IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-35457

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

v.

BNSF RAILWAY COMPANY,
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Washington
Civil Action No. 2:14-cv-1488-MJP

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS APPELLEE

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STATEMENT OF JURISDICTION

The EEOC agrees with Appellant BNSF Railway Company's (BNSF) Statement of Jurisdiction.

STATEMENT OF THE ISSUES

1. BNSF extended Russell Holt a conditional offer of employment as a patrol officer. BNSF's medical contractor then conducted a physical examination and reported that Holt was fit for the position. But because Holt injured his back four years earlier, BNSF required Holt to obtain a current magnetic resonance imaging scan (MRI), a test Holt's doctor would not order because it was not medically necessary and Holt could not afford to pay for out-of-pocket. Where BNSF had no evidence that Holt was unable to perform the job duties of a patrol officer, did the company violate the Americans with Disabilities Act (ADA) when it declined to hire Holt because he failed to submit a current MRI?

2. BNSF admits that most of its follow-up inquiries during pre-employment medical examinations inevitably are directed to individuals with conditions that do or may fit the definition of an ADA impairment. If the individual cannot procure the requested medical test(s), BNSF revokes its conditional offer of employment—even when it has no evidence the individual cannot perform the essential job functions—a practice the district court held violates the ADA. Did the district

court act within its discretion by enjoining BNSF from continuing to engage in this unlawful practice?

STATEMENT OF THE CASE

A. Nature of the Case

The EEOC sued BNSF in September 2014 alleging BNSF violated the ADA, 42 U.S.C. §§ 12101 *et seq.*, when it revoked Russell Holt's job offer as a Senior Patrol Officer. BNSF's brief includes numerous factual assertions—many of them disputed—that are immaterial to the legal issues in this case. Discovery revealed the following material facts, largely undisputed except as noted.

B. Statement of Facts

BNSF is one of North America's leading freight transportation companies, operating in multiple states and employing tens of thousands of individuals.

In June 2011, Russell Holt applied for a position as a BNSF Senior Patrol Officer in Seattle, Washington. BNSF asserts the position's job duties are similar to those of government police officers and involve protecting the safety of persons and property and preventing and responding to criminal acts. RE.533-34. Holt had worked for more than a decade in various law enforcement positions. RE.369. He was then working for the Pulaski County Sheriff's Office in Little Rock, Arkansas, where he had served for the prior five years as a patrol officer, sheriff's deputy, criminal investigator, and SWAT team member. RE.371-72, 1355, 1566.

He applied to BNSF because his family was relocating to the Seattle area. Supplemental Excerpts of Record (SER.)1-2. BNSF interviewed Holt and extended him a conditional offer of employment.

BNSF requires all applicants who receive conditional job offers to undergo a pre-employment medical examination to ensure physical fitness for the position. BNSF contracts with Comprehensive Health Services (CHS) to coordinate these examinations nationwide, but BNSF's medical department in Fort Worth, Texas, makes the medical decisions in all but routine cases. RE.258, 529-31; *see* RE.150 n.1. CHS contracted with local medical provider Concentra to conduct Holt's examination. RE.581. During the examination process, Holt disclosed that he had injured his back in 2007, but his back pain had resolved. RE.1312-13 (EEOC's Undisputed Material Facts (EEOC-Facts) ## 8, 12).

Specifically, after lifting weights at home one evening in March 2007, Holt awoke the next morning with severe back pain, which Holt eventually understood was caused by a "bulging disc."[1] RE.373-77, 717. An MRI revealed a two-level disc extrusion, RE.1367, a permanent musculoskeletal condition where "the jellylike material that's in the disc actually comes out into the spinal canal."

[1] BNSF suggests the condition may have been work-related, based on a cursory reference in a medical note written by an unidentified doctor. RE.773-74, 814. The cause of the injury is immaterial here.

RE.732. BNSF's chief medical officer described the condition as "very concerning" and "a significant finding." RE.552, 559, 567-74. From March 2007 through July 2009, Holt's doctors treated the condition with medication, chiropractic treatments, physical therapy, and ultimately epidural steroid injections. RE.1370-85.

Holt attested that it was close to a year after the March 2007 onset before the extreme pain began to subside. RE.1352. During that time, Holt was able to perform all of his job functions, "it just hurt a lot more afterwards." RE.1349-52. Holt's back pain re-emerged briefly in mid-2009. *See* RE.1236 (pain in Holt's back and leg "had worsened for about one week"). He underwent another MRI in June 2009. RE.1387-90. It showed the "previous disc herniation at L4-L5" was "still present" but " less prominent" and an additional extrusion. RE.762-63. Holt received another epidural steroid injection as a result. *See* RE.766-67, 1297.

In March 2011, Holt saw his doctor for knee pain and, while there, mentioned he also had some pain in his back. RE.726. His doctor later confirmed: the primary reason for Holt's visit was knee pain; he examined and x-rayed Holt's left knee but did not even examine his back; and the notation "may need MRI" in the medical record referred to Holt's knee. RE.726-29. Holt apparently never received the MRI and the knee pain resolved with medication and physical therapy. *See* RE.1235. Holt continued receiving regular "maintenance" chiropractic

treatments throughout this time. RE.382.

On September 20, 2011, Holt filled out the CHS medical questionnaire for his BNSF pre-employment medical examination, disclosing the 2007 back injury but not his brief March 2011 knee pain. RE.968-69. Holt discussed his back condition with a CHS nurse the following day, RE.383, calling it a "bulging lumbar disc," the term his chiropractor used, *see* RE.1424. Holt informed the nurse he had missed no work because of his back condition, never sought or needed a light duty assignment, and had been asymptomatic since 2009. RE.973. The nurse directed him to provide medical records regarding his back and suggested he obtain notes from his doctors. R.383.

