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SUPREME COURT UNANIMOUSLY REJECTS LIMITED DEFINITION OF "DIRECT THREAT" UNDER EEOC REGULATIONS

By Keith H. McCown

A unanimous United States Supreme Court recently ruled in *Chevron U.S.A. v. Echazabal* that an employer can rely upon medical opinion to bar an employee from a particular job that would be highly likely to damage his health. The Supreme Court reversed a federal appeals court, which had said that the Americans With Disabilities Act bestowed the employee with the right to stay on the job despite the threat to his health.

The ADA prohibits workplace discrimination against people with disabilities, and requires reasonable accommodations rather than exclusions from opportunity. However, the ADA has a common sense exception that allows an employer to bar an employee from a job

where the individual's disability "pose[s] a direct threat to the health or

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OBITUARY

Tony Mazzocchi, 76; Workplace Safety Advocate, Political Activist

Tony Mazzocchi, a longtime advocate for workplace safety whose disenchantment with traditional politics led him to organize the nation's first labor party in 70 years, died at his home in Washington, D.C., on October 5. He was 76 and had pancreatic cancer.

Mazzocchi grew up in the New York borough of Brooklyn, the son of a unionized garment worker who lost the family home because of medical bills for his cancer-stricken wife. She died when Mazzocchi was 6.

Mazzocchi was a member of the Paper, Allied-Industrial, Chemical & Energy Workers (PACE) International Union and the former Oil, Chemical & Atomic Workers Union (OCAW) for 52 years. He became a member of OCAW in 1950 on May Day and as a local union president, he negotiated a number of firsts, including the first

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dental insurance program ever in private industry. "Tony Mazzochi was one of the most dedicated trade unionists I have known," said PACE International President Boyd Young. "There were few people in this world like Tony-he was true to his belief and a champion of whatever cause he chose to undertake. Some of his best work was in the area of agitating for national health care for every man, woman and child in the United States. To be sure, he was a trailblazer for national health care and for safe conditions in the workplace. Both causes will sorely miss Tony's leadership, and the entire labor movement mourns his passing."

In 1996, Mazzocchi brought 1,400 union leaders to a Cleveland convention hall to form the Labor Party. Labeled a foolhardy idea by union leaders and political analysts, it was conceived in an era of waning union strength and has fewer than 14,000 members. Although disappointed by the fledgling party's slow growth, Mazzocchi remained committed to its pro-worker agenda, focused on single-payer national health insurance, free higher education and workers' rights. His slogan: "The bosses have two parties. We need one of our own!"

With Ralph Nader and other activists, he was a key figure behind the passage of the Occupational Safety and Health Act in 1970, one of the most far-reaching pro-labor laws of the past half-century. "Over the last 30 years, nobody comes close to him," said Nader, who praised Mazzocchi's leadership on the drives to pass OSHA, the Natural Gas Pipeline Safety Act and other major legislation.

As former secretary-treasurer of the Oil, Chemical and Atomic Workers International Union, Mazzocchi advised its most famous member, Karen Silkwood, whose struggles to ensure plant safety and tragic death inspired the 1983 Oscar-nominated movie "Silkwood." Silkwood, 28, died in a suspicious one-car crash in November 1974. She had been contaminated with plutonium while working at Kerr-McGee,a fuel rod processing plant in Crescent, Okla. A private investigator hired by the union after her death found evidence that Silkwood's car might have been forced off the road while she was allegedly carrying documents confirming her allegations about Kerr-McGee's safety violations. No documents were ever found. Mazzocchi pressed for a formal government inquiry into the circumstances surrounding her death, which was ruled an accident despite unanswered questions that fed speculation for years. In 1986, 12 years after her fatal car crash, a civil suit lodged against Kerr-McGee by Silkwood's estate was settled out of court for $1.3 million. The Kerr-McGee nuclear fuel plants closed in 1975. During the 1980s, Mazzocchi drew attention to efforts in industry to make women working around toxic materials undergo sterilization. Ms. magazine cited him in 1982 as one of the "40 Male Heroes of the Decade" for "exposing exclusionary corporate fetal protection policies' " that restricted the hiring of women of childbearing age.

