NO. 03-3599

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GARY L. BRANHAM,

Plaintiff-Appellant,

v.

JOHN W. SNOW, ET AL

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

APPELLANT'S ANSWER TO PETITION FOR REHEARING

TO THE HONORABLE COURT OF APPEALS:

COMES NOW, Appellant, GARY L. BRANHAM, and files this his Answer to Appellee's Petition for Rehearing. Appellant shows the following:

Introduction: Summary of the Argument

The IRS seeks panel rehearing, contending that while the Court reached the

correct disposition, its opinion contains erroneous "dicta" regarding the direct threat defense.

The agency appears to argue that the Court and Branham have sand bagged the agency. The IRS contends that Branham "deprived" it of the right to brief this issue by raising an important issue for the first time in his Reply Brief. Petition for Rehearing at 6. This assertion is contrary to the record.

The IRS itself raised the issue at this Court in its principal brief, contending that Branham was a direct threat as a matter of law. It argued that this was an alternative basis to support summary judgment. Petition for Rehearing pp.44, 47.

Second, the argument the IRS makes about the burden of proof is exactly the opposite of what it told the district court, namely that the agency *did* have the burden of proof on its direct threat defense, citing the same cases it now cites in its Petition for Rehearing.[1] We quote from the IRS' Motion for Summary Judgment:

> "[t]he defendant has burden [sic] of showing that the plaintiff was a direct threat if discrimination has been found...The burden of showing that the plaintiff was a direct risk falls upon the defendant only if the plaintiff first can show that there was discrimination." R 54, p. 8.

[1] *Bekker v. Humana Health Plan, Inc*. 229 F.3d 662 (7th Cir. 2000) and *Dadian v. Village of Wilmette*, 269 F.3d 831 (7th Cir. 2001).

It is undisputed that Branham showed that there was discrimination[2], therefore putting the burden of proof squarely on defendant, *by defendant's own admission*. The parties, like this Court, agreed that the Plaintiff's burden was to show himself qualified, and the Defendant's burden was to establish the direct threat defense. Having taken that position with the district court, the agency cannot take the opposite approach here.[3]

Appellate courts should not be the target of a completely different argument than was made to the trial court. Having conceded the burden of proof in the district court, it cannot seek rehearing based on its new construct.

Even *if* this Court's opinion *is* dicta, and even if the IRS disagrees with it, granting rehearing for "dicta" would not be efficient use of the Court's valuable resources. The IRS concedes that this Court's disposition is correct. It should not be heard to argue for "dicta" more to its liking in a petition for rehearing. If parties can seek rehearing based on dicta they do not like, the Court will be

[2]The IRS, in its Petition for Rehearing, asks this Court to "either amend its opinion to reflect the correct legal rule [on direct threat[urged by the IRS or simply excise this material from its opinion altogether. In any event, the disposition of the case need not change." Petition for Rehearing, p. 6. The IRS explicitly accepts the Court's decision that Branham established his *prima facie* case of discrimination.

[3]At no place in the Rule 56 pleadings did the IRS suggest there was a special rule or exception to the general rule that a party bears the burden of proving an affirmative defense.

inundated with unending pleas to fine tune language one party or another does not like.

Finally, there is no conflict between the opinion and the Court's prior precedent, as argued by the IRS. Thus, the Court's opinion is correct regardless of whether or not the applicable language can be characterized a dictum or not. In its petition, the IRS repeatedly relies on cases that do not even reach the issue of who carries the burden on the direct threat defense. These cases are in fact in harmony with this Court's opinion. Thus, the Petition for Panel Rehearing should be denied.

I. Rehearing Should be Denied Since the *IRS*, not Branham Raised the Direct Threat Issue on Appeal, and Conceded the Burden of Proof on its Direct Treat Defense at the District Court.

The IRS says in its petition that is does not seek to alter the holding of this Court. Petition for Rehearing, p.6. It also says it wants the Court to either excise or alter what it calls "prolonged discussion" that is mere "dictum". Petition for Rehearing, pp.5,6.

It appears to blame the Court- and implicitly Branham- for addressing the direct threat issue "without the opportunity of the IRS to brief the issues." Petition for Rehearing, p.6. This accusation is nonsense. The IRS itself raised the direct threat issue on pp. 44-46 of its principal brief. Branham simply

responded to this issue, and the Court ruled on the parties' contentions. Moreover, had the IRS considered its original briefing on the issue of direct threat inadequate, it had a ready remedy-to seek leave to file a surreply. FRAP 28. In any event, the IRS can show no prejudice because this Court carefully discussed the issues, and came to the legally correct conclusion, faithful to its prior precedent, the statutory language, and common sense.