On September 22, 2011, Holt visited the imaging center to obtain a copy of his MRI and asked his primary care doctor, Richard Heck, M.D., to provide his medical records to CHS and assess him for work clearance. RE.383, 768. Dr. Heck performed a general health examination and evaluated Holt's lumbar spine. RE.1010-12. He later attested that Holt's back appeared healthy, that he "had a full range of motion, full strength, and appeared to be pain free," and that Holt was capable of performing work as a police officer. RE.722-24. Dr. Heck's resulting report and summarizing letter indicated Holt had "normal" function since 2009 and was pain-free and able to work. RE.1007, 1010.

That same day, Holt visited his chiropractor, Steve Fender. RE.383.

Fender's resulting letter stated Holt was "in very good overall physical condition" and had experienced no work-related absences due to his back. RE.1008.

CHS received Holt's medical records, the assessments from both his chiropractor and doctor, and the 2007 MRI on September 27, 2011. RE.554, 973. Holt was administered a pulmonary function test, which he passed, RE.983, and an isokinetic strength test, on which he scored in the 95th percentile, RE.1013 (IPCS score). Concentra assigned Marcia Hixson, M.D., to conduct Holt's medical examination. RE.1409-11.

Dr. Hixson is an orthopedic surgeon who, at the time, had four years of experience conducting approximately fifty pre-employment examinations per week. RE.1032, 1037. The examinations often required her to assess an individual's back and spine, and she felt very comfortable making such assessments. RE.1033, 1037-38. As was typical for BNSF pre-employment exams, when she examined Holt, she did not have his prior medical records, even though CHS had received them a week earlier. RE.595; RE.1415-16.

Dr. Hixson described her examination of Holt as "very thorough." RE.1413. Because BNSF had offered Holt a job as a patrol officer, Dr. Hixson administered BNSF's standard Patrol Officer medical examination. And because Holt had disclosed a prior back injury, she looked at Holt's back "a little more closely," RE.1414-15, 1427, and administered an Occupational Health Assessment-A

(OHA-A) test designed specifically to assess fitness of an individual's back and spine. *See* RE.973.

Dr. Hixson found no cause for concern regarding Holt's back condition, RE.1415-16, 1427-28, and she reported that finding to BNSF in the CHS Medical Examination Report and the BNSF Occupational Assessment form. RE.1397-1403, 1418-21. She indicated "no abnormalities," RE.1398, and concluded that Holt did not have and was not likely to develop "any physical symptoms or limitations that could impair [his] performance as a police officer for the next two (2) years." RE.1399. In the space provided for summarizing her evaluation of Holt's "ability to safely perform the duties of police officer" she wrote: "No limitations or restrictions needed." RE.1400.

After examining Holt's back and neck she reported: "Normal with NO apparent functional limitations." RE.1402. CHS records indicate the OHA-A test administered on Holt's back and neck showed "WNL" (within normal limits). RE.973, 1422-27.

CHS sent Holt's medical file to BNSF for additional review. RE.1015, 1485. Despite the evidence of Holt's physical fitness from three different medical professionals and *no* evidence that Holt was not performing well at his current job, *see* RE.581, BNSF's chief medical officer, Dr. Michael Jarrard, instructed CHS to have Holt provide three categories of additional information regarding Holt's

"back injury, treatment, and final impairment rating": (1) a radiologist's report of a "current MRI scan" of Holt's lumbar spine (to compare to the 2007 MRI) "with specific evaluation for arthritic or degenerative changes and disc pathology"; (2) pharmacy records for the past two years for prescriptions related to treatment of his back pain; and (3) "[a]ll additional medical records for the past two years including Chiropractic notes." RE.1481.[2] Dr. Jarrard directed CHS to inform Holt the requirement was "due to uncertain prognosis of your back condition" and if he supplied the information, BNSF "can evaluate your condition again." *Id.*

Dr. Jarrard later admitted he had no evidence contradicting Holt's statement that he was performing his current law enforcement duties without problem. RE.580-81. Asked why he insisted on a current MRI, Dr. Jarrard stated that the fact that Holt had no current symptoms and his personal doctors and the CHS examining doctor all "said he had good function, that's very good for him." RE.561. But, in Dr. Jarrard's view, "it doesn't prove that he doesn't still have major pathology, that is a hair's breath away from leaving him paraplegic or having complete numbness in a leg or losing muscle movement when he's needing to use those legs … for his job." *Id.*

CHS emailed Holt Dr. Jarrard's three requirements. RE.1000-01. CHS then

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[2] The email's reference to a "2009 back injury" appears to be a misunderstanding, as Holt injured his back in 2007. *See* RE.1481 (Jarrard's deposition).

recorded the status of Holt's medical review as: "Not Qualified—further evaluation required," adding, in all caps: "PER BNSF MEDICAL." RE.975.[3]

Holt received the email and attempted to comply. RE.1357-60. He contacted his doctor's office, but when he explained that he was not in pain and needed the MRI only for a job application, the doctor's staff said it was not medically necessary and his medical insurance would not pay for it. RE.1357-59. Holt's doctor confirmed in his deposition that he would not have ordered an MRI for Holt in the fall of 2011 because it was not medically necessary. RE.725, 735. Holt and family members contacted several facilities about paying for an MRI out-of-pocket, but were told that without a doctor's referral the cost would be around $2,500 or more. RE.1359-60, 1362.

