NOTE
OSHA'S INTERACTION WITH THE ADA: HOW IT IS LIMITING ANTI-DISCRIMINATORY WORKER PROTECTIONS

I. INTRODUCTION

In a perfect world, employees in the United States are provided safe and healthy working conditions, free from discrimination, with the help of worker protection statutes.[1] However, conflicts in the law are inevitable and force society to choose which protections are more valuable.[2] In 2021, four Black New York firefighters filed suit against the New York Fire Department ("FDNY").[3] These firefighters have a disability, known as Pseudofolliculitis Barbae ("PFB"), which prevents them from shaving their facial hair.[4] This condition causes severe pain, scarring, and acne when they shave their face, and is significantly more common in Black men than White men.[5] There are some treatments to help limit the side effects of shaving; nevertheless, it is "medically recommended that individuals with PFB avoid shaving down to the skin."[6]

The FDNY is bound by both New York Labor Laws and Federal Agency Regulations.[7] Specifically, New York Labor Laws require the FDNY to comply with the U.S. Occupational Safety and Health Administration ("OSHA") regulations.[8] Under OSHA regulations, employers are required to prevent "employees from removing respirators in hazardous environments" and establish "procedures for the use of respirators in

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1. *See Workplace Rights, Know Your Rights*, U.S. DEP'T OF LAB., https://www.dol.gov/sites/dolgov/files/ofccp/regs/compliance/factsheets/FACT_Workplace_Aug2016_ENGESQA508c.pdf [https://perma.cc/C6HZ-U3LS] (last visited Apr. 1, 2023).

2. Tory L. Lucas, *Disabling Complexity: The Americans with Disabilities Act of 1990 and Its Interaction with Other Federal Laws*, 38 CREIGHTON L. REV. 871, 874-75 (2005).

3. Bey v. City of New York, 999 F.3d 157, 161-62 (2d Cir. 2021).

4. *Id.* at 161 (stating that "PFB affects between forty-five percent and eighty-five percent of [B]lack men.").

5. *Id.* at 161-62.

6. *Id.* at 161.

7. N.Y. LAB. LAW § 27-a (Consol. 2021).

8. *Id.* ("The commissioner shall by rule adopt all safety and health standards promulgated under the United States Occupational Safety and Health Act of 1970."); 29 U.S.C. §§ 651-678.

IDLH atmospheres."[9] Immediately dangerous to life or health ("IDLH") atmospheres refer to smoke and other toxic fumes that can negatively impact firefighters if they are exposed.[10] Respirators protect firefighters from toxic fumes and are known as self-contained breathing apparatuses.[11] To ensure the protection of firefighters, OSHA requires that facial hair cannot come in between the facemask and the face.[12] In order to adhere to the OSHA regulation, the FDNY has a written grooming policy requiring firefighters to be cleanly shaven anywhere the facial piece and face come into contact.[13]

However, from 2015 to 2018, the FDNY provided an accommodation for firefighters with PFB which permitted them to maintain short beards if they could pass a "fit test."[14] OSHA developed a "fit test" with the purpose of creating a standardized test designed to ensure that a face mask properly seals against the firefighter's face with no air leakage.[15] As long as the firefighter could pass the "fit test" with facial hair, the firefighter was not required to shave in accordance with the facial hair policy.[16] In 2018, the FDNY revoked this policy, stating that it is prohibited by OSHA regulations.[17] All firefighters now had to be cleanly shaven or be placed on light duty.[18] Four firefighters brought an action against the FDNY under the Americans with Disabilities Act ("ADA") and Title VII of the Civil Rights Act of 1964 ("Title VII").[19]

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9. 29 C.F.R. § 1910.134(g). "*Immediately dangerous to life or health (IDLH)* means an atmosphere that poses an immediate threat to life, would cause irreversible health effects, or would impair an individual's ability to escape from a dangerous atmosphere." § 1910.134(b).

10. § 1910.124(a). This regulation discusses the requirements for "employers to establish and implement procedures for the proper use of respirators." § 1910.134(g). The purpose of this regulation is to protect firefighters from the danger caused by toxic fumes and smoke. *Bey*, 999 F.3d at 161.

11. *Bey*, 999 F.3d at 161.

12. 29 C.F.R. § 1910.134(g)(1) (providing that under the respiratory-protection standard, "[t]he employer shall not permit respirators with tight-fitting face pieces to be worn by employees who have (A) facial hair that comes between the sealing surface of the facepiece and the face or that interferes with valve function; or (B) any condition that interferes with the face-to-facepiece seal or valve function").

13. *Bey*, 999 F.3d at 161.

14. *Id.* at 161-62; *see also* 29 C.F.R. § 1910.134(b) (defining a "fit test" as "the use of a protocol to qualitatively or quantitatively evaluate the fit of a respirator on an individual").

15. *Bey*, 999 F.3d at 162; 29 C.F.R. §§ 651-678 (creating the Occupational Safety and Health Administration ("OSHA") through the Occupational Safety and Health Act of 1970).

16. *Bey*, 999 F.3d at 162 (stating that during this time, twenty New York City firefighters took advantage of this program allowing them to maintain facial hair).

17. *Id.*

18. *Id.* Plaintiffs chose to remain on full duty and agreed to shave their facial hair, regardless of medical recommendations prior to bringing this action. *Id.*

19. *Id.*; 42 U.S.C. §§ 12101-12213 (creating the Americans with Disabilities Act of 1990 ("ADA") to protect individuals with disabilities); 42 U.S.C. §§ 2000e to 2000e-17 (creating Title VII of the Civil Rights Act of 1964 ("Title VII") which establishes unlawful employment practices).

In 2021, the United States Court of Appeals for the Second Circuit decided *Bey v. City of New York*,[20] holding that the FDNY is not required to provide an accommodation to firefighters who are unable to wear the required protective face coverings due to a disability.[21] Employers are generally required to provide accommodations to their employees under the ADA and Title VII in order to prevent discrimination on the basis of an employee's race, color, religion, sex, national origin, and disability status.[22] However, the court found that since a binding federal safety regulation requires firefighters to be cleanly shaven in order to wear these protective facial masks, the FDNY did not have to provide an accommodation to the grooming policy.[23] When making this decision, the court rejected the idea of a safe and reasonable alternative to the OSHA regulation, such as the "fit test" which was previously used by the FDNY without the occurrence of any adverse safety events.[24]

OSHA is part of the United States Department of Labor, which sets and enforces standards for employers with the purpose of ensuring a safe and healthy working environment for employees.[25] The way OSHA interacts with the ADA and Title VII creates elaborate issues regarding whether the safety and health of employees can or should ever trump the rights of employees to be protected from discrimination and, if so, under what circumstances.[26] In general, courts have held that the ADA and Title VII's anti-discrimination protections for employees must yield to OSHA standards ensuring workplace safety.[27] This case law values the OSHA regulations over the anti-discrimination protections.[28] This complex issue was posed to the Supreme Court of the United States in 1999

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20. 999 F.3d 157 (2d Cir. 2021).

21. *Id.* at 168 (holding that an accommodation under the ADA is not a reasonable accommodation if it would violate a regulation made by a federal agency).

22. 42 U.S.C. §§ 12101-12213; 42 U.S.C. §§ 1981 to 2000h-6.

23. *Bey*, 999 F.3d at 169; 29 C.F.R. § 1910.134(g)(1)(i); *see also* Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 577 (1999) (noting that the employer was not required to provide an accommodation if the accommodation was prohibited by an OSHA regulation).

24. *See Bey*, 999 F.3d at 169.

25. *About OSHA*, OCCUPATIONAL SAFETY AND HEALTH ADMIN., https://www.osha.gov/aboutosha [https://perma.cc/43CN-WPAY] (last visited Apr. 1, 2023); U.S. DEP'T OF LAB., ALL ABOUT OSHA, OCCUPATIONAL SAFETY AND HEALTH ADMIN. 3 (2020) https://www.osha.gov/sites/default/files/publications/all_about_OSHA.pdf [https://perma.cc/8H9Y-9FZU].

26. Lucas, *supra* note 2, at 891, 909 (discussing the ADA's interaction with other federal laws, including OSHA, while arguing the ADA defenses should be interpreted narrowly to allow the goals of both the ADA and OSHA to be met); *see, e.g.*, *Does the ADA Override Federal and State Health and Safety Laws?*, ADA NAT'L NETWORK, https://adata.org/faq/does-ada-override-federal-and-state-health-and-safety-laws [https://perma.cc/BUA6-QKGH] (last visited Apr. 1, 2023).

27. Lucas, *supra* note 2, at 891; *see Bey*, 999 F.3d at 169.

28. *See Bey*, 999 F.3d at 169; *see also Albertson's, Inc*., 527 U.S. at 577.

in *Albertson's, Inc. v. Kirkingburg*,[29] which held that a truck driver was not discriminated against due to his termination based on his failure to pass a vision exam as required by the Department of Transportation.[30] The Court stated, "[w]hen Congress enacted the ADA, it recognized that federal safety rules would limit application of the ADA as a matter of law."[31]

The Equal Employment Opportunity Commission ("EEOC") is the United States federal agency "responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy, transgender status, sexual orientation), national origin, age (40 or older), disability or genetic information."[32] The EEOC's mission is to "prevent and remedy unlawful employment discrimination and advance equal opportunity for all in the workplace."[33] The EEOC has interpreted the ADA standards to mean that an accommodation cannot be made if it would be in violation of a binding federal regulation.[34] However, there is currently insufficient guidance and instruction about the extent to which OSHA regulations should ever cede to an employer's ability to provide reasonable accommodations in connection with anti-discriminatory protections.[35] Thus, OSHA regulations may prohibit otherwise reasonable accommodations under the ADA.[36] By following OSHA regulations and the EEOC's interpretation of the ADA, courts ignore whether a

29. 527 U.S. 555 (1999).

30. *Albertson's, Inc*., 527 U.S. at 577-78. The Supreme Court held that the employer should not have the burden of justifying its adherence to the generally applicable regulatory standard, even when the regulation conflicts with the goals of the ADA. *Id.* at 577. Otherwise, the employer would be required to "reinvent the government's own wheel." *Id.*

31. *Id.* at 573.

32. *Overview*, U.S. EQUAL EMP. OPPORTUNITY COMM'N., https://www.eeoc.gov/overview [https://perma.cc/BRQ4-URXY] (last visited Apr. 1, 2023). The Equal Employment Opportunity Commission ("EEOC") was created by Title VII. 42 U.S.C. § 2000e-4.

33. *Overview*, U.S. EQUAL EMP. OPPORTUNITY COMM'N., *supra* note 32.

34. 29 C.F.R. § 1630.15(e) (2011) ("It may be a defense to a charge of discrimination under this part that a challenged action is required or necessitated by another [f]ederal law or regulation, or that another [f]ederal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required by this part."). OSHA has no such provision. *See* 29 U.S.C. §§ 651-678.

35. *See* Lucas, *supra* note 2, at 891 (stating that legislation provided in the ADA, but not in OSHA, shows the court clearly believes that OSHA trumps the ADA).

36. SUSANNE M. BRUYERE, OCCUPATIONAL SAFETY AND HEALTH AND DISABILITY NONDISCRIMINATION IN THE WORKPLACE: COMPLYING WITH DUAL REQUIREMENTS 5 (2010), https://ecommons.cornell.edu/bitstream/handle/1813/90057/A95_PDF.pdf?sequence=1 [https://perma.cc/U4H2-CUCS] (stating that if OSHA regulations prohibit the accommodation, the ADA would still require that the "employer consider transferring this employee to an equivalent, vacant position as an alternate accommodation").

reasonable and safe accommodation is possible when OSHA and the ADA interact.[37]

This Note will argue for the creation of a new regulation by OSHA stating that if an accommodation under the ADA and Title VII can be made safely and reasonably, it should be made.[38] For example, in *Bey*, a reasonable accommodation was possible, but the anti-discrimination protection under the ADA was required to yield to the OSHA regulation.[39] Therefore, the ability for a reasonable accommodation to be created should be considered on a case-by-case basis and at the discretion of the court.[40]

This proposed regulation would be similar to the ADA defenses created through EEOC interpretation.[41] Considering pregnancy protection case law, OSHA standards state that certain radiations and chemicals are dangerous to pregnant women because they can cause injury to the mother and fetus.[42] However, employers are required to provide pregnant women accommodations in a hazardous workplace, rather than simply terminate their employment.[43] Similarly, pregnant women and firefighters may experience immediate side effects such as shortness of breath and headaches when exposed to these chemicals and toxic fumes, as well as permanent long-term side effects.[44] The firefighters in *Bey* should be given the same, or at least limited, option to continue their employment and decide whether to accept the risk.[45]

Part II will discuss the working conditions in the United States prior to the passing of anti-discriminatory protections and federal safety regulations, as well as the implementation of Title VII, the ADA, and

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37. *See, e.g.*, Bey v. City of New York, 999 F.3d 157, 169 (2d Cir. 2021) (concluding that the FDNY was justified in adhering to the OSHA regulation, even though a previous accommodation was provided with no adverse safety events).

38. *Id.*; *see* Lucas, *supra* note 2, at 909 (stating that the Supreme Court has broadly interpreted the ADA's direct threat defense and arguing that it should be interpreted narrowly).

39. *Bey*, 999 F.3d at 169.

40. *See* Lucas, *supra* note 2, at 909; *cf.* 29 C.F.R. § 1630.15(e) (2011) (creating a strict rule requiring the ADA to yield to any conflicting federal regulations).

41. 29 C.F.R. § 1630.15.