The IRS made a voluntary choice to raise direct threat at this Court as an alternative basis to affirm summary judgment. It could have been content to simply address the issue of disability. Yet it chose to bring the direct threat issue to this Court, complaining only now, after the Court has disposed of it correctly.

In the district court, Branham cited *Dadian*[4], for the proposition that the IRS has the burden of proof on the direct threat defense. R. 42, p. 11. The IRS argued that the defendant has the burden of showing that the plaintiff was a direct threat once discrimination has been found. R 54, p. 8.

In this Court, the IRS' protest that the Court engaged in "prolonged" dictum is posturing. The IRS argued in its principal brief that it was entitled to judgment as a matter of law and that Branham was a "risk to himself" or "others". In order to be entitled to summary judgment on an affirmative claim or defense, the moving

[4]*Dadian*, *supra* at 841

party must establish the claim or defense as a matter of law.[5]

Because the IRS raised the issue, Branham appropriately briefed it, and the Court ruled on it. The Court properly disposed of the IRS claim that Branham was a direct threat as a matter of law, and correctly held that this was a fact issue. Given that the agency agrees with this disposition, no rehearing is necessary or appropriate.

II. The Panel Followed its Own Precedent and the Statutory Language

A. The IRS has conflated "qualified" and "direct threat".

The IRS has conflated two separate terms of the ADA. The Act contains two separate terms: "qualified" and the other, listed under defenses, is "direct threat."

[5] *Havoco of America, Ltd. v. Freeman, Atkins & Coleman, Ltd.*, 58 F.3d 303,306 (7th Cir. 1995).

Under the ADA, a plaintiff such as Branham must prove he is "qualified" to perform the essential functions of the job. "The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[6] Here, the Court held that Plaintiff met his burden to show he was qualified. Slip Op., 13-14. The IRS agrees. Petition for Rehearing, p. 6. As will be demonstrated below, this Circuit has plainly held that under these circumstances, the burden of proof is on the employer to prove the affirmative defense of direct threat.

[6] *Bekker, supra* at 669[citing the statute and the regulations].

This Court carefully relied on its prior decisions, and discussed them thoughtfully, before reaching the disposition this Court reached. Clearly the rule, by statute and this Court's precedent, is that direct threat is a defense.[7] Congress made it an affirmative defense.[8] 42 U.S.C. § 12113 provides: (a) It may be a *defense to a charge of discrimination* under this Act that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this title. (b) The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace. (Emphasis added).

The ADA defines "direct threat" as "a significant risk to the health or safety of others"[9], and it is a statutory creature with its own set of rules. *See* 29 C.F.R. §

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[7]*Dadian*, *supra* at 841.

[8]As is noted below, the Supreme Court has recently confirmed that the burden is on the defense to prove direct threat.

[9]42 U.S.C. § 12111(3)

1630.2. This Court simply applied the law as written. To require the plaintiff to *disprove* an affirmative defense would invert the burden of proof that Congress prescribed.

The IRS' cannot conflate terms with different meanings.[10] The Supreme Court explained in *Echazabal*:

[10]The meanings are quoted above, in Sec. II(A).

"Without deciding whether all safety related qualification standards must satisfy the ADA's direct threat standard, *see Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 569-570, n. 15, 119 S.Ct. 2162, 144 L.Ed.2d 518 (1999), we assume that some such regulations are implicitly precluded by the Act's specification of a direct threat defense, such as those allowing "indirect" threats of "insignificant" harm. This is so because the definitional and defense provisions describing the defense in terms of "direct" threats of "significant" harm, 42 U.S.C. §§ 12113(b), 12111(3), are obviously intended to forbid qualifications that screen out by reference to general categories pretextually applied. *See infra*, at 2052-2053, and n. 5. Recognizing the "indirect" and "insignificant" would simply reopen the door to pretext by way of defense." [11]

[11] *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80,fn 3, 122 S.Ct. 2045, 2050, fn 3, 153 L.Ed.2d 82 (2002).

The Supreme Court thus made it clear that employers may not invert the burden of proof. [12] The IRS has chosen to ignore this distinction and instead argues that since Branham has the burden of proving that he is qualified, then he also bears the burden of disproving the elements of the affirmative defense. However, this Court has precisely adhered to the statute in considering first, the plaintiff's prima facie burden to show that he was qualified for the job, and then considering the direct threat affirmative defense. Contrary to the IRS' protests, this Court *did* spend considerable time and space fully discussing the burden of proof issue vis-a-vis direct threat. Slip Op.at 16-19. A disagreement about alleged dicta does not support the rehearing of a cause where the movant agrees the disposition is correct.