Between November 12 and 15, Holt exchanged emails with BNSF's Director of Medical Support Services, Chris Kowalkowski. Holt indicated he was trying to provide the additional information BNSF was requesting. RE.961-63. He expressed concerned, however, about obtaining a new MRI since he had not "had

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[3] The standard form used to record BNSF pre-employment medical examinations offered four result categories: "Qualified," "Qualified with Restriction," "Not Qualified—does not meet standards," and "Not Qualified—further evaluation required." *See* RE.975. Dr. Jarrard attested that before the district court issued its liability ruling, BNSF "believed that the ADA allows it … to treat applicants as presumptively *not* medically qualified until the medical examination is completed, and thus to end the medical examination without a qualification decision if the applicant does not provide requested information." SER.10-11, 14-15.

any issues" with his back in the past two years and his doctor would likely not order it where there was no "medical necessity." RE.962. Holt was in bankruptcy at the time, RE.1489, and could not afford the cost out-of-pocket. Kowalkowski responded: "All three requested items are required by our Physician." RE.962. Acknowledging that "[i]t can be difficult to obtain an MRI," Kowalkowski stated: "The cost for the MRI … is not covered by BNSF Railway and is your responsibility." RE.962, 1360-61.

Holt explained that he had begun contacting his doctors to obtain the additional medical records and that there were no pharmacy records directly related to his back because he had not taken any prescription medication for his back during the prior two years. *Id.*; RE.961. He asked BNSF, again, why he needed to provide a new MRI after three medical professionals had cleared him to work, asking if it related to a possible future issue regarding his back. *Id.*; RE.1360, 1362.

On November 15, BNSF Medical Specialist Joy George emailed Holt asking him to call her. RE.1569. He did, and asked her if BNSF would waive the MRI requirement. RE.1361. She agreed to check with the doctor, but called him back the same day to say the doctor would not waive the requirement. *Id.* George explained that BNSF needed the current MRI because "the physician bases his determination not on [Holt's] abilities to currently perform the duties of the job,

but on the possibility of a future injury." RE.1315 (EEOC Fact #17); RE.1569.[4] She stated further that even if Holt provided a current MRI, there was no guarantee BNSF would approve him for the position, but if he failed to submit it soon, the job offer would be rescinded. RE.1315-16 (EEOC Fact #18); RE.1362, 1569.

Holt never stated nor suggested to BNSF that he was declining BNSF's job offer. On December 14, BNSF's Northwest Corridor Chief emailed BNSF staff indicating Holt had confirmed he could not afford the MRI.[5] RE.1483. On December 14, BNSF medical officer Kowalkowski informed CHS and BNSF staff: "candidate has declined the job offer." *Id.*, RE.974. The individual whom BNSF hired to fill the position had no disclosed prior back injury, so BNSF did not require him to provide a current MRI.

Holt ceased working for the Pulaski County Sheriff's Office November 23, 2011. RE.371. He moved his family to the Seattle area shortly thereafter. SER.2. After working at various security positions from March 2012 until December 2012,

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[4] BNSF disputed this statement below, on the grounds that George could not remember talking to Holt on the telephone and did not think the statement was one she would make. *See* RE.292 (EEOC Fact #17). These are ineffective bases for disputing an asserted fact, as explained *infra* at pp.43-44. Thus, EEOC Fact #17 remains undisputed.

[5] BNSF notes that Holt also failed to provide the requested copies of pharmacy and medical records. BNSF-Brf at 12. Kowalkowski attested that without a new MRI, the other two items—which Holt had agreed to provide—would have been insufficient. RE.402.

he moved to Oregon for a law enforcement job starting in January 2013. SER.4. During 2013 he experienced some back pain for which he received chiropractic treatments. RE.1149-1209. In December 2013 he experienced numbness in his left leg followed by acute back pain that was corrected by surgery. RE.381, 1210-21. Following a six-week medical leave, Holt returned to work February 1, 2014. R.46 (Holt Declaration dated July 30, 2015). In July 2014, Holt took a job as a police officer for the Umatilla Tribal Police in Oregon. RE.370.

The EEOC filed suit alleging BNSF violated the ADA by failing to hire Holt because of his record of disability or because BNSF regarded him as being disabled. RE.1577-83. The EEOC sought injunctive and monetary relief and punitive damages for BNSF's "malicious and reckless conduct." RE.1582.

C. District court rulings

1. Denial of BNSF's motion to dismiss

The district court denied BNSF's motion to dismiss the EEOC's amended complaint, ruling that the EEOC's allegations that BNSF's failure to hire Holt violated 42 U.S.C. §§ 12112(d)(3)(A) & (C) stated a plausible claim under the ADA. RE.162-64.

BNSF argued that the EEOC's complaint was legally insufficient because its reasons for not hiring Holt rested not on the results of any medical test, but on Holt's failure to procure a new MRI—a supplemental medical test the ADA

permitted BNSF to request at the post-offer, pre-employment stage—and that this failure meant Holt never completed the application process. *See* RE.163. The court disagreed. It explained that the ADA does not authorize an employer to require a prospective employee to "pay for the follow-up examination where only applicants with disabilities are asked to provide the follow-ups." *Id.* The court considered this particularly true where, as here, the EEOC alleged that the doctor who administered Holt's pre-employment examination for BNSF had already "cleared [Holt] as fit for the position." *Id.* The court found persuasive the EEOC's position that (1) refusing to hire Holt for not procuring an expensive supplemental medical test at his own expense constituted a selection criterion that screened out Holt, and tended to screen out other individuals with disabilities; (2) as such, 42 U.S.C. § 12112(b)(6) required this selection criterion (requiring a current MRI) to be job-related for the position in question and consistent with business necessity; and (3) EEOC's complaint plausibly alleged that BNSF did not establish any business necessity for requiring a current MRI. RE.162-64.