42. *Reproductive Hazards*, OCCUPATIONAL SAFETY AND HEALTH ADMIN., https://www.osha.gov/reproductive-hazards [https://perma.cc/7XP3-EMBQ] (last visited Apr. 1, 2023); Tricia M. Patterson, *Paternalistic Discrimination: The Chevron Deference Misplaced in* Chevron U.S.A., Inc. v. Echazabal, 23 J. NAT'L ASS'N ADMIN. L. 147, 173 (2003). The Supreme Court has ruled that "pregnancy discrimination is unacceptable where danger of exposing toxins to an unborn fetus resulted in terminating a pregnant employee. The Court held that it was up to the employee to decide whether to accept the risk." Patterson, *supra*, at 173.

43. *Id.* at 169-70.

44. *Exposure to Smoke from Fires*, N.Y.S. DEP'T OF HEALTH, https://health.ny.gov/environmental/outdoors/air/smoke_from_fire.htm [https://perma.cc/S78K-W9L2] (last visited Apr. 1, 2023); *Reproductive Hazards*, *supra* note 42.

45. *See* Bey v. City of New York, 999 F.3d 157, 167 (2d Cir. 2021).

OSHA.[46] Additionally, Part II will discuss the importance of a safe and inclusive working environment, and why it is essential for both the ADA's and OSHA's goals to be met.[47] Part III will articulate the issue of the interaction between OSHA and the ADA by analyzing the facts of *Bey*.[48] It will further discuss the elements to a claim under the ADA and defenses to providing an accommodation under the ADA by comparing these standards to the facts in *Bey* as well as how other courts have ruled on the issue.[49] Part IV will propose a solution to this legal issue by modifying an OSHA regulation that will allow courts to consider the interaction between the ADA and OSHA on a case-by-case basis based on whether there is a safe and reasonable accommodation that can be provided while eliminating the substantial risk the federal regulation seeks to prevent.[50]

II. THE ORIGIN OF ANTI-DISCRIMINATORY PROTECTIONS AND OSHA REGULATIONS

This Part will discuss Title VII, the ADA, and OSHA regulations by addressing each statute individually and explaining how the working environment in the United States has changed since their implementation.[51] Subpart A will discuss Title VII, the ADA, and OSHA, as well as the statistical impact they have had on the working conditions in the United States.[52] Prior to the implementation of these federal employee protections, employees were forced to work in dangerous conditions where they could be terminated for any reason at all, including their physical characteristics.[53] These working conditions eventually led to the creation of OSHA and anti-discriminatory protections.[54] Subpart B will

46. *See infra* Part II; 42 U.S.C. §§ 2000e to 2000e-17; 42 U.S.C. §§ 12101-12213; 29 U.S.C. §§ 651-678.

47. *See infra* Part II.

48. *See infra* Part III; *Bey*, 999 F.3d at 161.

49. *See infra* Part III; 42 U.S.C. §§ 12111-12113; 29 C.F.R. § 1630.15(e) (2011).

50. *See infra* Part IV.

51. *See supra* notes 46-47 and accompanying text.

52. *Id.*; *see infra* Part II.A.

53. U.S. DEP'T OF LAB., *supra* note 25, at 4; *see generally Timeline of Important EEOC Events*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/youth/timeline-important-eeoc-events [https://perma.cc/5CYK-PRJJ] (last visited Apr. 1, 2023) (providing a timeline for important events regarding employee protections); *A Brief History of Civil Rights in the United States*, GEO. L. LIBR., https://guides.ll.georgetown.edu/c.php?g=592919&p=4230126 [https://perma.cc/NH6B-SNCT?type=image] (last visited Apr. 1, 2023).

54. *See Civil Rights Act of 1964: A Long Struggle for Freedom*, LIBR. OF CONG., https://www.loc.gov/exhibits/civil-rights-act/epilogue.html [https://perma.cc/H8SP-23FJ] (last visited Apr. 1, 2023); *The New York Factory Investigating Commission*, U.S. DEP'T OF LAB., https://www.dol.gov/general/aboutdol/history/mono-regsafepart07 [https://perma.cc/6RTR-U9PS] (last visited Apr. 1, 2023).

go on to discuss the importance of each one of these statutes and why they must work together to create a safe and inclusive working environment.[55]

A. How the Implementation of Employee Protections Changed the Working Conditions in the United States

The dangerous and discriminatory workplace conditions that existed well into the middle of the last century eventually led to widespread demand for reform and social responsibility.[56] The first federal employee protection passed was the Equal Pay Act of 1963, which prevents discrimination based on sex in employment compensation.[57] After its passage, many other employee protections followed.[58] Title VII was passed in 1964, OSHA was passed in 1970, and the ADA followed later in 1990.[59]

1. The Implementation of Title VII

Title VII was implemented with the goal of resolving the discrimination problem in employment.[60] Prior to the implementation of federal anti-discriminatory protections for employees, employers could discriminate against employees on the basis of race, religion, gender, national origin, pregnancy, age, disability, or any other reason not related to the qualifications of the position.[61] Individual states may have had employee protections that predated federal law; however, at a federal level, an employer could deny an employee a promotion, decide not to give an employee a particular assignment, refuse to hire, or in some other way discriminate against an individual because of their physical characteristics.[62] The purpose of anti-discriminatory protections is to

55. *See infra* Part II.B.

56. *See The New York Factory Investigating Commission*, *supra* note 54.

57. *Timeline of Important EEOC Events*, *supra* note 53; *see* 29 U.S.C. § 206(d) (stating no employer shall discriminate "between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work").

58. *Timeline of Important EEOC Events*, *supra* note 53.

59. 42 U.S.C. §§ 2000e to 2000e-17; 29 U.S.C. §§ 651-678; 42 U.S.C. §§ 12101-12213.

60. *Civil Rights Act of 1964: A Long Struggle for Freedom*, *supra* note 54.

61. *See generally Timeline of Important EEOC Events*, *supra* note 53 (providing a timeline for the implementation for anti-discriminatory provisions and showing that prior to 1963, there were no federal employee protections).

62. *See* Tamara Lytle, *Title VII Changed the Face of the American Workplace*, SHRM (May 21, 2014), https://www.shrm.org/hr-today/news/hr-magazine/pages/title-vii-changed-the-face-of-the-american-workplace.aspx [https://perma.cc/85FA-FCLZ] (discussing how prior to the passage of anti-discriminatory provisions, William "Sonny" Walker, a Black man from the South, had to travel north to find employment, and even then, only made two-thirds of what his White colleagues

ensure that employees are selected on the basis of abilities and qualifications necessary to perform the job rather than physical characteristics, because there were very few minorities in the workplace prior to the enactment of Title VII.[63]

Title VII prohibits discrimination on the basis of race, color, religion, sex, and national origin, and applies to both private employers with more than fifteen employees, as well as federal, state, and local governments.[64] Title VII protects employees from discriminatory employment-related decisions, including recruitment, selections, terminations, contract terms, privileges of employment, compensation, promotions, or any other employment-related matter.[65] It was implemented due to the severe discriminatory practices that took place in employment decisions against otherwise qualified individuals.[66] Title VII resulted in an increase of the percentage of minorities in the workplace by ten percent between 1996 and 2012.[67] Although minorities are still underrepresented in the workplace, their representation has improved since the implementation of worker protections.[68]

Title VII has been modified multiple times to include other protections for employees through amendments such as the Pregnancy Discrimination Act of 1978 ("PDA"), the Age Discrimination in Employment Act of 1967 ("ADEA"), the Rehabilitation Act of 1973, the ADA,

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were making); *The New York State Human Rights Law's 75th Anniversary*, N.Y.S. DIV. OF HUM. RTS., https://dhr.ny.gov/75th-anniversary [https://perma.cc/E2K5-DXZ4] (last visited Apr. 1, 2023) (stating that New York was the first state to pass anti-discriminatory protections for workers in 1945); N.Y. EXEC. LAW § 296(1) (Consol. 2022).

63. *See Civil Rights Act of 1964: A Long Struggle for Freedom*, *supra* note 54. Employers that would select applicants based upon physical characteristics would miss out on the larger talent pool that was beginning to develop, as more minorities began receiving education and broke "down the barriers in the workplace." *Id.*; Jamie Schindler, *The Benefits of Cultural Diversity in the Workplace*, FORBES (Sept. 13, 2019, 9:00 AM), https://www.forbes.com/sites/forbescoachescouncil/2019/09/13/the-benefits-of-cultural-diversity-in-the-workplace/?sh=40d271e971c0 [https://perma.cc/7E44-LQ9X].

64. 42 U.S.C. §§ 2000e to 2000e-2 (defining employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or proceeding calendar year, and any agent of such a person").

65. 42 U.S.C. § 2000e-2(a)(1) (providing that it is unlawful for any employer to "fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin").

66. *See Civil Rights Act of 1964: A Long Struggle for Freedom*, *supra* note 54.

67. Lytle, *supra* note 62. Minorities made up thirty-five percent of the workplace in 2012, which is ten percent higher than in 1996. *Id.* In 1964, only twenty-six percent of Black people over the age twenty-five graduated from high school, and this number increased to eighty-five percent by 2012. *Id.* In 1960, fifteen percent of managers in the United States were female, and this number increased to forty percent by 2009. *Id.* In 1967, women only made up twenty-nine percent of the workforce, compared to the forty-seven percent in 2013. *Id.*

68. *Id.* In 2014, minorities were less than five percent of Fortune 500 CEOs. *Id.*

as well as many other protections.[69] In addition, several sections of the Civil Rights Act were amended in 1991 in order to strengthen and improve federal civil rights laws, and provide recovery of compensatory and punitive damages.[70] These amendments further supported anti-discriminatory protections for employees in other protected classes not originally listed in Title VII.[71] These anti-discriminatory protections, along with Title VII, are all enforced by the EEOC.[72]

2. The Implementation of OSHA

OSHA was created by President Nixon and the United States Congress through the Occupational Safety and Health Act of 1970.[73] Prior to the Act's implementation, there were few safety regulations in the workplace and nothing was done to ensure the well-being of employees.[74] In fact, many employees ended up dead or injured while working with machinery and in other dangerous working conditions.[75] In 1970, prior to OSHA's implementation, an estimated 14,000 workers were killed on the job, averaging approximately thirty-eight workers per day.[76] In 1972, 10.9% of employees were injured due to unsafe working conditions.[77] These high numbers and dangerous conditions eventually triggered public outrage and demand for reform, leading to OSHA's creation.[78]

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69. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327; Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355; Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602; Pregnancy Sex Discrimination Prohibition, Pub. L. No. 95-555, 92 Stat. 2076 (1978).

70. 42 U.S.C. § 1981. These additional remedies also exist for the ADA; however, if the employer demonstrates a good faith effort to provide a reasonable accommodation, damages may not be awarded. § 1981(a).

> The purposes of this Act . . . are—(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace; (2) to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court . . . ; (3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under Title VII of the Civil Rights Act of 1964 . . . (4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

§ 1981.

71. *See supra* note 69 and accompanying text.

72. 42 U.S.C. § 2000e-4. The EEOC is responsible for preventing "any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title." § 2000e-5(a).

73. U.S. DEP'T OF LAB., *supra* note 25, at 3.

74. *See id.* at 4.

75. *Id.*

76. *Id.* This number changed to 5,250 employee deaths per year, or about fourteen deaths per day. *Id.*

77. *Id.* at 5. This number changed to 2.8% of employees in 2008 due to OSHA. *Id.*

78. *See id.* at 4. In 1911, the Triangle Shirtwaist Factory burned down killing 146 workers in a New York City garment factory due to the lack of safety policies to protect the workers. *The Trian-*

OSHA is a federal public agency "dedicated to the basic proposition that no worker should have to choose between their life and their job."[79] Congress took this action in order to preserve human resources, and create safe and healthy working conditions after finding that injuries and illnesses arising from workplace situations were significantly increasing government expenses and were a hinderance to the economy.[80] Congress created "medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience."[81]

OSHA encourages "employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions."[82] OSHA does this through the General Duty Clause which provides duties for employers to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[83] Employers must provide a workplace without serious hazards and follow all safety and health regulations, including, but not limited to, "asbestos, fall protection, cotton dust, trenching, machine guarding, benzene, and lead and bloodborne pathogens," in order to prevent "work-related injuries, illnesses, and

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gle Shirtwaist Factory Fire, OCCUPATIONAL SAFETY AND HEALTH ADMIN., https://www.osha.gov/aboutosha/40-years/trianglefactoryfire [https://perma.cc/3CV5-9534] (last visited Apr. 1, 2023). "The tragedy brought widespread attention to the dangerous sweatshop conditions of factories, and led to the development of a series of laws and regulations that better protected the safety of workers." *Triangle Shirtwaist Factory Fire*, HISTORY.COM (Dec. 2, 2009), https://www.history.com/topics/early-20th-century-us/triangle-shirtwaist-fire [https://perma.cc/8DDL-CCTV]. This fire "convinced the nation that the government had a responsibility to ensure workers had a safe place to do their jobs." *How the Horrific Tragedy of the Triangle Shirtwaist Fire Led to Workplace Safety Laws*, HISTORY.COM (Mar. 25, 2019), https://www.history.com/news/triangle-shirtwaist-factory-fire-labor-safety-laws [https://perma.cc/8QT3-3XQL]. New Yorkers began to demand legislative action, and shortly after New York legislators established the Factory Investigating Commission, which was the first safety commission in the United States. *Id.*; *The New York Factory Investigating Commission*, *supra* note 54.