Testimonials

Rose H. Goldman, MD, MPH:

I would like to add a few of my comments to this wonderful obituary about Tony Mazzocchi. I was one of the students mentioned in the article who participated in the "innovative internship program that exposed medical and public health students to workplace conditions". I spent the summer of 1980 working with OCAW while I was in the Preventive Medicine (Occupational Health) program at HSPH. I worked directly with two locals (New Jersey, and upstate New York) who were dealing with health and safety concerns. I did plant tours with the workers, helped to identify potential hazards and associated toxic effects, and worked with them to define appropriate protective measures that they could negotiate for. I also had a chance to see Tony in action when he came to our locals to speak with company representatives-he was a tiger promoting health and safety. He also always took the time to educate me personally about the need to protect workers' health. I will never forget the experiences of that summer-which gave me a first hand view and appreciation of the workers' perspective. And the experience did not end there. Over the years I had many opportunities to reconnect with Tony, whether at meetings or over various issues—I was always amazed at his untiring energy and devotion to the cause of improving workers' conditions. He always expressed an interest in what I was doing, and nudged me to stay on the path of protecting workers' health and safety. He was self-taught and self made-he certainly showed me that not all knowledge and wisdom came from formal schooling. My parents taught me "knowledge is

power," but Tony taught me how to harness knowledge's power to bring about change. I am grateful that I had Tony as one of my most inspiring teachers.

Glenn Pransky, MD, MoccH:
I met Tony while in medical school. He was giving a talk (I forget the location) to students and practitioners in the medical field. He discussed the health and safety issues facing American workers and how little medical education or research was devoted to these issues. Tony described in very real terms the negative impact of doctors' failure to recognize occupational disease, or to consider the public health imperative to identify groups of workers affected by similar conditions, and become involved in preventing further injury or illness. He energized all of us - and our subsequent talks confirmed that this was the career that I wanted to pursue.

Direct Threat...

(Continued from page 1)
safety *of other individuals* in the workplace ..." This part of the law creates the so-called "direct threat" defense to a claim of workplace disability discrimination.

Many years ago the Equal Employment Opportunity Commission took the "direct threat" defense one step further in its regulations, allowing an employer to bar an employee from a job where the individual's disability "pose[s] a direct threat to the health or safety *of the individual or others* in the workplace." That regulatory expansion recently became the focus of high level judicial interpretation, which for a time called into question the ability of occupational physicians to prevent an employee from performing a job that was likely to cause him harm.

Chevron U.S.A. v. Echazabal began when Mario Echazabal was offered work at a Chevron refinery involving exposure to various chemicals on a daily basis. In a preplacement physical the company's doctor discovered that Echazabal had asymptomatic, chronic active hepatitis C. Chevron revoked the job offer to Echazabal because of a strong risk that he would damage his liver by working in this facility. Echazabal did not take this decision gratefully – he sued Chevron, alleging the company had discriminated against him on the basis of a disability.

The EEOC has long acknowledged that an employer can deny a job to an employee or applicant if the person has a disability that, in combination with the characteristics of the workplace or of the job in question, would pose a "direct threat" to the safety of others, *or* to the safety of the employee/applicant. In response to Echazabal's lawsuit, Chevron asserted the "direct threat" defense, and argued that the revocation of Echazabal's job offer was justified. The United States Court of Appeals for the Ninth Circuit (with jurisdiction over California and several other Pacific and Western states) rejected Chevron's defense and found that the revocation of the job offer constituted discrimination against a disabled person.

Setting aside the EEOC's longstanding regulatory stance, the appeals court found that the ADA "direct threat" defense did not apply to the candidate's *own* health or safety – regardless of the accuracy and reliability of the medical opinion, and regardless of the severity of the health threat. The Ninth Circuit relied on a literal reading of the ADA, which only mentions the threat to "others in the workplace" in describing this defense to a discrimination charge.