2. Decision granting EEOC partial summary judgment on liability

BNSF and EEOC cross-moved for summary judgment. BNSF argued that its request that Holt procure a current MRI was consistent with ADA statutory provisions and EEOC regulations and interpretive guidance addressing post-offer pre-employment medical examinations.

Moving for partial summary judgment on liability, the EEOC argued that requiring Holt to procure a follow-up MRI at his own expense after BNSF's contract doctor had examined him and found him medically qualified "functioned as a screening criterion that screened out an applicant with a disability by imposing an expensive additional requirement not imposed on other applicants." Citing, *inter alia*, 42 U.S.C. §§ 12112(a), (b)(6), & (d)(3)(A) & (C), the EEOC argued that BNSF's conduct violated the ADA because the company failed to demonstrate that its demand for an MRI was job-related and consistent with business necessity.

The EEOC further argued that BNSF did not meet its burden of proving its asserted "direct threat" affirmative defense. Instead, the company essentially (and impermissibly) shifted onto Holt the burden of proving his back condition did *not* pose a danger to himself or others. The EEOC asked the court to rule BNSF liable under the ADA and set the matter for a jury trial to determine relief.

The district court denied BNSF's motion and granted the EEOC's, concluding that Holt satisfied the definition of regarded-as disabled under the ADA Amendments Act of 2008 (ADAAA) and that BNSF's actions violated the ADA's "generic discrimination" provision, 42 U.S.C. § 12112(a). RE.139-58. The court noted that after a conditional job offer and before employment duties begin, the ADA permits an employer to conduct medical examinations of prospective employees, as long as the examination results are used "only in accordance with

[the ADA]." RE.146. (quoting 42 U.S.C. § 12112(d)(3)(C)). Such examinations do not have to be job-related and consistent with business necessity. *Id.* (quoting 29 C.F.R. § 1630.14(b)(3)). But if an employer uses certain criteria to screen out an employee with a disability as a result of any such medical examination or inquiry, "the exclusionary criteria must be job-related and consistent with business necessity." *Id.* (quoting 29 C.F.R. § 1630.14(b)(3)). Noting the absence of Ninth Circuit precedent or EEOC guidance on the specific question, RE.147, the district court relied on a Tenth Circuit decision and ADA legislative history to conclude that "an employer's reasons for withdrawing a conditional job offer must be 'job-related and consistent with business necessity.'" RE.146-47 (quoting *Garrison v. Baker Hughes Oilfield Ops., Inc.*, 287 F.3d 955, 960 (10th Cir. 2002); other citations omitted).

The court noted that an employer can request any additional information or examination that is "medically related" to the results of the initial examination; no job-related/business necessity criteria apply to such requests. RE.150-51 (citing EEOC Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations (1995) (http://www.eeoc.gov/policy/docs/preemp.html) ("Pre-employment Guidance"). The court distinguished such ADA-authorized requests from an employer's requirement that an applicant who received a conditional offer of employment "pay for costly additional information as a

condition of proceeding through the hiring process," which the court said finds no support in the EEOC's guidance. RE.151.

The court ruled that the EEOC established the absence of disputed facts for the three elements of a *prima facie* case of disability discrimination: that Holt was (1) disabled within the meaning of the ADA, (2) a qualified individual with a disability, and (3) discriminated against because of his disability. RE.152-55 (citing *Smith v. Clark Cty. Sch. Dist.*, 727 F.3d 950, 955 (9th Cir. 2013)). It ruled Holt met the ADAAA's "extremely low bar" for being "regarded-as" disabled because he advised BNSF of his 2007 back injury and provided an MRI showing a two-level disc extrusion, and "BNSF halted the hiring process in response to that information." RE.154 (citations omitted). The court noted that BNSF did not dispute Holt was otherwise qualified for the job. RE.155.

The court concluded that "BNSF's withdrawal of Mr. Holt's job offer when he failed to supply an updated MRI at his own cost constituted facial 'discrimination.'" RE.153 (citing *Garrison*, 287 F.3d at 960). The court stated that "[u]ndisputed facts also establish causation" because "[a] reasonable jury could not escape the conclusion that in the absence of the 2007 MRI and Mr. Holt's answers to the CHS medical questionnaire—'results' obtained from the post-offer medical examination, … —BNSF would not have demanded an

additional MRI and would not have treated Mr. Holt as though he had declined [BNSF's job] offer, although he had not." *Id.* (citing 42 U.S.C. § 12112(d)(3)(C)).

The court ruled that BNSF failed to establish any defense to this finding of liability. RE.155-56. It held that merely requesting a new MRI did not establish BNSF's burden of proof on the "direct threat" affirmative defense because, having "halted the hiring process when Mr. Holt failed to provide an MRI at his own cost," BNSF had no evidence to demonstrate that Holt posed a direct threat to his own health. RE.155-56.

The court denied BNSF's motion for reconsideration. RE.136-37.