B. This Court's opinion is completely faithful to its earlier cases.

The cases which the IRS asserts this Court overruled did not even *address* the allocation of the burden of proof. These cases decided no more and no less that the Plaintiff did not make out a prima facie showing that he or she was "qualified" to perform the essential functions of the job.[13] Neither of these cases

[12]To the extent the Supreme Court itself declined to micro manage all potential scenarios in *Echazabal*, this Court need not do so here, either. Such forays into the world of hypothetical scenarios are unnecessary, especially here, where the Court has properly disposed of the precise issues raised by the parties.

[13]*See Bekker*, 269 F.3d at 672, *Koshinski v. Decatur Foundry, Inc*., 177 F.3d 599,

even reached the direct threat defense in their analyses, as the plaintiffs were unable to establish a *prima facie* case of discrimination. Burden of proof was not contested in those cases.

603 (7th Cir. 1999).

In *Bekker*, the plaintiff, a physician, was unable to establish a *prima facie* case of discrimination by the hospital that terminated her, based upon her alcoholism or being regarded as an alcoholic. On appeal, the primary issue dealt with whether or not the defendant hospital had a legitimate non-discriminatory reason for firing the Plaintiff, *not* with a deliberation on the burden of the direct threat defense.[14] The Court emphasized that a hospital can terminate a physician if she was treating patients when she was drunk, regardless of whether or not she was disabled. *Id*. at 670-671. The *Bekker* court never reached the direct threat defense since the physician failed to establish the necessary *prima facie* case of discrimination in the first place.

In *Bekker*, the physician, because she was drunk or drinking while treating patients, was unable to perform the essential functions of a physician. By contrast, Branham *was* qualified to perform the essential functions of agent, as evidenced by the IRS offering him the job. R. 45, Attachment C-4. The only obstacle to Branham's promotion was the IRS' interpretation of his diabetes, a determination made *after* he was tentatively selected for the position.

[14]*Id*. at 672.

In *Koshinski, supra*, the plaintiff's own doctor admitted that he could not perform the essential functions, and therefore could not meet his burden of showing a *prima facie* case of discrimination.[15] Under such circumstances, the direct threat defense is not even reached. In recognizing this, the court in *Koshinski* stated: "The 'direct threat' issue arises, however, only after an ADA plaintiff has made out a *prima facie* case, as an employer's defense to the challenged an adverse employment decision."[16] Further, the *Koshinski* court specifically declared that because the plaintiff could not show that he was entitled to protection under the ADA, it did not "reach the question of whether the foundry had a valid defense for refusing to reinstate him."[17] Hence, *Koshinski* properly held that the direct threat defense only becomes material if the plaintiff establishes a *prima facie* case of discrimination. The IRS' argument that these cases are in direct conflict with the panel opinion is simply incorrect. Neither of these cases decided the burden of proof issue.

Once the IRS admitted that Branham created a fact issue on his prima facie case, this Court's precedents require it to prove its affirmative defense. By

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[15] *Id*. at 602.

[16] *See* 42 U.S.C. §12113(b); *Id*. at 603.

[17] *Id*. at 603.

contrast, the two cases to which the IRS clings involved plaintiffs could not create a fact issue on their prima facie case. Instead, both Plaintiffs were terminated, and the evidence in both cases clearly showed they were incapable of performing their jobs, either due to drinking on the job (*Bekker*) or a degenerative medical condition (*Koshinski*).

The precedents that this Court relied upon in its decision are clear. Defendant bears the burden of proof for its direct threat defense, once plaintiff makes out a *prima facie* case.[18] These precedents are not overruled, as the agency argues. They are followed. A plaintiff who cannot make out a prima facie case is subject to summary judgment, while a plaintiff who does make a showing that he or she is qualified, then the defendant must prove its affirmative defense in order to escape liability. The panel opinion was faithful to precedent, the statute and common sense.

[18]Again, this is *precisely* what the agency stipulated in the court below. R.54, p.8.

Although the agency attempts to brand *Dadian* as dicta, it still is the precedent of this Court.[19] The *Dadian* court states,

> "[W]e find the legislative history of 42 U.S.C. § 3604(f)(9) and the reasoning of courts interpreting the direct threat provisions under Titles I and III of the ADA persuasive. And we hold that the district court did not err in imposing the burden of proof on the Village to demonstrate by a preponderance of the evidence that the Board denied the Dadians a front driveway permit because Mrs. Dadian posed a direct threat to the safety of others."[20]

The IRS argues that the *Dadian* somehow legislated an exception to the statute by a single footnote. Petition for Rehearing, p. 9. However, this footnote does seek to invert the burden of proof where a plaintiff makes out a prima face of discrimination. The panel in the case at bar properly concluded that Branham had met his *prima facie* case, and therefore the burden of the employer's (IRS') defense belonged to the IRS under *Dadian*, *Bekker and Koshinsky*). The Court first examined Branham's *prima facie* case, carefully examining the question of actual disability, his qualifications, and only then addressed the defense.