When the case advanced to the Supreme Court, the justices unanimously gave short shrift to that literal reading of the ADA. *Chevron U.S.A. v. Echazabal* was decided largely on legal technicalities – the question of how much deference any court must give to regulations promulgated by a regulatory body like the EEOC. The Supreme Court found that the EEOC's more liberal regulations were deserving of deference, and that the expansion of the statutory "direct threat" defense to include the individual as well as others was supportable as a matter of law.

Amidst the legal technicalities was a bit of common sense statutory interpretation – if the ADA were to be applied only in its most literal sense, then an employer could not even bar a disabled employee who posed a direct threat to *customers* who were not part of the workplace. Justice David Souter, writing for the unanimous Supreme Court, noted that "... there is no apparent stopping point to the argument that by specifying a threat-to-others defense Congress intended a negative implication about those whose safety could be considered ... If Typhoid Mary had come under the ADA, would a meat packer have been defenseless if Mary had sued after being turned away?"

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Direct Threat...

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In resolving this question of statutory interpretation, the Supreme Court has ended an alarming instability in the relationship between occupational physician, employer and employee – who has the right to decide whether an employee's health poses an unacceptable risk for a particular job? The rejected reasoning of the federal appeals court would have allowed the employee to decide, even against medical opinion.

The Supreme Court's unanimity was a strong endorsement of the EEOC's regulatory approach, and a rebuke to the federal appeals court that had departed so abruptly from settled law and expectations. The "direct threat" defense has existed for many years within the overarching framework of disability discrimination law, which admonishes against paternalistic stereotyping. "Direct threat" has never been an easy defense to assert; it succeeds only where there is definitive medical evidence of the threat to health, and thus, by its narrow scope, *never* should involve paternalistic, overprotective decisions, rules, or policies. The EEOC would not lightly have issued a regulation that freely allowed the very discrimination intended to be erased by the ADA.

Mr. McCown is a partner at Morgan, Brown & Joy in Boston, a management-side employment and labor law firm representing large and small employers in all segments of the economy.

PROBLEM STATEMENT: WHY ECOLOGICAL MEDICINE?

Ted Schettler MD, MPH
Science and Environmental Health Network
tschettler@igc.org

Medical advances have resulted in substantial decreases in morbidity and mortality in many parts of the world. Some of these come at considerable economic as well as environmental costs, and benefits are not equally distributed. Now medicine and public health struggle to address the changing patterns of disease resulting both from a rapidly changing and degraded earth and from the ways people live on it.

In 1977, George Engel, professor of psychiatry and medicine at the University of Rochester, published a paper in *Science* called "The Need for a New Medical Model: A Challenge for Biomedicine." Engel contended that medicine was in a crisis that derived from adherence to an outdated model of disease. He developed an argument for a biopsychosocial model of disease, arguing that exclusion of psychosocial factors distorted perspectives and even interfered with patient care. "The boundaries between health and disease, between well and sick, are far from clear and never will be clear, for they are diffused by cultural, social, and psychological considerations."

Engel's arguments were revolutionary at the time, but they have since entered the mainstream. No well-informed physician today can doubt that psychosocial factors impact a patient's health and response to care. Engel encouraged us to consider how the psychosocial environment impacts human health and to incorporate those factors routinely into medical practice.

In 1998, Jane Lubchenco, outgoing president of the American Association for the Advancement of Science, urged scientists to rethink their social contract with the public. "Part of our collective responsibility to society must include a scientific community-wide periodic reexamination of our goals and alteration of our course, if appropriate," she said. "Despite the plethora of reports examining the future of the scientific enterprise, I see the need for a different perspective on how the sciences can and should advance and also return benefit to society."

Over 6 billion people inhabit the planet, and reasonable mid-level estimates predict 9-10 billion by mid-century. Two-and-a-half more "earths" would be needed to support today's population if everyone were to use as many resources as Americans do.

Stratospheric ozone depletion is the direct result of the release of ozone-depleting chemicals used for various industrial and agricultural purposes.

Carbon dioxide concentration in the atmosphere has increased by nearly 30% in the last 150 years.

