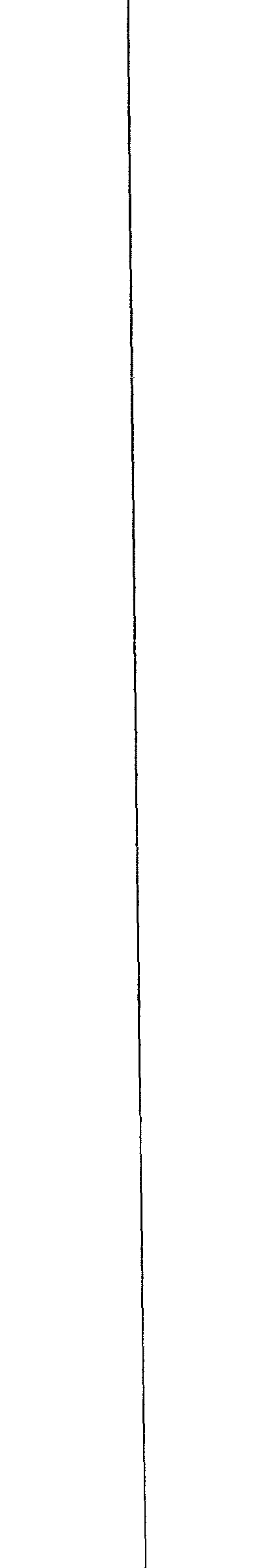
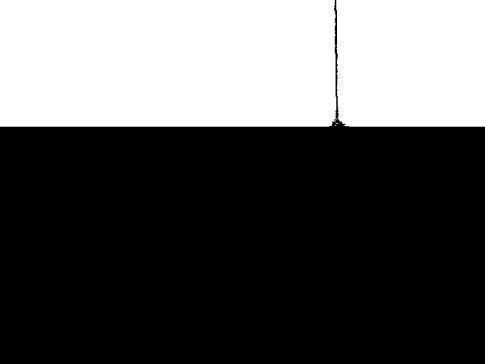
*Risks never exist in isolation. They are part of systems. For that reason, any effort to reduce a single risk will have a range of consequences, some of them likely unintended....*

*If the Occupational Safety and Health Administration ("OSHA') increases regulation Of benzene, a carcinogenic substance, it might lead companies to use a less safe, or perhaps even an unsafe, substitute; it might also decrease the wages of affected workers, and decrease the number of jobs in the relevant industry. People who have less money, and who are unemployed, tend to live shorter lives and hence occupational regulation might, under certain circumstances, sacrifice more lives than it saves. Of course the unintended consequences of risk regulation might be desirable rather than undesirable as, for example, when regulation spurs new pollution-control technologies.*





*-* CASS R. SUNSTEINB

From sudden deadly accidents, like the explosion of the Deep Horizon in the Gulf of Mexico, to the gradual onset of carpal tunnel syndrome from repetitive motions such as data processing or butchering, workers face a wide array of risks. Many of the worst hazards are invisible, like the chemical exposures that threaten the reproductive capacities of both men and women. Those who work in dry cleaners and laundries face carbon disulfide and benzene. Health workers-in hospitals, clinics, and dentist offices­ are exposed to infectious diseases and radiation from x-ray machines. Mercury, cadmium, coal tar, carbon tetrachloride, and vinyl chloride are risks for production line workers. Computer assemblers breathe toxic dust; taxi drivers breathe carbon monoxide.

In the following case, the court must weigh an individual's willingness to risk his own health against a company's efforts to ensure a safe working environment.

ECHAZABAL v. CHEVRON USA, INC.

United States Court of Appeals, Ninth Circuit, 2000 226 F.3d 1063

***REINHARDT, Circuit Judge.***

Mario Echazabal first began working at Chevron's oil refinery in El Segundo, California in 1972. Employed by various maintenance contractors, he worked at the refinery, primarily in the coker unit, nearly continuously until 1996, when the events that gave rise to this lit­igation occurred.

In 1992, Echazabal applied to work directly for Chevron at the same coker unit loca­tion.... A pre-employment physical examination conducted by Chevron's regional physi­cian revealed that Echazabal's liver was releasing certain enzymes at a higher than normal level. Based on these results, Chevron concluded that Echazabal's liver might be damaged by exposure to the solvents and chemicals present in the coker unit. For that reason, Chevron rescinded its job offer. Nevertheless, Echazabal continued to work for Irwin, a maintenance contractor, throughout the refinery including at the coker unit Chev­ron made no effort to have him removed from his assignment.

8 "Cost-Benefit Default Principles," 99 *Mich. L. Rev. 1651 (2001).*

Workers' Rights as Human Rights 181

In 1995, Echazabal again applied to Chevron for a position at the coker unit. Again, the job offer was rescinded because of the risk that his liver would be damaged if he worked in the coker unit. This time, however, Chevron wrote Irwin and asked that it "immediately remove Mr. Echazabal from [the] refinery or place him in a position that eliminates his exposure to solvents/chemicals."

(Echazabal claimed that Chevron's refusal to allow him to work in the coker unit was illegal discrimination under the Americans with Disabilities Act (ADA) based on his disability-his diagnosed Hepatitis C. Chevron tried to raise the "direct threat defense," arguing that if Echazabal worked in the coker unit he would present a "direct threat" to his own health. The court first looks at the language of the statute:] The direct threat defense permits employers to impose a "requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." On its face, the provision does not include direct threats to the health or safety of the disabled individual himself....