3. Allowance of compensatory damages and denial of punitive damages

BNSF next challenged EEOC's entitlement to seek compensatory and punitive damages, arguing, *inter alia*, that such relief is available only for disparate treatment discrimination and that the court's liability ruling rested on a disparate impact analysis. R.141. The court explained that on summary judgment it "found intentional disparate treatment discrimination by BNSF" and ruled EEOC was entitled to a trial on compensatory damages. RE.35-36. The court ruled that punitive damages, however, were unavailable, citing, among other reasons, the lack of prior guidance on the question of who had to pay for post-offer, pre-employment follow-up medical tests. RE.34-35.

The parties stipulated that BNSF would pay Holt compensatory damages of $62,500. RE.131-35. The court then awarded backpay and interest of $32,833.37. RE.73.

4. Injunction

The district court permanently enjoined BNSF "from engaging in the unlawful employment practice found in this case to constitute intentional disparate treatment discrimination." RE.9. It noted that BNSF had admitted that "most" of its follow-up medical inquiries are "inevitably" directed to "applicants with conditions that do or may fit the definition of an ADA 'impairment.'" RE.8 (citing R.124 at 6-7 (RE.252-53)). The court further noted that when a job candidate—for whatever reason—does not submit the requested additional information, BNSF "treat[s] the applicant as having declined the job offer" rather than determining whether the applicant is medically qualified based on the information it has. *Id.* (citing R.143 at 6 (SER-11)). The court observed that even after it ruled this conduct violated the ADA, BNSF's opposition to injunctive relief "include[d] not a single affirmative assurance . . . that BNSF [had] made any changes . . . to any of its policies or practices" in response to the court's decision. *Id.* (citing R.157 at 6-11 (RE.193-98)).

The court ordered BNSF to bear the cost of any additional medical tests it deems necessary or, alternatively, to complete the application process without

them and determine whether the applicant is or is not medically qualified for the job. RE.9. The court ordered BNSF to provide any applicant deemed not medically qualified for a position a written explanation why the applicant is medically unqualified. *Id.*

The court expressly tailored the injunction to exclude situations where a prospective employee is uncooperative. Paragraph 2 provides that if an applicant, after being told BNSF will bear the cost of procuring additional medical information, chooses not to sit for a medically-related follow-up examination or not to answer medically-related follow-up questions, BNSF is not required to complete the hiring process for that applicant. RE.9. Finally, the court ordered BNSF to inform all its decision makers, including those who conduct medical examinations and those who determine additional medical information is needed, that (1) BNSF must bear the cost of securing any additional information sought and (2) if no additional information is sought, BNSF must complete the medical examination process with existing information. RE.9-10.

BNSF moved to alter or amend the judgment or for relief from judgment. RE.172-86. The district court denied the motion. RE.1-3. BNSF appealed.

SUMMARY OF ARGUMENT

The district court correctly held that BNSF violated the ADA where undisputed facts demonstrate (1) the evidence BNSF obtained during its post-offer, pre-employment medical examination showed Holt was medically fit for the job, (2) BNSF nevertheless rescinded Holt's job offer because Holt was unable to procure additional medical testing that BNSF demanded, and (3) BNSF failed to establish any ADA-authorized defense for rescinding Holt's job offer. The district court's ruling that the ADA does not authorize an employer to abandon the hiring process under such circumstances is solidly grounded in both the language and the underlying policies of the ADA, and the court acted well within its discretion in enjoining BNSF from continuing to violate the Act in this manner.

The court correctly determined that Holt's back condition fell within the ADA's "regarded-as" definition of disability under the 2008 amendments that broadened protections from disability-based discrimination. And the court properly determined that BNSF, after extending a job offer, could not lawfully end the hiring process midstream when a prospective employee such as Holt cooperates fully with the pre-employment medical examination process but cannot afford an expensive supplemental medical test. Although employers may withdraw job offers on various bases such as dishonesty or failure to cooperate during the application process, nothing in the ADA authorizes an employer to withdraw a job

offer under the circumstances presented here. Rather, where the results of the medical examination show an individual is medically qualified for the job, the employer can lawfully rescind the job offer only if it establishes one of the ADA's defenses.

BNSF candidly admits that what it did here represents the company's routine response to prospective employees with any number of different medical conditions, and admits that most of these follow-up inquiries are inevitably prompted by conditions that do or may fit the definition of an ADA impairment. Indeed, BNSF's post-offer, pre-employment medical evaluation form includes a distinct category for situations where BNSF finds a prospective employee "not qualified" *not* because the individual "does not meet standards" (it has a separate category for that), but because "further evaluation [is] required."

BNSF's arguments that it acted lawfully here suggest it believes it has discovered a loophole in the ADA that permits it to screen out individuals who have statutorily-covered impairments even if the individual can presently do the job for which he is being considered. BNSF is incorrect. The company's conduct, and its arguments on appeal, rest on misreadings of the ADA's employee protections and employer prohibitions.

Given BNSF's admission that its conduct here reflects its standard practices—as well as the record evidence that BNSF centralizes its medical-

qualification decisions under a single medical review office—the district court, having ruled that BNSF's conduct toward Holt violated the ADA, acted well within its discretion by enjoining BNSF from continuing this unlawful conduct. The district court's judgment should be affirmed.

ARGUMENT

I. BNSF Violated the ADA by Rescinding Holt's Job Offer Despite the Absence of Any Evidence that Holt Could Not Perform the Job Duties of a Senior Patrol Officer.