Human activities are responsible for more atmospheric nitrogen fixation than all other sources combined. Nitrates contaminate ground water and surface water, and nitrous oxides the air, at toxic concentrations.

Humans are responsible for more mercury deposition on the surface of the earth than from

(Continued on page 5)

Ethics Column: Reply

Dean Hashimoto, M.D., J.D.

In the last ethics column, Dr. Kim Pearson describes a situation in which the safety officer from a client company calls in anticipation of having you evaluate one of the company's employees for an injury that occurred at work. In the past, he has regailed you with slurs about his company's employees' character, motivation, and minimized the mechanism of injury in each case. Dr. Pearson offers a range of options that include taking the call, ignoring the call, giving the safety officer a lecture about ethics, or resigning.

Obviously, the correct answer is none of these. I think that all of us would take the call and use it as an opportunity to learn about the manner of the injury and discuss whether there is a way to prevent future similar injuries. We face more personal and social conflicts in occupational medicine compared to other physicians because of our professional need to collaborate with people other than patients and with professionals in other disciplines. At the same time, we understand, uniquely, the importance of patient confidentiality concerning medical information and the value of providing an independent medical assessment. Each of us has developed our own special approach to handling and communicating with difficult individuals, whether they are patient, human resource officers, safety officers, or for that matter, fellow physicians.

A colleague, Dr. Skip Atkins, recently gave me a copy of an article, entitled "The Rise and Fall of Occupational Medicine in the United States" by Dr. Joseph LaDou (Am J Prev Med 2002;22(4):285-295). Dr. LaDou makes a strong case for the preposition that our specialty is dying. He argues that occupational medicine physicians have failed to establish the value in our specialty and that, to our detriment, industry simply hires the most compliant and cost-effective health care providers and safety specialists. Dr. LaDou observes that companies have turned away from occupational medicine physicians and have instead relied on alternatives, such as nurses.

I am, however, an optimist. I think that our specialty is still young and will someday serve as an important model for other medical specialties that similarly face increasingly intense economic pressures, whether it be in the form of managed care or disease management initiatives. Ultimately, each physician must try to be both a patient advocate as well as a "physician for the situation" and bear responsibility for establishing outcomes acceptable to all.

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other geological sources. Freshwater and marine fish are sufficiently contaminated with mercury to require warnings to women of reproductive age to limit consumption because of risks to fetal brain development.

Large numbers of plant and animal species have been driven to extinction, and most marine fisheries are severely depleted. More than half the world's coral reefs are threatened by human activities.

Novel synthetic industrial chemicals contaminate the world's ecosystems, its human and non-human inhabitants, their breast milk and egg yolk, ovarian follicles, and amniotic fluid. The toxicity of most is unknown.

At the same time patterns of human disease are changing throughout the world. To remain focused on increases in life expectancy and decreasing child mortality in many parts of the world is to miss the "essential newness" of environmental change and associated diseases.

Antibiotic resistance, including multidrug-resistant tuberculosis, is increasingly common.

Chronic diseases such as hypertension, heart disease, and diabetes are increasing throughout much of the world. Asthma prevalence and severity is sharply increasing throughout the world and is often of epidemic proportions.

Depression and other mental health disorders are becoming new public health threats in many parts of the world, with profound consequences for individuals, families, and communities.

Nearly 12 million children in the US (17%) suffer from one or more developmental disabilities. Learning disabilities alone affect 5-10% of children in public schools, and these numbers are increasing. Attention

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deficit hyperactivity disorder affects at least 3-6% of all school children, and the numbers may be considerably higher. The incidence of autism is increasing.

The age-adjusted incidence of melanoma, lung cancer in women, non-Hodgkins lymphoma, and cancers of the prostate, liver, testis, thyroid, kidney, breast, brain, esophagus, and bladder has increased over the past 25 years.

In the US, the incidence of some birth defects, including hypospadias, cryptorchidism, some forms of congenital heart disease, and obstructive disorders of the urinary tract is increasing.

Sperm density is declining in some parts of the US and elsewhere in the world.