79. U.S. DEP'T OF LAB., *supra* note 25, at 3.

80. 29 U.S.C. § 651(a) ("The Congress finds that personal injuries and illnesses arising out of work situations impose substantial burdens, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.").

81. 29 U.S.C. § 651(b)(7). Congress hoped to create a safe and healthy working environment "by building upon advances already made through employer and employee initiative for providing safe and healthful working conditions." § 651(b)(4).

82. 29 U.S.C. § 651(b) (stating that Congress wants to assure "every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . . ").

83. 29 U.S.C. § 654(a)(1).

fatalities."[84] Additionally, employees are required to follow the OSHA regulations which are applicable to their own actions and conduct to ensure that no employees will suffer diminished health due to their own actions.[85]

OSHA covers most private sector employers in all fifty states and all federal government workers.[86] State and local government workers are only covered if the state has implemented an OSHA-approved state plan, which has been done in twenty-two states.[87] The Administration takes strong action against both private and public sector employers when it finds an employer who fails to uphold safety and health responsibilities through surprise inspections.[88] Inspections take place after worker complaints, notice of immediate danger, a severe injury, or a fatality, and penalties for OSHA violations can be steep.[89] Serious violations can result in monetary fines and imprisonment.[90] A serious violation exists "if there is a substantial probability that death or serious physical harm could result from a condition which exists" unless the employer did not know and could not have known of the violation.[91]

The Act makes it clear that a safe workplace is a basic human right and meets this goal through outreach, enforcing standards, and providing training.[92] After the implementation of OSHA, work-related fatalities have been reduced by almost sixty-three percent.[93] While United States employment has more than doubled, fatalities at work were reduced from 14,000 in 1970, to approximately 5,000 in 2018.[94] Additionally,

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84. U.S. DEP'T OF LAB., *supra* note 25, at 5.

85. 29 U.S.C. § 654(b) (stating that "[e]ach employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this [Act] which are applicable to his own actions and conduct"); *see also* 29 U.S.C. § 651(b)(2) (stating that employees and employers have "separate but dependent responsibilities").

86. U.S. DEP'T OF LAB., *supra* note 25, at 6-8; *see* 29 U.S.C. § 652(5) (defining employer as "a person engaged in a business affecting commerce who has employees, but does not include the United States . . . or any State or political subdivision of a State").

87. U.S. DEP'T OF LAB., *supra* note 25, at 6-8 (stating that OSHA-approved state plans must be at least as effective as OSHA federal regulations and must be monitored by the federal agency).

88. *Id.* at 14; 29 U.S.C. § 657(a).

89. U.S. DEP'T OF LAB., *supra* note 25, at 14-16. A willful violation of OSHA regulations will result in a penalty between $5,000 and $70,000 per violation. 29 U.S.C. § 666(a). A willful violation that results in the death of an employee is punishable by a $10,000 fine and six months imprisonment. § 666(e).

90. 29 U.S.C. § 666.

91. 29 U.S.C. § 666(k) (discussing how it is decided if there is a serious violation of an OSHA regulation).

92. U.S. DEP'T OF LAB., *supra* note 25, at 4; *see* 29 U.S.C. §§ 651-678.

93. U.S. DEP'T OF LAB., *supra* note 25, at 4.

94. *Id.* The workplace now has over 146 million workers and ten million workplace facilities. *Id.* In 1970, approximately thirty-eight workers were killed on the job every day, and by 2018 that number decreased to fourteen workers per day. *Id.*

work-related injuries or illnesses decreased from 10.9% of workers to 2.8% of workers from 1972 to 2018.[95]

3. The Implementation of the ADA

The ADA was passed in 1990 and is a civil rights law that prohibits discrimination against individuals with disabilities with the purpose of making sure that they are given the same rights and opportunities as individuals without disabilities.[96] The purpose of the ADA is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[97] The ADA applies to all aspects of public life, including transportation, governmental services, and employment; however, this Note will focus only on the ADA's relationship to employment.[98] In an employment setting, the ADA regulations apply to "employer[s], employment agenc[ies], labor organization[s], or joint labor-management committee[s]" with fifteen or more employees.[99]

The ADA prohibits employers from discriminating against qualified individuals because of their disability.[100] The Act defines "disability" as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[101]

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95. *Id.* at 5.

96. David L. LaPorte, *The Conflict and Interaction of the Americans with Disabilities Act with the Omnibus Transportation Employee Testing Act: Two Modest Proposals to Achieve Greater Synchrony Comment*, 45 DEPAUL L. REV. 537, 543 (1996) (providing an overview of the ADA and a similar analysis with respect to its interaction with the Omnibus Transportation Employee Testing Act); U.S. DEP'T OF JUST., ADA UPDATE: A PRIMER FOR STATE AND LOCAL GOV'T 1 (2015), https://www.ada.gov/regs2010/titleII_2010/titleII_primer.pdf [https://perma.cc/VT5C-YNCX] (stating that over eighteen percent, or fifty-five million Americans, have disabilities); Chelsey Parrott-Sheffer, *Americans with Disabilities Act (ADA)*, BRITANNICA, https://www.britannica.com/topic/Americans-with-Disabilities-Act [https://perma.cc/B4ZG-YW83] (last visited Apr. 1, 2023); *see* Amy McKeever, *How the Americans with Disabilities Act Transformed a Country*, NAT'L GEOGRAPHIC (July 30, 2020), https://www.nationalgeographic.com/history/article/americans-disabilities-act-transformed-united-states [https://perma.cc/CT4F-LFKL].

97. 42 U.S.C. § 12101(b)(1). The ADA's goal is "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." *Id.*

98. 42 U.S.C. § 12112; *see supra* Part I; *see infra* Part II-V.

99. 42 U.S.C. § 12111(2).

100. 42 U.S.C. § 12112(a); *see What is the Americans with Disabilities Act (ADA)*, NAT'L NETWORK, https://adata.org/learn-about-ada [https://perma.cc/9SE9-ZSTA] (last visited Apr. 1, 2023).

101. 42 U.S.C. § 12102(1); *see* Greenbaum v. New York City Transit Auth., No. 20-cv-771-dlc, 2021 U.S. Dist. LEXIS 119024, at *5 (S.D.N.Y. June 25, 2021); Sarsycki v. United States Parcel Serv., 862 F. Supp 336, 339 (W.D. Okla. 1994). The ADA Amendment Act of 2008 defined "major life activities" and "substantially limits." ADA Amendment Act of 2008, Pub. L.

The ADA states that this disability "in no way diminish[es] a person's right to fully participate in all aspects of society."[102] A qualified employee or applicant with a disability is an individual who can perform the essential functions of the job, with or without a reasonable accommodation.[103] Under the ADA, employers are required to provide reasonable accommodations to employees with disabilities unless doing so would cause an undue hardship, which is "an action requiring significant difficulty or expense" on the employer.[104] Reasonable accommodations include reasonable changes to the facilities, job restructuring, work schedules, training procedures, reassignments, modification to equipment, interpreters, and other similar accommodations.[105]

The ADA was amended in 2008 through the Americans with Disabilities Act Amendment Act ("ADAAA") in order to change the definition of a "disability" after the Supreme Court interpreted it very narrowly.[106] The ADAAA makes important changes to allow for broader coverage by assessing the definitions of the necessary elements of the terms "substantially limits" and "major life activity."[107] These changes make it easier for an individual to establish that he or she has a disability within the meaning of the ADA when bringing an action.[108]

No. 110-325, 122 Stat. 3553. The definition of disability and elements to bringing a claim under the ADA will be further analyzed in this Note. *See infra* Part III.B.

102. 42 U.S.C. § 12101(a)(1) (discussing Congress's findings and purpose when enacting the ADA).

103. 42 U.S.C. § 12131(2); 42 U.S.C. § 12112(b)(5)(A) (providing that employers must make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual"); *see* 42 U.S.C. § 12111(8); *see also* McBride v. BIC Consumer Prods. Mfg. Co., 583 F.3d 92, 98 (2d Cir. 2009).

104. 42 U.S.C. § 12111(10).

105. 42 U.S.C. §§ 12111(8)-(9) (listing examples of reasonable accommodations the employer must provide to employees).

106. 122 Stat. 3553 (codified as amended in scattered sections of 29 U.S.C. §§ 651-678 and 42 U.S.C. §§ 12101-12213); *see* Sutton v. United Airlines, 527 U.S. 471, 471 (1999).

107. *The Americans with Disabilities Act Amendments of 2008*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statutes/americans-disabilities-act-amendments-act-2008 [https://perma.cc/M44F-CWDB] (last visited Apr. 1, 2023). The Act makes changes to the definition of a "disability" by rejecting the holding in *Sutton*. *Id.*; *Sutton*, 527 U.S. at 475. A major life activity includes "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. § 12012(2)(a). In determining whether the impairment substantially limits a major life activity, ameliorative effects of mitigating measures cannot be considered. 42 U.S.C. § 12012(e)(i).

108. *The Americans with Disabilities Act Amendments Act of 2008*, *supra* note 107.

B. The Importance of a Safe and Inclusive Working Environment

A safe and inclusive workplace is essential to the success of a business and the satisfaction of its employees.[109] Although the working conditions in the United States are not free from death, injury, or discrimination, such incidents have been significantly reduced since the passage of employee protections.[110] In 2019, 19.3% of individuals with disabilities were employed, which slightly decreased in 2020 to 17.9%, likely due to the COVID-19 pandemic.[111] Additionally, the 19.3% of employed individuals with disabilities is compared to the 66.3% of employed individuals without disabilities.[112] Workplace fatalities decreased by 63% from 1970 to 2018, but there were still approximately 5,000 deaths in 2018.[113] Therefore, even though working conditions are not perfect, the United States has definitely seen improvement since the implementation of Title VII, OSHA, and the ADA.[114] It is important that these three statutes work together in order to continue improving working conditions and creating a safe and inclusive work environment.[115]

A safe and inclusive work environment is not only beneficial to employees, but also for employers.[116] A safe and healthy workplace can "lower injury/illness costs, reduce absenteeism and turnover, increase

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109. *Safety Pays for Everyone*, SAFETY WORKS: ME. DEP'T OF LAB., https://www.safetyworksmaine.gov/safe_workplace/safety_pays.html [https://perma.cc/LL5D-WHY4] (last visited Apr. 1, 2023).

110. Michelle Maroto, *Twenty-Five Years After the ADA: Situating Disability in America's System of Satisfaction*, 35 DISABILITY STUD. Q., 2015, at 1. The average earnings for people with disabilities is significantly lower than people without disabilities. *Id.* at 2. The number of disabled persons and their average income steadily decreased throughout the 1990s, which is likely due to the increased awareness of mental health. *Id.* at 7; U.S. DEP'T OF LAB., *supra* note 25, at 4.

111. *Persons with a Disability: Labor Force Characteristics Summary*, U.S. BUREAU OF LAB. STAT. (Feb. 24, 2021, 10:00 AM), https://web.archive.org/web/20210307102520/https://www.bls.gov/news.release/disabl.nr0.htm [https://perma.cc/D9R9-FNWA?type=image] [hereinafter *Labor Force Characteristics*].

112. *Statistics*, U.S. DEP'T OF LAB., https://www.dol.gov/general/topic/disability/statistics [https://perma.cc/Y4NQ-NEY8] (last visited Apr. 1, 2023). The percentage gap between employed persons with disabilities and employed persons without disabilities was 47% in 2019. *Labor Force Characteristics*, *supra* note 111. This number decreased to 43.8% in 2020, which shows advancement for employees with disabilities. *Id.* Some believe that the ADA has not made a difference since 1990, as the number of employed people with disabilities increases along with the increase in the work force, but there are not sufficient statistics to prove this. Rebecca R. Hastings, *Has the Americans with Disabilities Act Made a Difference?*, SHRM (July 9, 2010), https://www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/global-and-cultural-effectiveness/pages/hastheadamadeadifference.aspx [https://perma.cc/YDP4-YRUB].

113. U.S. DEP'T OF LAB., *supra* note 25, at 4.

114. *Id.*; *Labor Force Characteristics*, *supra* note 111.

115. *See* Lucas, *supra* note 2, at 891.

116. *Safety Pays for Everyone*, *supra* note 109.

productivity and quality, and raise employee morale."[117] A diverse and inclusive workplace can also bring together different talents, experiences, perspectives, and various skills which will lead to a variety of ideas and new learning opportunities.[118] Additionally, inclusiveness "fosters increased productivity and employee satisfaction."[119] All employees like to feel safe, included, and as though their contribution has value.[120] Therefore, it is important that OSHA and the ADA work together in order to foster an environment that encompasses both safety and inclusiveness.[121]

III. THE INTERACTION BETWEEN OSHA AND THE ADA

This Part will discuss the interaction between OSHA and the ADA which, under the current law, can lead to employees with disabilities being denied accommodations because they conflict with a binding federal safety regulation.[122] The courts have failed to consider whether there is a safe and reasonable accommodation that can be offered while still satisfying OSHA's objectives and the purpose of the regulation.[123] Subpart A will reiterate the facts of *Bey v. City of New York* in greater detail.[124] Subpart B will discuss the elements of a claim under the ADA,[125] and Subpart C will discuss defenses to a claim under the ADA.[126] Subpart D will go on to analyze how the Supreme Court and lower courts have ruled on the interaction between OSHA and the ADA in the past.[127] Finally, Subpart E will examine how this issue can also arise under OSHA's interaction with Title VII protections.[128]

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117. *Id.* ("Employers can save $4.00 to $6.00 for every dollar spent on a safety and health program.").