A. Standard of Review

This Court reviews *de novo* the district court's grant of summary judgment, viewing the evidence in the light most favorable to the non-moving party and determining "whether there are any genuine issues of material fact and whether the district court correctly applied the substantive law." *EEOC v. UPS Supply Chain Sols.*, 620 F.3d 1103, 1110 (9th Cir. 2010) (citation omitted). To warrant summary judgment in its favor on liability, the EEOC was required to demonstrate that on this factual record, no reasonable jury could rule other than for the EEOC. *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007).

B. **Statutory framework for pre-employment exams under the ADA**

1. ADA's basic prohibition against discrimination

The ADA prohibits employers from "discriminat[ing] against a qualified individual on the basis of disability in regard to," among other things, "hiring." 42 U.S.C. § 12112(a). The statute defines "disability" as (1) "a physical or mental impairment that substantially limits [a] major life activit[y]" of an individual; (2) "a record of such an impairment"; or (3) "being regarded as having such an impairment." 42 U.S.C. § 12102(1)(A), (B), & (C). The EEOC's regulations define impairment, in relevant part, as "[a]ny physiological disorder or condition … affecting one or more body systems" including "musculoskeletal." 29 C.F.R. § 1630.2(h)(1).[6]

An individual satisfies the regarded-as prong of this definition if he was "subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment" that was not "transitory and minor." 42 U.S.C. § 12102(3)(A) & (B). In other words, an individual falls within the ADA's regarded-as definition if he establishes that ADA-prohibited conduct (such

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[6] Congress delegated to the EEOC the authority to promulgate regulations under Title I of the ADA, 42 U.S.C. § 12116. Accordingly, the EEOC's regulations, and its guidance regarding these Title I regulations, are entitled to deference. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984); *Auer v. Robbins*, 519 U.S. 452, 462-63 (1997).

as revoking a job offer) occurred *because of* an impairment that the individual has or the employer thinks he has. 29 C.F.R. §§ 1630.2(l)(1), (2).

Demonstrating that an action was taken because of an impairment does not automatically establish liability, however, as an employer may be able to establish a statutory defense. *See* 29 C.F.R. pt. 1630, app., § 1630.2(l) ("evidence that [an employer] took a prohibited action because of an impairment will establish coverage and will be relevant in establishing liability, although liability may ultimately turn on whether the covered entity can establish a defense").

2. ADA's prohibition against discriminatory selection criteria

In addition to the generic prohibition against discrimination, the statute lists specific examples of prohibited discrimination. 42 U.S.C. § 12112(b)(1)-(7). Subsection (b)(3) bars employers from "utilizing standards, criteria, or methods of administration—(A) that have the effect of discrimination on the basis of disability." 42 U.S.C. § 12112(b)(3)(A). Subsection (b)(6) bars employers from "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities." 42 U.S.C. § 12112(b)(6). There is an exception, however, where the employer can show that the qualification standard or selection criterion, *as used*, is "job-related for the position in question and is consistent with business necessity" and "performance cannot be accomplished by reasonable

accommodation." *Id.*; 42 U.S.C. § 12113(a) (explaining the defense); 29 C.F.R. § 1630.15(b) (same). "The purpose of this provision is to ensure that individuals with disabilities are not excluded from job opportunities unless they are actually unable to do the job." 29 C.F.R. pt. 1630, app., § 1630.10(a). Quoting these two statutory subsections, the Supreme Court explained that "[b]oth disparate-treatment and disparate-impact claims are cognizable under the ADA." *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003).

3. ADA's prohibition against discriminatory use of medical examinations

The ADA's generic prohibition against disability-based discrimination also extends to medical examinations and inquiries. 42 U.S.C. § 12112(d)(1). In this regard, the ADA specifies what employers may and may not do during the pre- and post-hiring process. 42 U.S.C. §§ 12112(d)(2)-(4).

Before making an offer, employers are prohibited from asking a job applicant if he or she has a disability or the nature or severity of any such disability, although the employer may ask about an applicant's ability to perform job-related functions. 42 U.S.C. § 12112(d)(2)(A) & (B). After hiring someone, employers are barred from requiring a medical examination or making any inquiries of an employee concerning the nature, existence, or severity of a disability unless the examination or inquiry is "job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A).

This appeal concerns the stage in the middle of the hiring process, when an employer has extended a job offer but the individual has not yet begun working. The ADA permits employers to condition offers of employment on the results of a post-offer, pre-employment medical examination if three criteria are met: all prospective employees are subjected to the examination, regardless of disability; the resulting medical information is kept separate and confidential; and "the results … [are] used only in accordance with [the ADA]." 42 U.S.C. § 12112(d)(3)(A), (B), & (C).

Restricting pre-employment medical examinations to the post-offer stage forces employers to isolate their consideration of medical issues, so "applicants know when they have been denied employment on medical grounds and can challenge an allegedly unlawful denial." *Leonel v. Am. Airlines, Inc.*, 400 F.3d 702, 709 (9th Cir. 2005). This sequence renders employers less able to mask a disability-based decision not to hire someone by claiming the decision was based on other considerations. *Id.*

The ADA does not limit the scope of post-offer medical examinations given to all entering employees. *See* 29 C.F.R. § 1630.14(b)(3). And an employer may "ask specific individuals for more medical information" including "follow-up examinations" as long as the follow-up requests and examinations are "medically related to the previously obtained medical information." Pre-Employment

Guidance, text accompanying n.22. But employers must use the results of such examinations "in accordance with [the ADA]." 42 U.S.C. § 12112(d)(3)(C). This means that if an employer utilizes "certain criteria … to screen out an employee or employees with disabilities as a result of such an examination or inquiry, the exclusionary criteria must be job-related and consistent with business necessity." 29 C.F.R. § 1630.14(b)(3).