Smoking, sun exposure, and diet explain few of these trends. Genetic factors explain, at most, about half of the population variance for a few of these conditions and far less for the majority of them. Improved understanding of development of the brain, immune, reproductive, respiratory, and cardiovascular systems and of gene-environmental interactions leads to the conclusion that other environmental factors contribute significantly to impairments. In laboratory animals, wildlife, and humans, considerable evidence documents a link between ambient levels of environmental contamination and malignancies, birth defects, reproductive success, and impaired behavior and immune system function.

But there is more to the story. During the past 25 years, the medical-industrial complex has grown enormously in the US, and it now represents about 12% of the GNP. Its reach into many corners of our social and political institutions is extensive.

Ironically, during this time of unprecedented global environmental change, the expanding medical industrial complex has itself contributed substantially to environmental damage through the manufacture, use, and disposal of an extensive array of materials, including toxic substances such as mercury, cadmium, solvents, dioxin precursors, cleansing agents, and pharmaceuticals. Health care institutions use large amounts of water and are second only to manufacturing in electricity consumption per square foot. The exhaust from vehicles traveling to and from medical facilities adds considerably to resource depletion and air pollution. Some of these environmental threats are unique to the health-care industry.

Like other enterprises intended to focus on the public good in return for public support, medical and public health practices have attempted to respond to societal needs as they were perceived and articulated in the last century. But even by prevailing standards, the shortcomings of the dominant medical model have become apparent. Some forms of alternative or complementary medical care address these deficiencies in substantive ways. A less positive result has been a weakening of the public health system. The public health approach, which emphasizes primary prevention for individuals, families, and communities, has often stood in contrast to and competed unsuccessfully for resources supporting the biomedical model of treating disease. Environmental health is often narrowly imagined as dealing with little more than the impacts of air, water, or food contamination on the wellbeing of people.

The context for any of these approaches or practices has fundamentally shifted, and a new perspective is needed to guide how medicine advances and returns benefit to society. This perspective must be embedded in knowledge of changes in the natural and social worlds, and the shifting patterns of disease. Indeed, not only must health care providers and institutions reexamine their stance in the world, but all individuals and communities would do well to become aware of how their wellbeing is connected to other people, other species, and the natural world.

The "essential newness" of observations and circumstances calls for a more ecological view of medicine. Ecological medicine would easily shift focus back and forth between the individual and public health; between nutrition and the food chain and agricultural systems. It would consider other species and biodiversity, soil fertility, water cleanliness, forestation, land use patterns, or any of a number of other measures of the health of the systems that support life. It would no doubt understand human health by the health of its most vulnerable individuals and populations. It would incorporate movement of focus from the individual to larger biotic and social systems and back again, because the health of larger systems affects individuals, and vise versa.

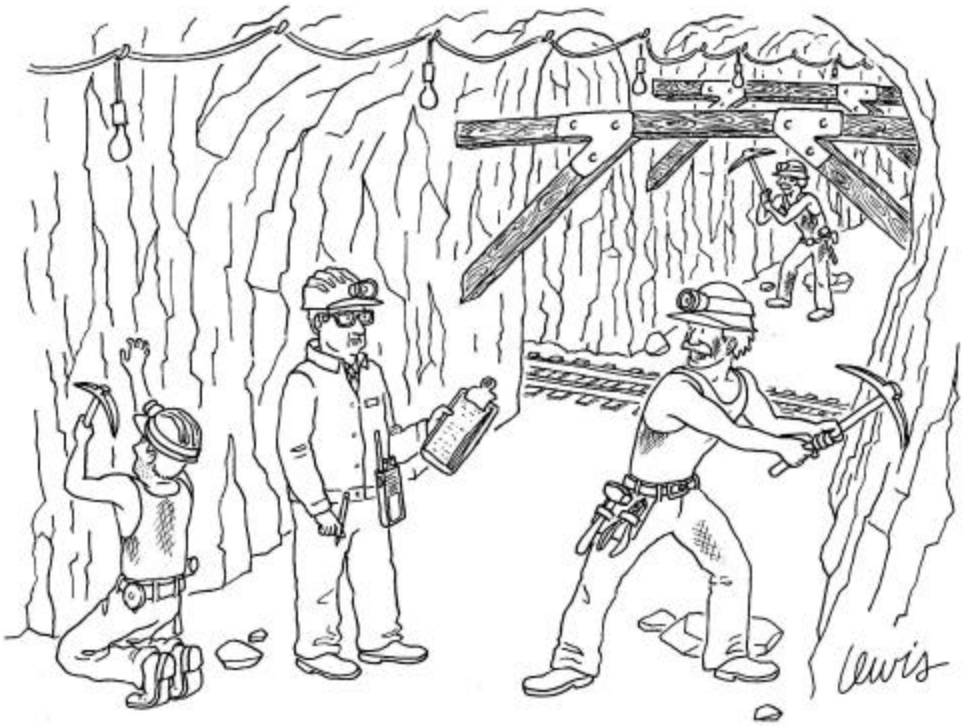
The challenge is to integrate this ecological perspective into health care and public health practice in ways that demonstrate understanding of the identifiable changes occurring in the natural and social worlds around us, as we collectively develop the new social contract for medicine.