118. Schindler, *supra* note 63. Approximately ninety-five percent of all directors agree that "diversity brings unique perspectives" to the workplace. *Id.* Eighty-four percent of directors believe that diversity "enhances board performance." *Id.*

119. *Id.*; *see also* Mark C. Perna, *Workplace Discrimination and Abuse Far More Common Than We Might Think*, FORBES (May 26, 2021), https://www.forbes.com/sites/markcperna/2021/05/26/workplace-discrimination-and-abuse-far-more-common-than-we-might-think/?sh=5434ea9d46f7 [https://perma.cc/6CL4-5AKQ].

120. *See supra* notes 112-114 and accompanying text.

121. *See* Lucas, *supra* note 2, at 891.

122. *See infra* Part III; *see also* Bey v. City of New York, 999 F.3d 157, 170 (2d Cir. 2021) (holding that an employer is not required to provide an accommodation under the ADA, if the accommodation is a violation of federal regulation).

123. *See* Lucas, *supra* note 2, at 891 (discussing the interaction between the ADA with other federal statutes, including OSHA).

124. *See infra* Part III.A.

125. *See infra* Part III.B.

126. *See infra* Part III.C.

127. *See infra* Part III.D.

128. *See infra* Part III.E.

A. Bey v. City of New York

The United States Court of Appeals for the Second Circuit decided *Bey* in 2021, holding that the FDNY is not required to provide an accommodation to the firefighters.[129] The court reasoned that the plaintiffs' proposed accommodation unambiguously violates the binding federal safety regulation and that the binding regulation is a complete defense to the FDNY's refusal to accommodate.[130] Four Black firefighters had a condition known as PFB which caused severe pain, irritation, acne, and scarring when they shaved their facial hair.[131] Although maintaining facial hair may not be a problem for other professions, firefighters are exposed to smoke and other toxic fumes, referred to as "IDLH atmospheres" on a regular basis.[132] IDLH atmospheres include, but are not limited to, oxygen-deficient atmospheres.[133] To protect the employees, OSHA implemented a regulation requiring firefighters to wear a respirator, known as a self-contained breathing apparatus ("SCBA").[134] Regulations concerning the respirator's fit and seal on the mask-wearer's face exist because if a respirator does not seal tightly against the mask-wearer's face, there is a risk that the mask will not be able to keep out the IDLH atmosphere.[135] This requires facial hair to not come between the sealing surface of the respirator's facial piece and the face.[136]

Under New York Labor Law, the FDNY is required to comply with OSHA regulations.[137] In order to do so, the FDNY passed a grooming

129. Bey v. City of New York, 999 F.3d 157, 170 (2d Cir. 2021).

130. *Id.* at 169-70 (holding that both the ADA and Title VII claims "cannot be used to require employers to depart from binding federal regulations").

131. *Id.* at 161 ("The effects of shaving with PFB can range from mild or moderate (such as skin irritation, bruising, and boils) to severe (such as facial scarring)."); *see* Amanda Oakley, *Folliculitis Barbae and Pseudofolliculitis Barbae*, DERMNET NZ, https://dermnetnz.org/topics/folliculitis-barbae [https://perma.cc/NN49-5FA3] (last visited Apr. 1, 2023). PFB is a "foreign-body reaction towards curved hair-follicles that penetrate the perifollicular epidermis as they grow . . . . " *Id.* Prevalence of PFB is higher among males of African ancestry than among Caucasian men. *Id.* Treatment for PFB includes letting the beard grow to eliminate irritation, as well as topical antibacterial. *Id.*

132. 29 C.F.R. § 1910.134(b) (explaining that "IDLH" stands for "Immediately Dangerous to Life or Health" which means "an atmosphere that poses an immediate threat to life, would cause irreversible adverse health effects, or would impair an individual's ability to escape from a dangerous atmosphere"); *Bey*, 999 F.3d at 161.

133. 29 C.F.R. § 1910.134(d)(3)(iii).

134. 29 C.F.R. § 1910.134(b); *Bey*, 999 F.3d at 161.

135. *See supra* note 134 and accompanying text.

136. 29 C.F.R. § 1910.134(g)(1)(A) (providing that respirators cannot be worn by employees with facial hair that comes between the face and the facepiece of the mask).

137. 29 U.S.C. §§ 651-678; LAB. § 27-a.

policy governing facial hair consistent with the OSHA regulations.[138] However, in 2015, the FDNY began offering medical accommodations to firefighters with PFB, which allowed them to wear closely cropped beards as long as they can pass a "fit test."[139] A "fit test" is a "standardized test designed by OSHA to ensure that an SCBA properly seals against the mask-wearer's face."[140] Twenty New York firefighters, including the four plaintiffs, took advantage of this accommodation and had no negative safety or health effects during this time.[141] In 2018, the FDNY revoked this program after determining the accommodation was prohibited by a binding OSHA safety regulation.[142]

The plaintiffs brought an action against the FDNY alleging that the FDNY discriminated against the firefighters in violation of the ADA and Title VII because the FDNY refused to provide a medical accommodation to the grooming policy.[143] The firefighters requested as an accommodation that they be permitted to grow a minimal amount of facial hair in the neighborhood of one millimeter.[144] The United States District Court for the Eastern District of New York ruled in favor of the plaintiffs only on the ADA claim, stating that the OSHA regulation should be interpreted to permit medical accommodations that are reasonable and do not present an undue hardship on the FDNY.[145] However, on appeal, the Second Circuit reversed the decision for the claim under the ADA.[146]

The court based its decision on OSHA's interpretive letter that facial hair is allowed but cannot "protrude under the respirator['s] seal."[147] An employer cannot be held liable for failing to offer a medical accommodation that is expressly prohibited by a binding federal law because

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138. *Bey*, 999 F.3d at 161 ("In its current form, the policy requires all full-duty firefighters to be clean shaven to the neck, chin, and cheek area, and permits only short sideburns and a closely trimmed mustache that does not extend beyond the mouth . . . .").

139. *Id.* at 161-62; *see* 29 C.F.R. § 1910.134(b) (defining a "fit test" as a procedure to evaluate the fit of the respirator on an individual).

140. *Bey*, 999 F.3d at 162.

141. *Id.*

142. *Id.*; *see* 29 C.F.R. § 1910.134(g)(1).

143. *Bey*, 999 F.3d at 161 ("This case presents the question of whether employers are required to offer a medical accommodation to their employees under the Americans with Disabilities Act . . . and Title VII of the Civil Rights Act of 1964 . . . , even if the requested accommodation is expressly prohibited by binding federal safety regulations."); 42 U.S.C. §§ 12101-12213; 42 U.S.C. §§ 2000e to 2000e-17.

144. *Bey*, 999 F.3d at 161-62.

145. Bey v. City of New York, 437 F. Supp. 3d 222, 235 (E.D.N.Y. 2020), *rev'd*, 999 F.3d 157 (2d Cir. 2021) (holding that the FDNY was required to resume the accommodation program because the OSHA guidance letter permitted the medical accommodations the firefighters sought).

146. *Bey*, 999 F.3d at 171.

147. *Id.* at 167; 29 C.F.R. § 1910.134(g)(1)(i).

the illegality alone is considered an "undue hardship."[148] However, it is irrelevant whether it is an unreasonable accommodation because the existence of the federal regulation is an affirmative defense or because the illegality of the accommodation presents an "undue hardship."[149] The court further stated that it is irrelevant that no adverse safety events took place between 2015 and 2018, when the firefighters were permitted to maintain facial hair.[150] Additionally, the court rejected the Title VII claim because complying with a binding federal law is a business necessity and a defense to a Title VII claim.[151] A challenge like this should be directed to OSHA, not the FDNY.[152]

B. Elements of a Claim Under the ADA

To have a claim under the ADA, a plaintiff must show (1) the employer is subject to the ADA and had notice of the disability; (2) the employee is disabled within the meaning of the ADA; (3) the employee is able to perform the essential functions of the job, with or without a reasonable accommodation; and (4) the employer took an adverse employment action against the employee because of the employee's protected disability.[153] The ADA defines disability as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment."[154] Like other discrimination claims, the ADA is subject to a burden-shifting framework, where the plaintiff bears the initial burden of establishing these elements of the claim and then the burden shifts to the employer to establish a legitimate, non-discriminatory reason for the adverse action.[155] Nevertheless, the Supreme Court limited the scope of the definition of a "disability" in *Sutton v. United Airlines, Inc.*[156]

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148. *Bey*, 999 F.3d at 168; McNelis v. Penn. Power & Light Co., 867 F.3d 411, 416 (3d Cir. 2017) (reasoning that the refusal to treat compliance with a binding federal law as a defense would be to "to pick between ADA liability on the one hand and administrative penalties on the other").

149. *Bey*, 999 F.3d at 168.

150. *Id.* at 169 ("The fact that no adverse safety events were reported during the period when the FDNY permitted the Firefighters to avoid shaving does not now preclude the FDNY from enforcing the respiratory-protection standard as written.").

151. *Id.* at 170.

152. *Id.* at 169.

153. *Id.* at 165; 42 U.S.C. § 12111(8); *see also* Noll v. Int'l Bus. Machs. Corp., 787 F.3d 89, 94 (2d Cir. 2015).

154. 42 U.S.C. § 12102(1) (providing definitions for the ADA).

155. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); *Bey*, 999 F.3d at 165.

156. 527 U.S. 471, 489 (1999) (asking whether an individual's disability should be determined by taking into account corrective measures and changing the definition of "substantially limits"); *see* 42 U.S.C. § 12102(1).

1. Defining a Disability

In *Sutton*, twin sisters applied for positions as pilots with an airline and both had severe myopia.[157] With corrected lenses, both plaintiffs had 20/20 vision; however, the airline company refused to hire the plaintiffs because of their failure to meet the minimum vision requirement and their uncorrected visual acuity.[158] The Supreme Court decided that a person whose physical or mental impairment was corrected by medication or other measures did not have an impairment that substantially limited a major life activity.[159] In addition, the Court interpreted that an individual is regarded as having a disability when the covered entity mistakenly believes the individual to have a disability or mistakenly believes that an impairment substantially limits one or more major life activities.[160] This definition was reconsidered three years later in *Toyota Motor Manufacturing v. Williams*.[161]

In *Toyota Motor Manufacturing*, an employee had carpal tunnel and other related impairments, but her employer refused to provide an accommodation.[162] The employee argued that she had a disability under the ADA because her physical impairments substantially limit the major life activity of general manual tasks.[163] The Supreme Court determined

157. *Sutton*, 527 U.S. at 475; *see* Allison Duncan, *Defining Disability in the ADA:* Sutton v. United Airlines, Inc., 60 LA. L. REV. 967, 967 (2000).

158. *Sutton*, 527 U.S. at 475-76. With corrected licenses, both girls could "function identically to individuals without a similar impairment." *Id.* at 475. "[W]ithout corrective lenses, each 'effectively cannot see to conduct numerous activities such as driving a vehicle, watching television or shopping in public stores.'" *Id.*

159. *Id.* at 482. The Court decided that mitigating measures must be taken into account when judging whether an individual possesses a disability. *Id.*; *but see* 42 U.S.C. § 12012(e)(i). In *Albertson's, Inc.*, the Court held that mitigating measures include "measures undertaken with artificial aids, like medications and devices, and measures undertaken whether consciously or not, with the body's own systems." Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 565-66 (1999). The Court in *Sutton* recognized that the EEOC had already issued an interpretative guidance that an ADA disability determination is made "without regard to mitigating measures"; however, the Court determined the approach adopted by the EEOC's guidelines "is an impermissible interpretation of the ADA." *Sutton*, 527 U.S. at 472, 481; 29 C.F.R. § 1630.2(j)(1) (1998).

160. *Sutton*, 527 U.S. at 489. In order to have a disability the employer must "entertain misperceptions about the individual—it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting." *Id.* The Court further noted that when determining if an individual has a disability, "substantially limits" means "unable to perform" or "significantly restricted." *Id.* at 480.

161. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 196 (2002).

162. *Id.* at 187-88 (providing that while working at the automobile manufacturer, the plaintiff developed carpal tunnel that precluded her from lifting more than twenty pounds and engaging in constant repetitive use of her wrists).

163. *Id.* at 189-90 (stating that the plaintiff rotated through departments weekly, when she began experiencing pain and missing work).

that "substantially limits" clearly precludes minor impairments from qualifying as a disability, and the impairment must prevent or restrict the individual from doing activities central to most people's daily lives.[164] The Supreme Court stated that the definition of a disability under the ADA needs "to be interpreted strictly to create a demanding standard for qualifying as disabled."[165]

In 2008, the ADA was amended to reject the narrow holdings in both *Sutton* and *Toyota Motor Manufacturing*.[166] The Amendment changed the definition of a "major life activit[y]" to "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."[167] In determining whether the impairment substantially limits a major life activity, ameliorative effects of mitigating measures cannot be considered.[168] The disability also no longer had to fully prevent or significantly restrict the major life activity.[169]

2. Defining "Employer" Under the ADA

In addition to establishing that the employee is disabled, in order to bring a claim under the ADA, the employer must be subject to the ADA.[170] A "covered entity" includes "an employer, employment agency, labor organization, or joint labor-management committee."[171] An employer is defined as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or proceeding calendar year,

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164. *Id.* at 197. "An individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." *Id.* at 198. The Court also states that a category of significant importance includes basic abilities of walking, seeing, hearing, and performing manual tasks. *Id.* at 197. The impairment also must be permanent or long-term. 29 C.F.R. § 1630.2(j)(2)(ii) (2001). "Major life activities" was defined to include "activities that are central to daily life." *Toyota Motor Mfg., Ky.*, 534 U.S. at 198.