The EEOC's Technical Assistance Manual on the ADA further explains:

> The results of a medical inquiry or examination may not be used to disqualify persons who are currently able to perform the essential functions of a job, … because of fear or speculation that a disability may indicate a greater risk of future injury, or absenteeism, or may cause future workers' compensation or insurance costs.

EEOC, Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act § 6.4 (1992).

This guidance is consistent with the statute's legislative history. *See, e.g.*, H.R. Rep. No. 101-485 (III), at 43 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267 ("The results of the medical examination cannot be used to discriminate against a person with a disability if the person is still qualified for the job."); 136 Cong. Rec. 10,872 (1990) (statement of Representative Weiss) ("The results of the examination can only be used to withdraw a job offer if the applicant is found not to be qualified for the job based on the results of the exam.").

This Court has not yet addressed at any length the circumstances under which the ADA permits employers to withdraw a conditional offer of employment based on what occurred, or did not occur, during the post-offer, pre-employment medical examination process. The Tenth Circuit, however, concluded that an employer violates the ADA if, based on information obtained during that process, it rescinds a conditional offer of employment for medically-related reasons that are not "job-related and consistent with business necessity." *Garrison*, 287 F.3d at 959-61 (citing, *inter alia*, 42 U.S.C. § 12112(d)(3) and 29 C.F.R. § 1630.14(b)(3)).

The employer in *Garrison* withdrew its job offer after learning Garrison had suffered a number of injuries during previous employment. *Id.* at 958. When Garrison asked why he did not get the job, the human resources manager told him the company had looked at his worker's compensation claims with regard to "possible future injuries," explaining the jobs for which he was being considered "would put you in a position to likely be injured again and we don't do that." *Id.* The Tenth Circuit upheld the jury's verdict that this explanation established a violation of the ADA because the employer withdrew its conditional job offer based in part on motives (fear of future injury) that were not job-related and consistent with business necessity. *Id.* at 958-61. The Tenth Circuit characterized withdrawal of a job offer "because of unsubstantiated speculation about future

risks from a perceived disability" as a "discriminatory use of medical exam results." *Id.* at 960-61.

C. **Holt fell within the ADA's definition of "regarded as" disabled.**

Applying the standards Congress enacted in the ADAAA, the district court correctly held that Holt fell within the regarded-as prong of the ADA's definition of disability. 42 U.S.C. § 12102(C).[7]

The ADAAA significantly changed the legal standards for determining coverage under the ADA's three definitions of disability. *Rohr v. Salt River Project Agric. Improvement & Power Dist.*, 555 F.3d 850, 853 (9th Cir. 2009). Of significance here, regarded-as coverage no longer requires proof the employer believed the individual had an impairment that was substantially limiting. 42 U.S.C. § 12102(3)(A); 29 C.F.R. § 1630.2(j)(2) (whether an impairment substantially limits a major life activity not relevant to coverage under regarded-as prong). Instead, a plaintiff need only demonstrate he was subjected to an ADA-prohibited action "because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."

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[7] The district court did not reach the EEOC's alternative argument that Holt had a record of a disability based on his 2007 back injury, and the EEOC does not advance this argument on appeal. Establishing coverage under the ADA's regarded-as provision suffices to hold BNSF liable here; no additional protection is gained by establishing record-of coverage as well. *See* 29 C.F.R. § 1630.2(g)(3).

42 U.S.C. § 12102(3)(A); *Mercado v. Puerto Rico*, 814 F.3d 581, 588 (1st Cir. 2016) (ADA plaintiff "need plead and prove only that the defendants regarded [him] as having a physical or mental impairment, no matter the defendants' view of the magnitude of the effect of the perceived impairment on her daily life activities"). Moreover, the definitions of disability are to be construed in favor of "*broad coverage* of individuals … to the maximum extent permitted" by the terms of the amended statute. 42 U.S.C. § 12102(4)(A) (emphasis added); *Rohr*, 555 F.3d at 861.

Because the ADAAA accomplished such a major shift in regarded-as coverage, cases applying pre-ADAAA standards—including Supreme Court decisions—are no longer good law on this point. *See, e.g.*, Findings and Purposes of ADAAA [42 U.S.C. § 12101 note] (b)(3) (ADAAA's purposes include "reject[ing] the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) with regard to coverage under the [regarded-as] prong of the definition of disability"). *Compare, e.g.*, *Mercado*, 814 F.3d at 588, *with Walton v. U.S. Marshals Serv.*, 492 F.3d 998, 1006 (9th Cir. 2007) (to establish "regarded as" claim, plaintiff must provide evidence employer "subjectively believes that the plaintiff is substantially limited in a major life activity."). In light of this, the district court properly found BNSF's reliance on pre-ADAAA cases "not helpful." *See* RE.154.

When BNSF conducted its post-offer, pre-employment medical review of Holt in the fall of 2011, his back condition constituted an impairment within the meaning of the ADA. Although Holt was pain-free at the time, his musculoskeletal anomaly (two-disc extrusion) that began in 2007 still existed. BNSF's actions at the time and its subsequent explanations in this litigation demonstrate that Holt's back condition was the basis for its 2011 demand that Holt procure a current MRI—a demand that BNSF maintained even after Holt told BNSF he would have to pay for it himself and could not afford to do so. And Holt's inability to procure the MRI was the reason BNSF failed to hire him. Thus, the district court correctly held that Holt fell within the ADA's regarded-as definition of disability, because the EEOC demonstrated that Holt was subjected to an ADA-prohibited action—rescission of his job offer—because of a physical impairment—Holt's back condition. *See* 42 U.S.C. §§ 12102(1)(C) & (3)(A).

