encompasses the consideration of a variety of factors. Some of those factors have been previously discussed because they lay the factual foundation for the employer's job-relatedness and business necessity defenses. Information establishing the link between the work environment and its impact upon employee health, how many employees have contracted the disease, what the possible impact is of employees contracting the disease in the future are all included in that decision. This information still does not answer all of the questions. The 'should' question must take into account the reality of the technology and public perception, as well as potential change within the respective environment.

The use of genetic screening to determine adult-onset disorders, such as Alzheimer's, is premature.²⁵⁹ Technology has not advanced to the stage where there is a high degree of accuracy in identifying when, if at all, these diseases will begin to wage their quiet, debilitating war within the body.²⁶⁰ The medical research community has cited difficulty in interpreting the test results as creating sufficient uncertainties to prevent the tests usage as more than a research tool.²⁶¹ Because of this noted inaccuracy, an employer's reliance on these test could be seen as unreasonable and erode the employer's defenses under the ADA and Title VII. Additionally, there is a matter of employee and public perception. *Echazabal* is different from our genetic screening scenarios because Mr. Echazabal is ill.

259. *Gene Testing*, HGP Info, *supra* note 41. See also Miller, *supra* note 39, at 231 ("other genetic tests of uncertain predictability are used to determine the presence of genetic mutations linked to diseases like cystic fibrosis and Alzheimer's Disease.").

260. *Id.* (predictive ability of tests is limited because they only forecast a mere possibility).

261. *Id.* See also Casey, *supra* note 15.

However, medical science has advanced enough to link Mr. Echazabal's illness with Chevron's work environment. Chevron's denial of employment resonates with the reasonable person who would not want more harm to be inflicted upon an ill person. Company-implemented safety programs have a positive impact upon the employees because they make employees feel as if Chevron, a corporate giant, cares about their health and safety.²⁶² An applicant with a genetic predisposition is, nevertheless, a healthy person. Denying this individual employment due to some probability of future disease erodes the caring illusion and adversely impacts employee moral. Therefore, the employer must give careful consideration to the full range of repercussions created by the use of genetic screening.

V: CONCLUSION

Genetic screening is only a tool, though its current reliability is questionable. When technology advances to the point where its predictive powers improve, it will serve to benefit both employers and applicants. While employers realize a healthier and more efficient workforce, the applicant will gain valuable information about their health. This information may serve to lay the foundation for life choices that could increase the applicant's life span and improve the applicant's quality of life.

Genetic screening, however, is not a tool to be wielded by every employer. It is for those employers whose profession or industry requires constant and repeated exposure to those environmental factors, including copper, carbon monoxide, cyanide, lead or radiation, known to trigger the onset to specific genetic disorders such as Wilson's disease, sickle cell anemia and breast cancer. This tool's application is limited to a small arena by the provisions of Title VII and the ADA, that require specificity as to how it relates to a specific job and business necessities. Where these provisions cannot be articulated and supported with factual data, the application of such tests would be discriminatory and therefore prohibited.

262. Neville, *supra* note 23.