165. *Toyota Motor Mfg., Ky.*, 534 U.S. at 197. The idea that the definitions must be interpreted strictly was reversed by Congress in the ADA Amendment Act of 2008 because this created greater limitation than Congress had intended. ADA Amendment Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

166. 122 Stat. 3553; Sutton v. United Airlines, 527 U.S. 471, 475 (1999); *Toyota Motor Mfg., Ky.*, 534 U.S. at 197; 42 U.S.C. § 12101 n.2.

167. 42 U.S.C. § 12102(2)(a).

168. 42 U.S.C. § 12012(e)(i); 122 Stat. 3553 (stating the definition in *Toyota* is too restrictive); *see also* Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 565 (1999) (explaining that visual impairments are an exception and should not be considered, so *Sutton* would have been determined the same way).

169. 42 U.S.C. § 12012(e)(i).

170. 42 U.S.C. § 12111(2); Bey v. City of New York, 999 F.3d 157, 164 (2d Cir. 2021).

171. 42 U.S.C. § 12111(2) (defining a "covered entity").

and any agent of such person."[172] This includes both private companies and public companies, as well as state and local governments; however, the term "employer" does not include the U.S. government.[173]

3. Defining a Qualified Individual

An employee must be qualified for the position in order to bring a claim under the ADA.[174] A qualified individual is defined as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[175] The essential job functions are up to the employer to determine and "assures that an individual with a disability will not be considered unqualified simply because of inability to perform marginal or incidental job functions."[176]

Additionally, an employee is still qualified for the position, even if an accommodation is required to perform the essential functions of the job.[177] A reasonable accommodation may include making reasonable changes to the facilities, job restructuring, work schedules, training procedures, reassignments, modification to equipment, interpreters, and other similar accommodations.[178] However, an accommodation is only reasonable if it does not create an undue hardship, which means "an action requiring significant difficulty or expense."[179] Factors to be considered include (1) the nature and cost of the accommodation; (2) the size and financial resources of the facility; (3) the size and financial

172. 42 U.S.C. § 12111(5)(A) (defining an "employer").

173. 42 U.S.C. §§ 12111(5)(A)-(B) (providing that there are two exceptions to the definition of an employer "(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or (ii) a bona fide private membership club (other than a labor organization that is exempt from taxation under section 501(c) of [the Internal Revenue Code of 1986])").

174. 42 U.S.C. §§ 12111(8).

175. *Id.* (defining a "qualified individual").

176. *Who Is a "Qualified Individual"?*, NAT'L NETWORK, https://adata.org/faq/who-qualified-individual [https://perma.cc/4JL9-5QUV] (last visited Apr. 1, 2023) (explaining that "[i]f a written job description has been prepared in advance of advertising or interviewing applicants for a job, this will be considered as evidence, although not conclusive evidence, of the essential functions of the job").

177. 42 U.S.C. § 12111(8).

178. 42 U.S.C. § 12111(9). Reasonable accommodations may include:

> (A) making existing facilities used by employees readily accessible to and unusable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Id.

179. 42 U.S.C. § 12111(10) (defining an undue hardship, as well as other relevant factors).

resources of the covered entity; and (4) the type of operation of the covered entity.[180]

4. Comparing These Requirements to *Bey v. City of New York*

Although the court in *Bey* stated simply that the firefighters did have a disability and the ADA elements were not an issue, this case provides a good example as to how the elements of ADA are applied.[181] First, the employer is subject to the ADA because the FDNY is a New York City government employer that employs more than fifteen employees for more than twenty calendar weeks.[182] Additionally, the firefighters are disabled within the meaning of the broad interpretation of the term "disability" from the 2008 Amendment to the ADA.[183]

The firefighters are disabled because they are unable to shave their facial hair without severe pain and irritation.[184] The broad interpretation of a major life activity includes the inability to properly care for one's hygiene, which is substantially limited by the inability to shave.[185] Although there are ways to eliminate these side-effects from shaving, it is medically recommended that firefighters with PFB do not shave their facial hair; however, these mitigating factors should not be considered regardless.[186] Furthermore, these firefighters are qualified for the position because they are able to perform the essential functions of the job with an accommodation.[187] This is illustrated by the firefighters' ability to perform the job when the FDNY offered an accommodation prior to revoking it.[188] However, the FDNY argued, and the court agreed, that since the accommodation is prohibited by a binding safety regulation, the accommodation was unreasonable.[189]

C. Defenses to Providing a Reasonable Accommodation Under the ADA

The ADA provides employers with defenses for not providing accommodations to their employees as required by the ADA, and EEOC

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180. 42 U.S.C. § 12111(10)(B).

181. Bey v. City of New York, 999 F.3d 157, 164 (2d Cir. 2021); 42 U.S.C. §§ 12101-12213.

182. 42 U.S.C. § 12111(5)(A); *Bey*, 999 F.3d at 161.

183. 42 U.S.C. § 12102(1); ADA Amendment Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; *Bey*, 999 F.3d at 161.

184. 42 U.S.C. § 12012(2)(a); *Bey*, 999 F.3d at 161.

185. 122 Stat. 3553; *see Bey*, 999 F.3d at 161.

186. 42 U.S.C. § 12012(e)(i); Sutton v. United Airlines, 527 U.S. 471, 482 (1999); *see also* Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 565 (1999); *Bey*, 999 F.3d at 161.

187. 42 U.S.C. § 12111(8); *Bey*, 999 F.3d at 161.

188. *Who Is a "Qualified Individual"?*, *supra* note 176; *Bey*, 999 F.3d at 161.

189. 42 U.S.C. § 12111(9); *Bey*, 999 F.3d at 170.

regulatory guidance expands on those defenses.[190] The FDNY in *Bey* relied on the defense that providing an accommodation to the firefighters would put them in violation of another federal law.[191] Another relevant defense is the direct threat defense which states that an employee is not considered a qualified individual under the ADA if the individual poses a direct threat to him- or herself, as well as other employees.[192]

1. Conflict with Other Federal Laws Defense

In anticipation of the ADA conflicting with federal laws, EEOC regulations for implementing the ADA provide a defense when "a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required."[193] If the employer can comply with both the ADA and the OSHA regulation, then the employer must do so.[194] However, if it is not possible, the ADA must yield to the OSHA regulation.[195] This defense, as opposed to an "undue hardship," is only provided in the EEOC's interpretation of the ADA, and not the ADA itself.[196]

The court validated the EEOC's interpretation of this defense in *Bey*; however, the Supreme Court has not yet ruled on it.[197] The court found in favor of the FDNY, stating the illegality of the accommodation and the actual existence of the federal regulation are both affirmative defenses that present an "undue hardship."[198] Under this argument, even if the regulation conflicts with the goals of the ADA, the employer should not have the burden of justifying its adherence to the generally applicable regulatory standard.[199]

190. 29 C.F.R. § 1630.15 (2011) (providing defenses to the ADA as interpreted by the EEOC).

191. 29 C.F.R. § 1630.15(e) (2011) (articulating the defense for not providing an accommodation under the ADA as it is in conflict with another federal law); *Bey*, 999 F.3d at 170.

192. 42 U.S.C. § 12113(b).

193. 29 C.F.R. § 1630.15(e) (2011).

194. *Does the ADA Override Federal and State Health and Safety Laws*, *supra* note 26.

195. *Id.*

196. 42 U.S.C. § 12213; 29 C.F.R. § 1630.15(e) (2011).

197. 29 C.F.R. § 1630.15(e) (2011); Bey v. City of New York, 999 F.3d 157, 170 (2d Cir. 2021).

198. *Bey*, 999 F.3d at 168; McNelis v. Penn. Power & Light Co., 867 F.3d 411, 416 (3d Cir. 2017).

199. Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 577 (1999) (stating that the employer should not be required to "reinvent the government's own wheel").

2. Direct Threat Defense

The employer can defend against an ADA claim by contending that an employee who is a direct threat is not a qualified individual with a disability.[200] According to the ADA, the qualification standard "may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."[201] However, the EEOC expands this exception to include the "direct threat to the health or safety of the individual or others in the workplace."[202] Therefore, the employer may be able to refuse to provide an accommodation if the challenged action is required or necessitated by federal law, if the employee with a disability poses a threat to him- or herself or other individuals in the workplace.[203] In these cases, an employer can take an adverse employment action against the employee, even if there is no OSHA regulation protecting the health and safety of the employees in that circumstance.[204]

In 2002, the Supreme Court in *Chevron U.S.A., Inc. v. Echazabal*[205] found that the EEOC properly expanded the direct threat defense in the ADA to include threats to one's self.[206] When Echazabal applied for a job with Chevron, the company required a physical examination, which revealed that Echazabal had a liver condition caused by Hepatitis C.[207] The doctors said the condition would worsen if he continued to work with toxins, and therefore, Echazabal was denied the position because the position required lead exposure.[208]

The Ninth Circuit Court of Appeals tackled the question of "whether the 'direct threat' defense includes threats to one's own health or safety."[209] The court found in favor of Echazabal, stating that "the language of the direct threat defense plainly does not include threats to the disabled individual himself"[210] and that the EEOC interpretation "exceeded

200. 42 U.S.C. § 12113(b) (providing definitions to the ADA statute).

201. 42 U.S.C. § 12113(b).

202. 29 C.F.R. § 1630.15(b)(2). This defense is in the EEOC's interpretation of the ADA, rather than the ADA itself. *Id.* Congress authorized the EEOC to interpret and enforce civil rights laws. 42 U.S.C. § 2000e-4.

203. 29 C.F.R. § 1630.15(b)(2).

204. 42 U.S.C. § 12113(b); 29 U.S.C. §§ 651-678.

205. 536 U.S. 73.

206. *Id.* at 86.

207. *Id.* at 76.

208. *Id.*

209. Echazabal v. Chevron USA, Inc., 226 F.3d 1063, 1066 (9th Cir. 2000), *rev'd*, 536 U.S. 73 (2002) (stating that the plain language of "other individuals in the workplace" makes it clear that threats to the disabled individual himself are not included in the direct threat defense).

210. *Id.* at 1067.

the scope of permissible rulemaking under the ADA."[211] The court went on to look at legislative history, which showed that Congress believed "overprotective rules and policies" could be considered discrimination against individuals with disabilities and that statutes tend to prohibit these types of paternalistic employment policies.[212] Based on Chevron's argument that an employee who poses a risk is not a qualified individual, the court stated that "the risk that [the employee]'s employment might pose to his own health does not affect the question whether he is a 'qualified individual with a disability.'"[213] The Ninth Circuit came to the conclusion that "disabled persons should be afforded the opportunity to decide for themselves what risks to undertake."[214] The case was appealed to the Supreme Court and granted certiorari.[215]

Prior to the Supreme Court's decision in the case, there was a split among the federal circuit courts about the EEOC interpretation of the ADA direct threat defense.[216] The Supreme Court rejected the Ninth Circuit's decision, ruling in favor of the EEOC's direct threat defense interpretation.[217] The Court rejected the idea that "expressing one item of an associated group or series excludes another left unmentioned" which the Court referred to as the expression-exclusion rule.[218] The Court interpreted the ADA's reference to "harm to others," as an example of a legitimate qualification that is job-related and a business necessity that may fall under the direct threat defense, and the Court gave the EEOC "a good deal of discretion in setting limits of permissible qualification standards."[219] Additionally, the Court rejected Echazabal's argument that Congress intentionally excluded "threat to self" in the statute because

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211. *Chevron USA*, 536 U.S. at 77. "[T]he language of the direct threat defense plainly expresses Congress's intent to include within the scope of a § 12113 defense only threats to other individuals in the workplace." *Echazabal*, 226 F.3d at 1069.

212. *Chevron USA*, 536 U.S. at 85; *Echazabal*, 226 F.3d at 1067-68 (quoting Senator Edward Kennedy stating "that the ADA specifically refers to the health and safety threat to others. Under the ADA, employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health"); *see* 136 CONG. REC. S9684-03, at S9641 (1990).

213. *Echazabal*, 226 F.3d at 1072.

214. *Id.*

215. *Chevron USA*, 536 U.S. at 73.

216. *Echazabal*, 226 F.3d at 1072; *see* Kalskett v. Larson Mfg. Co., 146 F. Supp. 2d 961, 985 (N.D. Iowa 2001) (stating "the defense of direct threat to oneself is not a defense authorized by the plain language of the statute authorizing the defense of direct threat to others"); *see also* Kohnke v. Delta Airlines, Inc., 932 F. Supp. 1110, 1111 (N.D. Ill. 1996) (stating "that any 'direct threat' jury instruction must refer to a direct threat to others, not a direct threat to . . . himself").

217. *Chevron USA*, 536 U.S. at 78.

218. *Id.* at 80 (quoting United States v. Vonn, 535 U.S. 55, 65 (2002)) (discussing the Latin phrase "*expressio unius exclusio alterius* which means expressing one item of an associated group or series excludes another left unmentioned").

