



## ECHAZABAL REVISITED

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**A**lthough our newsletter is entitled the "Workers' Compensation Commentary", we do, of course, include discussions of significant decisions in the disability discrimination field since we deal with those cases as well and they impact our clients both directly and indirectly through their impact on workers' compensation.

A while ago, we reported that the U.S. Supreme Court had heard an appeal in the case of *Echazabal v Chevron USA, Inc.* If you will recall, Mr. Echazabal had applied for a position with Chevron and had been denied access to that position on the basis that the work involved exposure to chemicals that would be dangerous for him to work around because he had been diagnosed with Hepatitis "C" and therefore his liver function was impaired. The court below had specified that Mr. Echazabal could not be excluded from that position because the ADA only permitted an employer to raise the defense that an individual could be excluded from a job if they presented risks to other employees but not because of any risk to themselves. This ruling was made by the Ninth Circuit Court of Appeals....the most reversed Circuit Court of Appeals in the United States....the court that, you will recall, extracted "under God" from the Pledge Of Allegiance.

The U.S. Supreme Court, logically, decreed that the protection also had to be extended to the individual if a danger is presented to them.

The case was remanded and, certainly, employers were generally pleased with the Supreme Court's pronouncement.

The case did not expire however. Mr. Echazabal went back to the Federal District Court where the employer was granted a summary judgment and then he once again stepped up in front of the Ninth Circuit Court of Appeals. Now, the Circuit Court, in a decision handed down on July 23, 2003, has decreed (in a split 2-to-1 decision) that while they recognize the principle that was established by the U.S. Supreme Court, but that in this particular case, an analysis of the evidence upon which Chevron relied in denying employment to Mr. Echazabal disclosed that it was inadequate and did not satisfy the burden imposed upon employers to look at the four factors outlined in the *Arline* case and reversed the summary judgment that was made in favor of the employer by the District Court. The case has now been returned (remanded) to the District Court for the evidence to be considered anew.

What this means is that while the employer can certainly rely on evidence that a particular job or geographic position is potentially harmful and a "direct threat" to a worker, that the employer must be diligent in acquiring evidence and satisfying the four *Arline* factors.

The case that is being referred to is *School Board of Nassau County v Arline* 480 US 273 (1987). That was a US Supreme Court case in

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which the Court specified four factors to be considered in assessing whether or not an employee's condition posed a "direct threat." The *Arline* factors announced by the US Supreme Court are as follows:

1. In the first place, an employer must properly assess the **nature** of this potential harm to the employee. That means that hard evidence of not only the environmental factors to be considered must be obtained, but scientific evidence of the effect of that environment will have on the physical or mental condition of the worker must be established. Most of the time this information cannot be acquired without the use of experts and it should be established not only that those individuals have the capability of making this assessment and judgment but they are given all necessary evidence to consider in that regard.
2. The second factor is the **duration** of the risk. This defense is not available to an employer when an employee has a temporary condition since such a condition is not covered in any of them by the ADA. The disability therefore must be one for which permanent restrictions or limitations must be imposed or at least they must be imposed for an indefinite period of time.
3. The third factor is the **severity** of the risk. Is it life threatening or one that would lead to substantial impairment or just a marginal risk or nuisance. This generally requires an expert medical or toxicological opinion.
4. The fourth factor is the **probability** that potential harm will occur.

Again, without competent expert evidence, usually medical in nature, that determination cannot be made.

In that case, a School Board dealt with an individual who had recurrent tuberculosis and the School Board was afraid that that individual would communicate the disease to the students. In this particular case, we are dealing with an individual who ostensibly could be harmed by exposure to hydrocarbons and other chemicals because of a weakened liver.

A review of this most recent decision in the Echazabal matter discloses that the court majority believes that Chevron's reliance on the opinion of their physicians was not well founded because their physicians were not experts in either toxicology or liver damage and the opinions that they expressed were not based on any substantial evidence. It is clear that the court considered their opinions to be based on speculation and conjecture and that the evidentiary basis for the exclusion of Mr. Echazabal from this employment was not sufficient to support the summary judgment that had been granted to the employer in the trial court below.

This decision, if it stands, however, places a very heavy burden on the employer that is very eloquently summarized by the dissenting opinion that was filed by Justice Trott of the Ninth Circuit.

As Justice Trott points out, the employer in this case had relied on the opinions expressed by Mr. Echabazal's own treating doctor who agreed with the employer's examining doctors that his health would be jeopardized if he were employed in the capacity that he sought. As Justice Trott points out, "Mr. Echazabal now attacks not only the opinion of Chevron's

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doctors, but also the medical opinion of the doctor he chose to treat him. His 'ammunition?' Two competing academic opinions never communicated to Chevron in connection with its hiring decision and not produced until the filing of his lawsuit." (Daily Journal, Daily Appellate Report, page 8155). Justice Trott goes on to state at later point, "my colleagues' opinions dismissing the opinions of the doctors upon whom Chevron relied will have a significant pernicious impact on all employers in this Circuit who are doing their best in good faith to comply with the law. Moreover, it will encourage lawyers to choose lawsuits for their clients rather than employment."

Basically what the justice is saying is that the burden being placed on an employer is really unfair and untenable. The Circuit Court's majority would have an employer go behind a medical opinion to establish the credentials and the viability of an opinion expressed by a purported expert or face successful prosecution for discrimination when the employee produces later medical reports at odds with those upon which the employer relied. One of the points that the Circuit Court majority is making that makes a lot of sense is that an assessment must be individualized. Therefore, an employer cannot establish a blanket prohibition but must make a case-by-case determination as to such employment decisions. That is a well-established principle. That is a point that the US Supreme Court has made over and over again in its rulings concerning discrimination under the ADA, but the point has been stretched to a substantial extent in this case. In fact, Justice Trott went on to discuss a decision in "another Circuit Court" thereby pointing out the fallacy behind this majority determination in the Ninth Circuit. In a 1996 decision (*Knapp v Northwestern University* 101 F3d 473 (1996), that "other" Circuit Court said:

"we do not believe that, in cases where medical experts disagree in their assessment of the extent of a real risk of serious harm or death, Congress intended that the courts - neutral arbiters that generally are less skilled in medicine than the experts involved - should make the final medical decision. Instead, in the midst of conflicting expert testimony regarding the serious risk of harm or death, the court's place is to ensure that the exclusion or disqualification of an individual was individualized, reasonably made, and based upon competent medical evidence."

Mr. Echazabal's case is being remanded to the District Court for a consideration of the evidence presented by the two sides. Given the position of the majority at the Ninth Circuit Court of Appeals, it is likely that we will see this case back once again. Hopefully we will see a little refinement and some consideration for the position that an employer is in while making such a decision. It is my belief that if the Circuit Court of Appeals maintains the position that they do, that this case will once again find its way to the U.S. Supreme Court since it would create effectively a split of opinion among the Circuits, something that the U.S. Supreme Court generally deems important enough to review.

*This newsletter contains only personal opinions and suggestions by the writer which may be of general application in the subject area being discussed. This letter is not intended as specific legal advice as applied to any fact situation and it is recommended that if legal advice is desired concerning the application of any of the information contained herein to a particular factual situation that direct contact with an attorney be sought.*