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[19]This Court expressly held that it would follow *Dadian* and honor the statutory language establishing "direct threat" as a defense. Now the IRS calls this "dicta". Motion for Rehearing at 9. This assertion is meritless. When a party makes an argument and the Court addresses it in a manner adverse to that party, it simply will not do to brand the disposition "dictum".

[20]*Dadian* at 841.

Likewise, the agency's attempt to avoid *AIC*[21] is unconvincing. The Court, in its discussion of the jury instruction, clearly indicates that the defendant bears the burden of proof for his defense of direct threat.[22] *AIC* also further emphasizes that any threat must be "significant".[23] And this Court clearly held that the party in the best position to prove direct threat is the agency. *AIC*'s ruling simply recognizes that the burden of proof is on the party asserting the defense. The IRS' arguments opposing *Dadian* and *AIC* as sound precedent for this Court, if true, would invent a new exception where one has not been created.[24] Based upon the foregoing, the IRS' petition for a rehearing should be denied.

III. This Court is in Accord with Its Sister Circuits

As the panel astutely observed, its direct threat holding "finds support in the plain wording of the statute and in common sense." Slip Op. 17-18, fn 5. The IRS attempts to find refuge in some other Circuit Court opinions. The IRS represents that a "majority" of the Circuits agree that the employee bears the

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[21] *EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995).

[22] *Id.* at 1283-1284.

[23] *Id.* at 1284.

[24] This Circuit's own draft Pattern Jury Charges, published one month before this Court's opinion, clearly places the burden of proof on the defendant. PJC 4.10. www.ca7.uscourts.gov/Rules/pjury_civil-draft.pdf. This Court's disposition validates that instruction.

burden of proof if the ability to perform the job safely is inextricably tied to the performance of essential job functions. Petition for Rehearing, p. 11. However, two Circuits with nuances do not a majority make. This is especially true when the IRS argues that the Fifth Circuit agrees with its construct, when this is not the case.

The IRS argues that the Fifth Circuit has "gestured" towards its position. Petition for Rehearing, p. 15. The IRS also argues that the Fifth Circuit "declined to actually decide the matter". Petition for Rehearing, p. 15. This is not accurate. *Rizzo I*[25] has been the law of that circuit since 1996, and it holds plainly that "As with all affirmative defenses, the employer bears the burden of proving that the employee is a direct threat." *Id*. at 764. The case involved a hearing impaired bus driver of small children, a safety sensitive job. The panel held that the driver had made out her *prima facie* case, and that the burden of proof on the direct threat defense was on the employer, and reversed summary judgment. On remand from *Rizzo I*, the case was tried to a jury, which found in favor of the driver. After a panel affirmed the judgment, the

[25]*Rizzo v. Children's World Learning Centers, Inc*., 84 F.3d 758 (5th Cir. 1996).

Fifth Circuit, *en banc*, affirmed in *Rizzo III*[26]. The *en banc* court held: "[I]n allocating the burden of proof to the defendant to establish its defense, the district judge carefully followed the marching orders we gave him in *Rizzo I*."[27]

As for the Tenth and the First, Circuits. They simply blur two separate terms of the statute, terms which this Court observed, have two different definitions. The Tenth Circuit appears to hold that if a person cannot do a job without hurting people, then that person is not qualified. If a Plaintiff cannot make a prima facie showing that he is qualified, then summary judgment will certainly be appropriate. Here, however, where this Court has held that Branham has made out a *prima facie* case, and where the agency concedes that the disposition is correct, there can be no rehearing.

Regardless of the importance of whether two circuits have carved out nuances in attempting to interpret Congress' allocation of the burden of proof, this Court properly applied the statute as written, based on the record brought to this Court. And where a court's holding complies with the statute, the case law, and common sense, rehearing should be denied.[28]

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[26]*Rizzo v. Children's World Learning Centers, Inc*., 213 F.3d 209 (5th Cir. 2000, rehearing *en banc*); cert. denied 531 U.S. 958, 121 S.Ct. 392, 148 L.E. 2d 294 (2000).

[27]*Rizzo III* at 213.

[28]Although some circuits have struggled with the burden of proof under the direct

WHEREFORE, Appellant, GARY L. BRANHAM, requests that the Court deny the Appellee's petition for rehearing, and for such other and further relief to which he is justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John W. Griffin, Jr., hereby certify that one original and three paper copies of the Appellant's Response to Petition for Rehearing were sent this _____ day of March 2005, via overnight commercial carrier to:

United States Court of Appeals
Seventh Circuit
219 S. Dearborn, Room 2722
Chicago, Illinois 60604

and one copy of said Response was mailed to the following attorney, via overnight commercial carrier:

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threat defense, the record before this Court leads to the inescapable conclusion that his Court's opinion was correct and not subject to rehearing.

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