219. *Id.*

Congress used identical language in the Rehabilitation Act.[220] The EEOC had amplified the Rehabilitation Act by including "threat to self" in the interpretation, and Congress used identical language, while being fully aware of how the EEOC previously interpreted it.[221] Finally, the Court reasoned that expression-exclusion rules would prevent an employer from having a defense if an employee could potentially harm those outside the workplace.[222] The Court held in favor of the EEOC's interpretation of the ADA provision and rejected the idea of paternalism.[223] This decision was interpreted narrowly which was expected to decrease future OSHA and ADA conflict by making legislative and administrative rulemaking clear.[224]

D. How Courts Have Ruled on the Interaction Between OSHA and the ADA

The Supreme Court has addressed the interaction between OSHA and the ADA on a number of occasions and has found that "[w]hen Congress enacted the ADA, it recognized that federal safety rules would limit application of the ADA as a matter of law."[225] Although there is not much precedent on how OSHA directly interacts with the ADA, there is precedent on how the ADA must yield to other binding federal regulations.[226] In *Albertson's, Inc. v. Kirkingburg*, the plaintiff was terminated from his job as a commercial truck driver for a national grocery chain after it was discovered that he did not meet a legally required vision standard promulgated by the Department of Transportation.[227] The driver had amblyopia which is a condition that resulted in monocular vision.[228] The company followed the Federal Highway Administration's ("FHWA") requirements and before the driver was discharged, they

220. *Id.* at 83; *see* 29 C.F.R. § 32.3 (1990).

221. *Chevron USA*, 536 U.S. at 83. "Omitting the EEOC's reference to self-harm while using the very language that the EEOC had read as consistent with recognizing self-harm is equivocal at best. No negative inference is possible." *Id.*

222. *Id.* at 84 (explaining through an example that "[i]f Typhoid Mary had come under the ADA, would a meat packer have been defenseless if Mary had sued after being turned away?").

223. *Id.* at 86.

224. *Id.*; Scott Quillin, Chevron U.S.A., Inc. v. Echazabal*: The Supreme Court's Common Sense Interpretation of the Americans with Disabilities Act's Direct Threat Defense*, 29 OKLA. UNIV. L. REV. 641, 655 (2004).

225. Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 573 (1999); Melanie D. Winegar, *Big Talk, Broken Promises: How Title I of the Americans with Disabilities Act Failed Disabled Workers*, 34 HOFSTRA L. REV. 1267, 1307 (2006) (explaining how *Albertson's, Inc.* has decreased the amount of protection provided to disabled workers).

226. *Albertson's Inc*., 527 U.S. at 558.

227. *Id.*

228. *Id.* at 559.

created a waiver program.[229] This waiver program allowed for Kirkingburg to be legally able to drive if he obtained the waiver from a nurse or doctor.[230] Prior to his termination, Kirkingburg failed to meet the waiver program, which was a factor in his termination.[231] Kirkingburg later received a waiver following his termination as required by the standard, but the company refused to reinstate him.[232]

The Supreme Court found that the FHWA regulations took priority over the general requirement of the ADA by recognizing the EEOC's defense of conflict with another federal law.[233] The Court held that the employer's refusal to accept the waiver did not violate the ADA because the employer should not have the burden of justifying its adherence to the generally applicable regulatory standard, even when the regulation conflicts with the goals of the ADA.[234] Otherwise, the employer would be required to "reinvent the government's own wheel."[235] An employee or applicant for a position is unable to be considered a qualified individual with a disability if the individual is unable to meet the safety requirements as required by a binding safety regulation.[236] The Senate Labor and Human Resources Committee Report on the ADA stated that "a person with a disability applying for or currently holding a job subject to [Department of Transportation standards for drivers] must be able to satisfy these physical qualification standards to be considered a qualified individual with a disability . . . . "[237] The Supreme Court went on to state that the driver's great record and years without an accident did not change the view that the employer can insist on strict adherence to the regulation.[238]

Many courts continue to rely on this decision to show that the ADA must yield to another binding federal regulation.[239] However, according to scholar Samuel R. Bagenstos, it would be unreasonable

> to read the ADA as requiring an employer like Albertson's to shoulder the general statutory burden to justify a job qualification that would

229. *Id.* at 560, 562; 49 C.F.R. § 391.11 (creating the distant visual acuity standard for commercial truck drivers and providing that the distant visual acuity standard is binding on *Albertson's, Inc.*).

230. *Albertson's Inc*., 527 U.S. at 559.

231. *Id.* at 560.

232. *Id.*

233. *Id*. at 577.

234. *Id.*

235. *Id.*

236. *Id.* at 568; *see supra* notes 103-05 and accompanying text.

237. S. Rep. No. 101-16, pp. 125 (1998).

238. *Albertson's Inc*., 527 U.S. at 569.

239. *See* Bey v. City of New York, 999 F.3d 157, 168 (2d Cir. 2021).

> tend to exclude the disabled, whenever the employer chooses to abide by the otherwise clearly applicable, unamended substantive regulatory standard despite the Government's willingness to waive it experimentally.[240]

Therefore, Bagenstos argues an employer would be justified in relying on the waiver program because the waiver program is a part of the "government's wheel."[241]

In *McNelis v. Pennsylvania Power & Light Company*,[242] McNelis was an armed security officer at a nuclear power plant, and was terminated in 2012 after failing a fitness-for-duty exam.[243] McNelis's position involved sensitive matters that authorized him to use deadly force with a firearm.[244] In 2012, McNelis began experiencing personal and mental health problems that led to alcohol and drug usage.[245] After the defendant learned of this behavior, McNelis was required to meet with a third-party psychologist who performed fitness-for-duty exams for the company.[246] The psychologist came to the conclusion that McNelis was not fit for the position and suggested possible treatment facilities.[247] McNelis was then terminated and brought an action arguing his termination was in violation of the ADA based on alcoholism and mental health.[248]

On appeal, the court examined the interaction between the ADA and the regulations created by the Nuclear Regulatory Commission ("NRC").[249] In order to adhere to the NRC regulations, the defendant was required to implement a "fitness for duty program" which ensures that "individuals are not under the influence of any substance, legal or illegal, or mentally or physically impaired from any cause, which in any

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240. Samuel R. Bagenstos, *The Supreme Court, the Americans with Disabilities Act, and Rational Discrimination*, 55 ALA. L. REV. 923, 928-29 (2004) (arguing that the waiver program in *Albertson's, Inc.* was established through the same notice and rulemaking procedures as the prima facie regulations); Winegar, *supra* note 225, at 1307.

241. Winegar, *supra* note 225, at 1307; *Albertson's Inc*., 527 U.S. at 577.

242. 867 F.3d 411 (3d Cir. 2017).

243. McNelis v. Penn. Power & Light Co., 867 F.3d 411, 412-14 (3d Cir. 2017).

244. *Id.* at 413 (explaining that McNelis was a Nuclear Security Officer for a plant that was responsible for radiological sabotage).

245. *Id.* at 413-14 (stating that McNelis became paranoid about surveillance, checking even his kids' toys, became obsessed with synthetic drugs that affect the nervous system, split from his family, and entered psychological treatment).

246. *Id.* at 414.

247. *Id.*

248. *Id.* "To establish a prima facie case under the ADA, McNelis had to establish that he '(1) has a 'disability,' (2) is a 'qualified individual,' and (3) has suffered an adverse employment action because of that disability.'" *Id.* (citing Turner v. Hershey Chocolate USA, 440 F.3d 604, 611 (3d Cir. 2006)).

249. *McNelis*, 867 F.3d at 413.

way adversely affects their ability to safely and competently perform their duties."[250] The court found that McNelis could not perform the essential functions of the job, and was therefore not a qualified individual, and ruled in accordance with *Albertson's, Inc*.[251] The court found that the ADA should apply differently to professions of the public welfare by allowing the company to screen for traits and behaviors that might otherwise violate the ADA.[252]

In a more recent case, *Holmes v. Gen. Dynamics Mission Sys.*,[253] Holmes began working for General Dynamics, which involved the use of heavy equipment and machinery.[254] According to OSHA's General Duty Clause to protect workers, the employer implemented a policy requiring employees to wear steel-toed shoes as protection and applying disciplinary action against employees who refuse.[255] Holmes suffered from diabetes and brachymetapodia which was "characterized by short or overlapping toes."[256] For this reason Holmes always wore flexible shoes because inflexible shoes may lead to foot sores, ulcerations, or even threaten her life or lead to amputation.[257] Holmes was allowed to wear flexible shoes for years after providing the company with a doctor's note explaining her condition.[258] After receiving a negative audit,

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250. *Id.*; 10 C.F.R. § 26.23(b). If the employee's fitness is "questionable," the employer must "take immediate action to prevent the individual from continuing to perform his duties." 10 C.F.R. § 26.77(b). Additionally, the defendant was required to maintain an "access authorization program" to monitor employees who had access to sensitive areas of the plant." *McNelis*, 867 F.3d at 413; 10 C.F.R. § 73.56(a).

251. *McNelis*, 867 F.3d at 416 (quoting Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 570 (1999)) ("In ruling on the plaintiff's ADA claim, the Court explained that the employer has an 'unconditional obligation to follow the [Department of Transportation] regulations and [a] consequent right to do so,' and therefore could fire the plaintiff due to his vision issues.").

252. *Id.* at 417.

> The NRC regulations do not exempt individuals with disabilities, and indeed, it would be strangely ineffective for them to do so; the fact that a certain trait or behavior coincides with a recognized disability does not make it any less dangerous to the public. To the contrary, NRC regulations explicitly require nuclear power plants to screen for traits and behaviors in a manner that in other contexts may violate the ADA.

Id.

253. No. 19-1771, 2020 U.S. App. LEXIS 38425 (4th Cir. Dec. 9, 2020).

254. Holmes v. Gen. Dynamics Mission Sys., No. 19-1771, 2020 U.S. App. LEXIS 38425, at *2 (4th Cir. Dec. 9, 2020).

255. *Id.* (stating that the employer is allowed to provide disciplinary action to employees who refuse to cooperate with the company's safety precautions according to the collective bargaining agreement); 29 U.S.C. § 654(a)(1); *see supra* note 83 and accompanying text.

256. *Holmes*, 2020 U.S. App. LEXIS 38425, at *2.

257. *Id.*

258. *Id.* at *3 ("The company allowed Holmes to continue wearing tennis shoes and told her to keep a copy of her doctor's note explaining her condition on hand to show to supervisors.").

the employer removed this accommodation.[259] The court found, "Holmes's inability to comply with the steel-toed shoe requirement thus means that she is not a 'qualified individual' protected by the ADA."[260] The employer has a right to require its employees to follow a valid safety rule, and this right trumped the ADA's reasonable accommodation provision.[261] In other words, for an employee to qualify as part of an ADA protected class, the employee must still be able to comply with their employer's safety requirements.[262]

In *EEOC v. Murray, Inc.*,[263] plaintiff, Waits, was an insulin-dependent diabetic working as a forklift operator at Murray for about twenty years.[264] Murray implemented a program preventing insulin-dependent diabetics from operating forklift positions and Waits was immediately discharged.[265] Murray argued that insulin-dependent diabetes created a hazard to other employees because they could easily kill or injure someone, and therefore OSHA's General Duty Clause should be applied.[266] The General Duty Clause of OSHA provides duties for employers to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[267]

The EEOC disagreed, arguing that the ADA prevents an employer from relying on generalizations when fulfilling OSHA's requirements.[268] Here, Murray was making generalizations because not all diabetics have the same blackouts and cause the same risk in the workplace.[269] The

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259. *Id.* (providing that during the audit, the employer received sanctions because an inspector saw another employee, not Holmes, without steel-toed shoes).

260. *Id.* at *11.

261. *Id.* ("If exemptions from valid safety policies were required as ADA accommodations, it is unclear under what circumstances an employer could ever enforce a valid safety policy.").

262. *Id.*

263. 175 F. Supp. 2d 1053 (M.D. Tenn. 2001).

264. *Id.* at 1055-56 (noting that the medical screening program also excluded individuals with other impairments, such as hearing problems, epilepsy, or heart problems); *see also* Rayha v. United Parcel Serv., 940 F. Supp. 1066, 1067 (S.D. Tex. 1996). Plaintiff had worked for UPS for ten years when OSHA began requiring UPS to formalize its process for disposing hazardous packages and UPS began requiring employees to wear respirators. *Id.* at 1067. Plaintiff could not wear respirator without threat of injury. *Id.* The District Court found that plaintiff was no longer a qualified individual with a disability and can be transferred to a different position. *Id.* at 1069.

265. *Murray*, 175 F. Supp. 2d at 1055-56.

266. *Id.* at 1065. Murray offered no evidence on how these disabilities cause injuries and offered only general statistics such as over 18,000 employees are injured per year. *Id.*; 29 U.S.C. § 654(a)(1); *see supra* note 83 and accompanying text.

267. 29 U.S.C. § 654(a)(1).

268. *Murray*, 175 F. Supp. 2d at 1066.

269. *Id.* at 1067-68.

> For example, an insulin-dependent diabetic who is determined to suffer from frequent blackouts due to uncontrolled blood sugar may be precluded from operating a forklift

United States District Court for the Middle District of Tennessee agreed with the EEOC's argument, stating that the employer "must show that the condition necessarily results in a specific limitation that would preclude all individuals with the condition from being able to operate the forklift."[270]

In contrast, some other courts have taken a different approach in finding that if there is an accommodation that can be offered while still eliminating the substantial risk, the accommodation is reasonable.[271] In *Strathie v. Department of Transportation*,[272] the plaintiff was denied a school bus driver's license because he could not meet the hearing standard without a hearing aid.[273] This violated a Department regulation which stated that school bus drivers must have good hearing without a hearing aid.[274] The court found that allowing the plaintiff to wear a hearing aid sufficiently mitigated any legitimate safety concerns and was therefore a reasonable accommodation.[275] If a reasonable accommodation eliminates the substantial risk the federal regulation is hoping to prevent, the employer must make the accommodation.[276] Here, the Department could create regulations such as requiring hearing aids to be inspected regularly, bus drivers to always carry batteries, or bus drivers to wear hearing aids where the sound cannot be turned off.[277] Therefore, since the wearing of a hearing aid did not create an appreciable risk to the safety and control of the bus passengers, the bus driver was permitted to wear one.[278]

> because it would pose a hazard in the workplace, but employees may not be precluded solely on the basis of their medical conditions without any individualized assessment of the specific risk posed by their operation of a forklift.