In Massachusetts,

The Impartial Unit of the DIA has agreed to increase the rate paid to physicians for impartial examinations from $350 to $450.

This change was actively supported by the Senior Judge of the DIA, Daniel J. O'Shea, in recognition of the time and expertise that impartial physicians bring to the process and the value of their examinations.

Bill Patterson, MD, MPH, FACOEM
Chair, Medical Policy Board
OH+R



"If it's all the same to you chief, I'd like to work from home tomorrow."

In Vermont

Vermont passed a compromise drug screen bill. Random and For Cause testing were removed. The 10 day prenotification rule was removed for post hire testing as well as the requirement that it must be accompanied by a preplacement physical. Prior to this change last July, all applicants had to have a signed prenotification agreement 10 days prior to the test date. Thus THC was likely to be the only positive.

A Legionnaires' disease outbreak was traced back to a cooling tower at the State Office Complex at the old Waterbury State Hospital Site. A total of 18 cases of Legionnaires' disease were confirmed during the outbreak investigation, which began on August 1. All of these individuals had pneumonia. Two of the cases were classified as sporadic and unrelated to the outbreak. There were no deaths associated with the outbreak and no one remains hospitalized. An additional 12 cases of milder illness caused by the same bacterium that causes Legionnaires' disease were also identified in the Waterbury area. More than 180 people with a range of symptoms were tested and found to be negative for Legionnaires' disease.

Verne Backus, M.D., M.P.H.
Medical Director
Northwestern Occupational Health
St. Albans, VT 05478-9753

For more info, see http://www.healthyvermonters.info/
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New England College of Occupational and Environmental Medicine

22 Mill Street,
Groveland, MA 01834

Voice/Fax: 978-373-5597
Email: NECOEM@aol.com

NECOEM Reporter,
Editor: Robert Naparstek, MD
NECOEM President: Fred Kohanna, MD,MBA
Executive Director: Dianne Plantamura,MSW

N E C O E M

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NECOEM has over 200 physician members and is dedicated to preventing and treating occupational injuries and illnesses. NECOEM provides continuing medical education for its physician members in order to enhance the care that they provide to men and women in the workplace. NECOEM is an advocate for workplace safety, occupational health research, raising public awareness of occupational and environmental health issues, guiding public policy, and recognizing outstanding achievement by individuals in occupational and environmental health."

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State of Maine Workers' Compensation Board, Department of Labor
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State of New Hampshire Department of Labor
State of Rhode Island Workers' Compensation Court
State of Vermont Workers' Compensation Division

Physician employment resources:
Healthecareers, LWW classifieds, Medbulletin, PhysicianWork

Other useful sites submitted:
Interfacetec, free electronic w/c forms for all New England states
OEM Press, specialty book sales, Beverly Farms, Massachusetts (enter contest here)
BWDRG, Biological Weapon Diagnosis and Support Guide

Annual Conference December 5-6

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