Although we need not rely on it, the legislative history of the ADA also supports the conclusion that the direct threat provision does not include threats to oneself.... Congress's decision not to include threats to one's own health or safety in the direct threat defense makes good sense in light of the principles that underlie the ADA in partic­ular and federal employment discrimination law in general.... (T]he ADA was designed in part to prohibit discrimination against individuals with disabilities that takes the form of paternalism....

Chevron suggests that we must ignore Congress's clear intent because forcing employers to hire individuals who pose a risk to their own health or safety would expose employers to tort liability.... [G]iven that the ADA prohibits employers from refusing to hire individuals solely on the ground that their health or safety may be threatened by the job, state tort law would likely be preempted if it interfered with this requirement. Moreover, we note that Chevron's concern over an award of damages reflects a fear that hiring a dis­abled individual will cost more than hiring an individual without any disabilities. The extra cost of employing disabled individuals does not in itself provide an affirmative defense to a discriminatory refusal to hire those individuals....

[W]e conclude that the ADA's direct threat defense means what it says: it permits employers to impose a requirement that their employees not pose a significant risk to the health or safety of other individuals in the workplace. It does not permit employers to shut disabled individuals out of jobs on the ground that, by working in the jobs at issue, they may put their own health or safety at risk. Conscious of the history of paternalistic rules that have often excluded disabled individuals from the workplace, Congress con­cluded that disabled persons should be afforded the opportunity to decide for themselves what risks to undertake. [Held:] The district court's grant of summary judgment to Chevron on Echazabal's ADA claim is reversed.

***TROTT, Circuit Judge, dissenting.***

Mario Echazabal sues over not getting a job handling liver-toxic substances.... He was denied the job because he suffers from a chronic, uncorrectable, and life-threatening viral liver disease, Hepatitis C, that most likely will be aggravated by exposure to these hazard­ous materials to the extent that his life will be endangered.

[Under the ADA, employers are not required to hire disabled individuals unless they are "otherwise qualified" to handle the "essential functions" of the job.] ... Mr. Echazabal simply is not "otherwise qualified" for the work he seeks. Why? Because the job most probably will endanger his life. I do not understand how we can claim he can perform the essential functions of the position he seeks when precisely because of his disability, those functions may kill him. To ignore this reality is bizan-e....

Our law books, both state and federal, overflow with statutes and rules designed by representative governments to protect workers from harm iong before we rejected the idea that workers toil at their own peril in the workplace "Paternalism" here is just an abstract out-of-place label of no analytical heip. Whether paternalism or maternalism, the

182 CHAPTER 5

concept is pernicious when it is allowed to dislodge longstanding laws mandating work­place safety. That battle was fought and lost long ago in our legislatures. In many jurisdic­tions, it is a crime knowingly to subject workers to life-endangering conditions.. . In effect, we repeal these laws with respect to (Echazabal], and to other workers in similar situa­tions. So much for OSHA. Now, our laws give less protection to workers known to be in danger than they afford to those who are not. That seems upside down and backwards. Precisely the workers who need protection can sue because they receive what they need....

I believe it would be an undue hardship to require an employer to place an employee in a life-threatening situation. Such a rule would require employers knowingly to endanger workers. The legal peril involved is obvious, and as a simple human to human matter, such a moral burden is unconscionable. [I dissent.]

**QUESTIONS**

1. Look again at the facts offered by both the majority and the dissent. Why do you think Echazabal was willing to risk his health by working in the coker unit? Assuming he had a complete grasp of the risks involved, is it ethical to allow him to work there? For this, re-examine the frameworks for ethical decision making in Chapter 1.

2. Chevron gave certain reasons for refusing to allow Echazabal to work in the coker unit. Name them. Can you think of any other reasons the company may have had for that decision?

3. Research: On appeal, the Supreme Court reversed. Justice Souter explained why. "The EEOC was certainly acting within the reasonable zone when it saw a difference between rejecting workplace paternalism and ignoring specific and documented risks to the employee himself, even if the employee would take his chances for the sake of getting a job. *Chevron* USA Inc. v. *Echazabal,* 536 U.S. 73, 122 S.Ct. 2045 (2002). The "direct threat defense" is allowable, according to the Court, when it is based on a "'reasonable medical judgment that relies on the most current medical knowledge and/ or the best available objective evidence,' and upon an expressly 'individualized assess­ment of the individual's present ability to safely perform the essential functions of the job....'" Find out how the lower courts applied the test when they revisited *Echazabal* on remand from the Supreme Court. Are you satisfied that Chevron's decisions were not based on the kind of pretextual stereotypes at which the ADA is aimed?

4 In this case, we see both the company and the employee between a rock and a hard place. Echazabai must choose to either further endanger his health or lose a coveted opportunity, while Chevron is caught between liability under the ADA and liability for unsafe work conditions. Suppose you were a top manager inside Chevron, responsible for strategic planning on workplace safety. Is there anything you and your firm could do to prevent or minimize the risk of this type of scenario from developing in the future?

5. In the 1990s Johnson Controls was similarly accused of paternalism for banning fertile women from working on a battery-making production line where exposure to lead could cause harm to future offspring. In *International Union v. Johnson Controls* (199') the Supreme Court held that this restriction amounted to illegal sex discrimina­tion under Title VII, writing that female workers should "not be forced to chocse between having a child and having a job." The company had argued ft was concernea about harm to future generations, but the Court wrote: "Decisions about the weifars Or future children must be left to the parents who conce!ve, bear, support, and raise trem rather than to the employers who hire those parents." Who are the stakeholders in this controversy? Are they the same as those in *Echazabal v.* Chevron?