Id. at 1066.

270. *Id.* at 1066-67.

271. Strathie v. Dep't of Transp., 716 F.2d 227, 234 (3d Cir. 1983); Goldstine v. FedEx Freight, Inc., No. C18-1164 MJP, 2019 WL 5455726, at *5 (W.D. Wash. Oct. 24, 2019).

272. 716 F.2d 227 (3d Cir. 1983).

273. *Strathie*, 716 F.2d at 228.

274. *Id.* The regulation cited by the court in *Strathie* provides that:

> [i]n order to obtain a school bus driver's license, an applicant must have "no hearing loss greater than [twenty-five] decibels at frequencies of 500, 1,000, and 2,000 in the better ear, without a hearing aid." The regulation was formulated by the Medical Advisory Board of the Department of Transportation, and adopted by the Department of Transportation effective July 1, 1970.

Id. (citing 67 PA. CODE § 71.3(b)(5)).

275. *Strathie*, 716 F.2d at 234.

276. *Id.* at 233.

277. *Id.* at 232-33 (stating that this regulation is too remote and the "Department's characterization of the essential nature of the licensing program is overbroad").

278. *Id.* at 232.

Some courts such as the Western District of Washington in *Goldstine v. FedEx Freight*,[279] have abandoned this point of view, stating "*Kirkingburg* is old law that has been repudiated by the legislative history and updated to the ADAAA."[280] Here, the plaintiff was only qualified to drive for three months because the doctor was concerned about the plaintiff's glucose levels and his bad knee.[281] The plaintiff disclosed this information to his supervisor who required a physical examination.[282] After undergoing multiple physical exams, the plaintiff was told not to return to the Service Center during the investigation.[283] The court found in favor of the plaintiff and rejected the defense that Fed-Ex had an obligation to comply with the Federal Motor Carrier Safety Act which overrides the ADA.[284] The court stated that *Kirkingburg* is old law and the plaintiff is a qualified individual with a disability based on having a condition that substantially limits a major life activity.[285] The defendant did not have a "legitimate, non-discriminatory reason" for de-certifying the plaintiff because he told the company about his disability prior to being hired, performed his job without complaints, and revealed the existence of knee surgery which certified him as fit.[286]

Part IV of this Note will suggest that individuals with disabilities should be provided similar protections to pregnant women, who had the ability to choose whether to accept the risk of harm to oneself.[287] In *Dothard v. Rawlinson*,[288] the Alabama Board of Corrections required applicants for prison guards to meet a minimum of 120 pounds in weight and be a minimum height of five feet, two inches.[289] Rawlinson was rejected from the position based on her failure to meet these requirements.[290] The Supreme Court found that Rawlinson established a prima facie case and that the employer failed to show the defense that this requirement is

279. No. C18-1164 MJP, 2019 WL 5455726 (W.D. Wash. Oct. 24, 2019).

280. *Id.* at *5.

281. *Id.* at *1.

282. *Id.* at *1-2; 49 C.F.R. § 391.11(a) ("A person shall not drive a commercial motor vehicle unless he is qualified to drive a commercial motor vehicle.").

283. *Goldstine*, 2019 WL 5455726, at *2.

284. *Id.* at *9.

285. *Id.* at *6 (stating that "his claim of 'disability' arguably qualifies under the ADA definition, he has evidence that he was able to perform the essential functions of his job, and it is beyond question that FXF took adverse action against him on the basis of his perceived impairment").

286. *Id.* at *7.

287. *See infra* Part IV; Patterson, *supra* note 42, at 173; *see* Dothard v. Rawlinson, 433 U.S. 321, 335 (1977); Int'l Union v. Johnson Controls, 499 U.S. 187, 202 (1991) (stating "danger to a woman herself does not justify discrimination"). The Court held that the prospect of workplace liability could not be used to justify exclusion of protected-class employees. *Id.* at 213.

288. 433 U.S. 321 (1977).

289. *Id.* at 327.

290. *Id.* at 324.

job-related and a business necessity.[291] The height and weight requirements were found to discriminate against women because the requirement excluded forty-one percent of all females in the nation.[292] The Court stated that "the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself."[293]

Chevron distinguished *Dothard* in its decision explaining that "[it], like Title VII generally [was] concerned with paternalistic judgments based on the broad category of gender while the EEOC required that judgments based on the direct threat provision be made on the basis of individualized risk assessments."[294] Therefore, the Court seems to have implied that discriminating based on gender would be a paternalistic judgment, but discriminating against a disability is not.[295] The Supreme Court has repeatedly held that the ADA must yield to OSHA, however some courts continue to make arguments on why this should be changed.[296]

E. The Interaction Between OSHA and Title VII

Similar to the ADA, there have been cases where courts have ruled that OSHA regulations can be relied upon to deny religious accommodations to employees under Title VII.[297] In *Smith v. City of Atlantic City*,[298] the plaintiff worked for the Fire Department for sixteen years and, at the time of the complaint, had recently began exercising his Christian faith

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291. *Id.* at 332.

292. *Id.* at 329-30 (stating the policy would exclude 41.13% of females and 1% of males).

293. *Id.* at 335.

294. Chevron USA, Inc. v. Echazabal, 536 U.S. 73, 86 n.5 (2002); *see Dothard*, 433 U.S. at 335.

295. *Chevron USA*, 536 U.S. at 86 n.5; *Dothard*, 433 U.S. at 335.

296. *See Chevron USA*, 536 U.S. at 86 n.5; Goldstine v. FedEx Freight, Inc., No. C18-1164 MJP, 2019 WL 5455726, at *7 (W.D. Wash. Oct. 24, 2019); Strathie v. Dep't of Transp., 716 F.2d 227, 228 (3d Cir. 1983).

297. Smith v. City of Atl. City, No. 19-6865, 2019 U.S. Dist. LEXIS 47892, at *11 (N.J. Mar. 22, 2019); Lucas, *supra* note 2, at 893; Potter v. District of Columbia, 558 F.3d 542, 544 (D.C. Cir. 2009). In *Potter*, the county required firefighters to be cleanly shaven based on OSHA regulations in order to wear SCBA to protect from IDLH atmospheres. *Potter*, 558 F.3d at 544. For a short period of time, the Department accommodated the plaintiffs who, for religious purposes, did not want to shave their beards, but in 2005 it issued a new safety policy which prevented firefighters from maintaining facial hair that came between the surface of the face and the facepiece. *Id.* at 454; 29 C.F.R. § 1910.134(g). The firefighters challenged the policy under the Religious Freedom Restoration Act. *Potter*, 558 F.3d at 544; 42 U.S.C. §§ 2000bb-bb-4. The court found that firefighters are safe when using the SCBA in a smoky environment and there are other types of masks available, finding in favor of the firefighters. *Potter*, 558 F.3d at 551.

298. No. 19-6865, 2019 U.S. Dist. LEXIS 47892, at *1 (N.J. Mar. 22, 2019).

by growing a beard.[299] The plaintiff then asked for a religious accommodation to be exempted from the Department's grooming policy which prevents facial hair due to safety concerns.[300] The plaintiff was an Air Mask Technician responsible for conducting the Department's annual "fit tests" for respirators of firefighters and previously was in the Fire Suppression Unit.[301] After making this request, the Department denied the accommodation and moved the plaintiff into a temporary position.[302]

The plaintiff asserted a violation of Title VII for failure to provide a religious accommodation.[303] Title VII "prohibits religious discrimination and requires employers to make reasonable accommodations for their employees' religious beliefs and practices" unless it would result in "'undue hardship' to the employer."[304] In order to establish a prima facie case under Title VII the employee must show "(1) he holds a sincere religious belief that conflicts with a job requirement; (2) he informed the employer of the belief; and (3) he was disciplined for failing to comply with the conflicting requirement."[305] The burden will then shift to the defendant to establish that the requested accommodation would create an undue burden.[306]

The New Jersey District Court found that the Title VII claim was unlikely to succeed on the merits.[307] The plaintiff succeeded in proving the prima facie case; however, the defendant was able to prove that the requested accommodation would create an undue burden.[308] The court stated that if the company grants the accommodation, it "faces additional safety risks as Plaintiff will be unable to engage in fire suppression, and the Department is already understaffed."[309] In addition, the company was unable to find an alternative mask that would meet the required standards.[310]

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299. *Id.* at *1-2.

300. *Id.* at *2.

301. *Id.* at *8-9; N.J. STAT. ANN. § 34.6A-25 (West 2021) (enacting the "New Jersey Public Employees Occupational Safety and Health Act").

302. *Smith*, 2019 U.S. Dist. LEXIS 47892, at *4-5.

303. *Id.* at *5-6.

304. *Id.* at *23; 42 U.S.C. §§ 2000e to 2000e-17.

305. *Smith*, 2019 U.S. Dist. LEXIS 47892, at *23 (citing Protos v. Volkswagen, 797 F.2d 129, 133 (3d Cir. 1986)).

306. *Id.* at *23-24 (citing TWA v. Hardison, 432 U.S. 63, 92 (1977)); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

307. *Smith*, 2019 U.S. Dist. LEXIS 47892, at *23.

308. *Id.* at *24.

309. *Id.* at *25.

310. *Id.*

IV. PROPOSED AMENDMENT TO OSHA PROVISIONS ALLOWING COURTS TO LOOK AT SITUATIONS ON A CASE-BY-CASE BASIS

Currently, ADA provisions allow employers to discriminate against employees on the basis of a disability if the accommodation is prohibited by an OSHA regulation.[311] However, neither the ADA nor OSHA has made an exception for a safe and reasonable accommodation that can be offered even if it does violate an OSHA regulation.[312] In *Bey*, a safe and reasonable accommodation was available to the firefighters and was offered to the firefighters from 2015 through 2018.[313] Therefore, even though the accommodation was a violation of OSHA, the FDNY should not be able to suddenly stop providing these accommodations.[314]

This Part will recommend statutory and regulatory changes in order to provide uniform guidelines for employers on the interaction between the ADA and OSHA.[315] The case law does not furnish sufficient guidance on how to apply the EEOC's conflict regulation.[316] Subpart A will recommend the modification of an OSHA provision in order to create a defense for a violation of the Act, if there is a safe and reasonable alternative that can be made while maintaining the primary purpose of the regulation.[317] Subpart A will go on to recommend factors that should be considered in judicial proceedings for determining if an accommodation is a safe and reasonable one.[318] Subpart B will discuss the EEOC's interpretation of the ADA and recommend that regulations be modified in order to adhere to a textualist approach based upon the plain language in the ADA.[319]

A. Proposed Amendment to OSHA Provisions

When an individual with a disability poses a direct threat to others, the employer is placed in an inevitable position of potentially violating one federal law to comply with another.[320] Providing provisions in the ADA for conflict resolution with other federal statutes, but not doing the

311. *See* 29 U.S.C. §§ 651-678.

312. *See id.*; 42 U.S.C. §§ 12101-12213 (2009).

313. Bey v. City of New York, 999 F.3d 157, 161-62 (2d Cir. 2021) (providing that the FDNY offered firefighters with the option of passing a fit test while maintaining facial hair for three years).

314. *See id.* at 170.

315. *See infra* Part IV.

316. *See infra* Part IV; Lucas, *supra* note 2, at 893.

317. *See infra* Part IV.A.

318. *See infra* Part IV.A.

319. *See infra* Part IV.B.

320. *See generally* Lucas, *supra* note 2, at 893 (stating "conflicts of the law are inevitable").

same in OSHA, suggests that OSHA will always trump the ADA.[321] Understanding why Congress and the EEOC chose to elevate workplace safety over accommodating employees with disabilities who pose a direct threat to him- or herself or others in the workplace is essential.[322] Although it is true that safety of employees should generally trump anti-discriminatory protections, there are instances in which a safe and reasonable alternative could be offered to eliminate substantial risk and still meet the primary goals of the safety regulation.[323]

Congress should amend OSHA by creating a provision that will allow the employers to look at situations on a case-by-case basis to determine whether the anti-discrimination protections or the OSHA protections should govern the situation.[324] The amendment would also allow for court discretion by negating the assumption that another binding federal law automatically created an undue hardship under the ADA.[325] Specifically, the statute should be amended to include a similar "conflict with other federal laws" defense as seen in the ADA.[326] The recommended test is set forth below.[327]

> SECTION 1. SHORT TITLE. This Act may be cited as the "Occupational Safety and Health Administration Conflict with Other Federal Laws Defense."
> SECTION 2. GEOGRAPHIC APPLICABILITY; JUDICIAL ENFORCEMENT; APPLICABILITY TO EXISTING STANDARDS; REPORT TO CONGRESS ON DUPLICATION AND COORDINATION OF FEDERAL LAWS; WORKMEN'S COMPENSATION LAW OR COMMON LAW OR STATUTORY RIGHTS, DUTIES, OR LIABILITIES OF EMPLOYERS AND EMPLOYEES UNAFFECTED. The Occupational Safety and Health Act (29 U.S.C. § 653) is amended by inserting the following:
> (a) *In general.* It may be a defense to a violation of the Occupational Safety and Health Act or refusal to adhere to an employer's safety policy by an employee if there is a safe and reasonable alternative to meet

321. *Id.* at 891; *see* Bey v. City of New York, 999 F.3d 157, 170 (2d Cir. 2021); *see also* Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 573 (1999).

322. Lucas, *supra* note 2, at 909 (arguing that the direct threat defense needs to be narrowly tailored to avoid stereotypes).

323. Strathie v. Dep't of Transp., 716 F.2d 227, 234 (3d Cir. 1983).

324. *See* 29 U.S.C. §§ 651-678; 42 U.S.C. §§ 12101-12213 (2009); 42 U.S.C. §§ 2000e to 2000e-17.

325. McNelis v. Penn. Power & Light Co., 867 F.3d 411, 416 (3d Cir. 2017); 42 U.S.C. § 1981a(a)(3) (2009); 29 C.F.R. § 1630.15(e) (2011) (articulating the defense for not providing an accommodation under the ADA as it is in conflict with another federal law).

326. 29 C.F.R. § 1630.15(e) (2011). "A challenged action is required or necessitated by another Federal law or regulation, or another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required." *Id.*

327. 29 U.S.C. § 653.

> the goals, purposes, and primary objectives of the safety regulations, rules, and orders issued pursuant to this Act, in accordance with section (b) and (c) of this Act.
> (b) *Conflict with other federal laws.* It may be a defense to a violation of the Occupational Safety and Health Act under this part that a challenged action is required or necessitated by another federal law or regulation, or that another federal law or regulation prohibits an action that would otherwise be required by this Act, only if there is a safe and reasonable alternative. In order for an alternative to be safe and reasonable, the factors that should be considered, but are not dispositive, are:
> (i) the goals, purposes, and primary objectives of both Acts; and
> (ii) the risk of harm to the employee or others in the workplace.
> (c) If no safe and reasonable alternative is available, the safety regulations, rules, and orders issued pursuant to this Act will take priority over other federal laws.

The language for this statute was taken directly from the language in the EEOC's interpretation of the ADA regulations.[328] In 29 C.F.R. § 1630.2, the EEOC sets out multiple defenses to the ADA, including conflicts with another federal law and the direct threat defense.[329] By including similar language applicable to both statutes, employers will have the opportunity to use their discretion in regard to which Act should govern the situation based on an employee's individualized circumstances.[330]

Throughout the interactive process, the employer and employee should "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[331] Some accommodations may include

> (i) [m]aking existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (ii) [j]ob restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.[332]

If any of these accommodations can be made, while still meeting the goals of both the OSHA regulation and the ADA, the accommodations

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328. 29 C.F.R. § 1630.15(e) (2011); *see* 29 U.S.C. § 653.
329. 29 C.F.R § 1630.2; 29 C.F.R. § 1630.15; 42 U.S.C. § 12113(b).
330. *See* Lucas, *supra* note 2, at 909.
331. 29 C.F.R. § 16030.2(o)(3).
332. 29 C.F.R. § 16030.2(o)(2).

must be made.[333] However, since the Supreme Court has found that the employee's safety outweighs the employee's right to work, if there is no safe and reasonable alternative, the OSHA regulations should take priority.[334] Applying this standard will avoid an unsafe workplace in violation of OSHA, while protecting an individual with disability's right to work.[335]

If a reasonable accommodation eliminates the substantial risk the federal regulation is hoping to prevent, the employer must make the accommodation.[336] This approach may be criticized by some due to the potential for stereotyping and discrimination, as employers will have the responsibility of determining when the substantial risk is eliminated.[337] However, this risk of employer and court biases exists in the current situation as well, when determining if the individual poses a direct threat to him- or herself, or others in the workplace.[338] Updating the regulation to create more discretion for courts will allow courts to apply the direct threat defense only in limited circumstances.[339]

This amended OSHA provision provides discretion to the employer, as well as the court for determining whether the requested accommodation is a safe and reasonable alternative for the policy argument behind the OSHA regulation being violated.[340] When making this judgment, the court should consider two factors.[341] The first factor is the goals, purposes, and primary objectives of both Acts.[342] Understanding these goals is essential to determining if the accommodation is reasonable based on understanding what the federal regulation is hoping to

333. Strathie v. Dep't of Transp., 716 F.2d 227, 232 (3d Cir. 1983) (holding that if a reasonable accommodation eliminates the substantial risk the federal regulation is hoping to prevent, the employer must make the accommodation).

334. Lucas, *supra* note 2, at 915-16. "Because the direct threat defense precludes an individual with a disability from working, the defense should be asserted only in limited circumstances." *Id.* at 909. "With some work from both the employer and employee, the use of the direct threat defense should be rendered moot whenever an appropriate accommodation can be discovered." *Id.* at 914.

335. *Id.*

336. *Id.* at 891. This approach may be criticized due to the potential of stereotyping. *Id.*

337. *See id.* at 909 (stating that individuals with disabilities have been discriminated against based on fear).

338. *Id.* "The direct threat defense, as applied to an individual who poses a threat to his own safety, could be applied sporadically and illogically to individuals with disabilities based on stereotypes and fear." *Id.*

339. *Id.*

340. *See id.* at 891; Strathie v. Dep't of Transp., 716 F.2d 227, 232 (3d Cir. 1983).

341. *See* Lucas, *supra* note 2, at 909.

342. *Strathie*, 716 F.2d at 234 (finding no factual basis in the record for a conclusion that accommodating appellant by allowing him to wear a stereo hearing aid would pose an appreciable risk to the safety and control of school bus passengers).

prevent.[343] For example, in *Bey*, the regulation was to require facial coverings for firefighters, but the goal of this regulation was to protect the firefighters from toxic atmospheres.[344] The second factor that should be considered is the risk of harm posed to the individual and others in the workplace.[345] In *Bey*, the only risk posed was to the firefighter, and there was no risk to others in the workplace.[346] Therefore, the requested accommodation of maintaining facial hair is a reasonable accommodation that should be awarded under the OSHA amendment.[347] The goal of OSHA to protect the firefighters was met through the "fit test," and there was limited harm that would only affect the firefighter himself.[348]

B. The EEOC Interpretation of the ADA's Direct Threat Defense Should Be Limited

The EEOC should have taken a textualist approach when interpreting and creating enforcement regulations for the ADA.[349] However, given the Supreme Court's validation of the EEOC's expanded direct threat defense in *Chevron*, it is important that this defense be limited in scope with clear guidance.[350] The direct threat defense must be modified because as it stands, employers have the ability to preclude individuals from working based on their disability and there is limited instructional guidance on when this can occur.[351] In order to narrow the direct threat defense to still allow the employer and the court to have discretion, the employer and employee must engage in an individualized assessment and an interactive process.[352]

Pregnant women have the right to decide for themselves to stay in a position that is possibly hazardous to the mother and child, but while under this current standard, employees with disabilities do not have the opportunity to make this same choice.[353] Pregnant women and employees with disabilities, such as the firefighters in *Bey*, can both experience

343. *See* 29 U.S.C. § 651(b). Congress wants to assure "every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." *Id.*

344. Bey v. City of New York, 999 F.3d 157, 161 (2d Cir. 2021).

345. 42 U.S.C. § 12113(b); 29 C.F.R. § 1630.15(b)(2).

346. *Bey*, 999 F.3d at 160.

347. *See* Lucas, *supra* note 2, at 891.

348. *See* 29 U.S.C. § 651(b); *Bey*, 999 F.3d at 162.

349. *See* 42 U.S.C. § 12113(b).

350. *See* Lucas, *supra* note 2, at 915-16. "If an employee does not pose a direct threat to the health or safety of herself or other individuals in the workplace, then OSHA is not impacted. Similarly, if the employee does pose a direct threat, then OSHA requires the employer—and employee—to take protective precautions." *Id.*; Chevron USA, Inc. v. Echazabal, 536 U.S. 73, 80 (2002).

351. *See* Lucas, *supra* note 2, at 909.

352. 29 C.F.R. § 1630.2.

353. Dothard v. Rawlinson, 433 U.S. 321, 335 (1977); *Echazabal*, 536 U.S. at 80.

immediate side effects and permanent side effects.[354] However, *Chevron* distinguished the two by stating that *Dothard* is concerned with paternalistic judgments based on gender, while the direct threat defense is concerned with individualized assessments.[355] Therefore, the direct threat defense should apply to individuals with disabilities, but in a limited scope.[356]

Individuals with disabilities have been stereotyped for years and the direct threat defense, as applied to the threat of the individual's own safety, could be applied sporadically based on stereotypes.[357] The ADA attempts to eliminate these stereotypes by eliminating the paternalistic employer's ability to discriminate against individuals with disabilities.[358] The EEOC has interpreted the ADA to require "an individualized assessment of the individual's present ability to safely perform the essential functions of the job."[359] The position was reinforced in *EEOC v. Murray*, where the court held that "employees may not be precluded solely on the basis of their medical conditions without any individualized assessment of the specific risk posed."[360] To determine if an individual poses a direct threat, the court should consider "(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."[361] Without the individualized assessment the defendant will be engaging in the exact type of behavior the ADA hoped to prevent by making "generalized assumptions about physical and mental impairments without determining the individual capabilities of each employee with the specific impairment."[362] In *Bey v. City of New York*, an individualized assessment would have evaluated the risk posed to the firefighters with facial hair when exposed to toxic fumes while wearing a face mask.[363]

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354. *Exposure to Smoke from Fires*, *supra* note 44; Bey v. City of New York, 999 F.3d 157, 161 (2d Cir. 2021).

355. *Echazabal*, 536 U.S. at 86; *Dothard*, 433 U.S. at 335.

356. 42 U.S.C. § 12113(b); 29 C.F.R. § 1630.15(b)(2).

357. *See* Lucas, *supra* note 2, at 909 (stating the role of stereotypes and fear in discrimination).

358. 42 U.S.C. §§ 12101-12213 (2009).

359. 29 C.F.R. § 1630.2(r).

360. EEOC v. Murray, 175 F. Supp. 2d 1053, 1066 (M.D. Tenn. 2001).

361. 29 C.F.R. § 1630.2(r); Hamlin v. Charter Township of Flint, 165 F.3d 426, 432 (6th Cir. 1999) (stating that the risk must be significant risk or high probability, as a minimal or remote risk is insufficient). The individualized assessment should be based on "the most current medical knowledge and/or on the best available objective evidence." *See* Lucas, *supra* note 2, at 910.

362. *Murray*, 175 F. Supp. 2d at 1064.

363. Bey v. City of New York, 999 F.3d 157, 170 (2d Cir. 2021).

In addition to the individualized assessment, an interactive process must occur between the employees and employers.[364] Employees should have the opportunity to participate in the decision regarding what the best option is for them, rather than being terminated or rejected from a job due to the employer's discriminatory practices.[365] The employee's safety still outweighs the employee's right to work; however, the employer and employee should "strive to accommodate the individual's disability to eliminate the threat to the employee's health or safety."[366] An individual whose employment may pose a risk to his own health can still be considered a "qualified individual with a disability" if a reasonable accommodation can be offered while eliminating the substantial risk the federal regulation hoped to prevent.[367]

Broadening OSHA and ADA defenses and sufficient arguments will provide more discretion for the court.[368] Ensuring an individualized assessment and an interactive process occur will allow the court to use its discretion to determine when OSHA regulations should cede to the ADA and vice versa.[369] Although this does not solve the conflict between the federal regulations, it should harmonize issues that arise by allowing for litigation to occur when it is necessary.[370]

V. CONCLUSION

OSHA's interaction with the ADA and Title VII poses complex problems regarding the safety and health of employees and the rights of employees to be protected from discrimination.[371] Currently, the EEOC has interpreted the ADA to include a defense to an accommodation of conflicting federal law, but there is no OSHA regulation addressing its interaction with the ADA.[372] The ADA is required to yield to OSHA regulations even if there is a safe and reasonable accommodation that can be provided that would also meet the goals of the OSHA

364. 29 C.F.R. § 1630.2(o)(3). To determine a reasonable accommodation "it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." *Id.*

365. *See* Patterson, *supra* note 42, at 173.

366. Lucas, *supra* note 2, at 913 (discussing that reasonable accommodations may eliminate the threat in the direct threat defense); *see* Patterson, *supra* note 42 at 173.

367. *See* Echazabal v. Chevron USA, Inc., 226 F.3d 1063, 1067 (9th Cir. 2000); *Bey*, 999 F.3d at 170.

368. *See supra* notes 357-67 and accompanying text.

369. *Id.*

370. *Id.*

371. *See supra* notes 26-31 and accompanying text.

372. *See supra* note 204 and accompanying text.

regulation.[373] This interaction becomes clear when an individual with a disability poses a direct threat to him- or herself or others in the workplace.[374] The ADA's direct threat defense is a protective measure that allows the employer to remove an employee from a dangerous position, unless a reasonable accommodation would remove the potential threat.[375] In *Bey v. City of New York*, a reasonable accommodation was possible, but the OSHA regulation trumped the ADA protections.[376]

The interaction can be remedied by modifying the OSHA regulations to allow an accommodation under the ADA and Title VII to be made, if it can be made safely and reasonably.[377] Additionally, the EEOC's interpretation of the direct threat defense should only be limited based on individual assessment and the interactive process.[378] These remedies will not completely resolve the conflict of the law, but harmonize the issue and open the door to litigation when there is a safe and reasonable alternative to an OSHA regulation.[379] There are over fifty-five million Americans with disabilities in the United States; therefore, OSHA and the ADA must work together in order to create a workplace that is safe and inclusive for all employees with disabilities.[380]

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373. *Id.*
374. *See supra* notes 200-24 and accompanying text.
375. *Id.*
376. *See supra* Part III.A.
377. *See supra* Part IV.A.
378. *See supra* Part IV.B.
379. *See supra* Part II.B.
380. *See supra* Part II.B.

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