BNSF argued below, and repeats on appeal, that it did not perceive Holt to have any impairment when it was reviewing Holt's medical information and considering his fitness for the job. The company argues that, while the ADAAA eliminated the need to show the employer perceived an impairment to be *substantially limiting*, it did not eliminate the need for an employer to believe an impairment currently existed. *Id.* at 34. It further argues that, in the fall of 2011, it knew only that Holt had a prior back condition, knowledge that BNSF says raised

questions about the current state of Holt's back, but not a belief that any impairment still existed. BNSF-Brf at 33-36. The district court properly rejected this contention, and this Court should as well.

The EEOC agrees that regarded-as coverage requires a showing that the individual had a current impairment—*i.e.*, any "physiological disorder or condition," including one affecting the musculoskeletal system, 29 C.F.R. § 1630.2(h)—or that the employer wrongly thought he did, and that the employer took action because of it. But BNSF's arguments that Holt did not have, and it did not perceive him to have, any ADA impairment in 2011 contradicts both medical evidence in the record and testimony of BNSF's chief medical officer.

First, although Holt was symptom-free in 2011, the record establishes that his back condition satisfied the definition of an ADA impairment based on the medical evidence. Before demanding Holt procure a current MRI, Dr. Jarrard reviewed Holt's 2007 MRI report, which showed a two-disc extrusion on Holt's spine. RE.1367. As Dr. Jarrard knew from his medical training, Holt's diagnosis of an extrusion indicated that the gelatinous, shock-absorbing spinal material known as "nucleus pulposus" had squeezed out of two of Holt's vertebrae into the spinal canal. RE.731-732, 743-44 (deposition of Dr. Heck).

Dr. Jarrard agreed in his deposition that once such a disc extrusion occurs, the extruded gelatinous material cannot return to the interior of the vertebrae

(likening it to toothpaste squeezed out of a tube). RE.558-60, 900. He further conceded that the human body does not regenerate the extruded gelatinous material once it is pushed out of a vertebra. RE.900-901. In both senses, Dr. Jarrard's testimony demonstrates that he knew, in 2011, that Holt's 2007 back condition involved a permanent alteration of Holt's musculoskeletal system.[8]

Furthermore, Dr. Jarrard's own testimony confirms that in 2011 he viewed Holt's back condition as grounds for ongoing concern. When he instructed CHS to require Holt to provide a current MRI, he told CHS to inform Holt the request was based on the "due to uncertain prognosis of your back condition," RE1493, a statement that contradicts BNSF's position on appeal that Dr. Jarrard did not think Holt had any back "condition" in 2011. BNSF-Brf at 35-36. Dr. Jarrard explained in his deposition that he insisted on a current MRI despite the favorable contemporaneous medical opinions of Holt's personal doctors and the CHS examining doctor because those opinions "[did]n't prove that [Holt] doesn't still

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[8] BNSF quotes Dr. Jarrard's statement that the extrusion could have possibly "healed or been resorbed," BNSF-Brf at 35, but even if the extruded fluid were resorbed into other parts of the body, that would not alter the permanent nature of the extrusion that the 2007 MRI revealed. RE.558-60, 900-01. BNSF also quotes Dr. Jarrard as saying "it could have been a nonissue in 2011," that he "just didn't know." BNSF-Brf at 35. In fact, Holt's back *was* a nonissue in 2011, but not because the impairment no longer existed. The impairment was a "nonissue" in 2011 because it did not interfere in any way with Holt's ability to do the job for which BNSF conditionally hired him, as three separate medical professionals had confirmed.

have major pathology, that is a hair's breath away from leaving him paraplegic or having complete numbness in a leg or losing muscle movement when he's needing to use those legs … for his job." RE.561.

Dr. Jarrard's reference to the "uncertain prognosis" of Holt's "back condition," his characterization of Holt's 2007 musculoskeletal condition as "major pathology," and his statement that he ordered the 2011 MRI because he considered it possible that in the fall of 2011 Holt was "a hair's breath away" from becoming a paraplegic because of his back condition all belie BNSF's arguments that Dr. Jarrard did not regard Holt as having an existing back impairment in 2011. A reasonable jury could only conclude from this evidence that Dr. Jarrard believed that Holt's underlying spine impairment, which began in 2007, still existed in 2011.

The pain and other physical manifestations of such a condition can be addressed through medical interventions, and the symptoms may subside over time. This was so in Holt's case. But the physical change in the musculoskeletal system remains. Thus—as Dr. Jarrard knew when he saw Holt's 2007 MRI and read his 2007-2009 medical records—Holt's back impairment was a physiological disorder of his musculoskeletal system that began in 2007 and still existed in 2011. BNSF's awareness of the impairment is what caused BNSF to demand Holt procure a current MRI before proceeding further with the hiring process. And

Holt's inability to procure the MRI was what caused BNSF to rescind his job offer. The district court thus correctly ruled that the EEOC met the "extremely low bar" for regarded-as coverage that Congress established with the ADAAA. RE.154.

BNSF cites numerous cases for the noncontroversial proposition that the alleged impairment must exist (or the employer must believe it exists) at the time of the discrimination. BNSF-Brf at 34-38. As noted above, the EEOC agrees. In all other respects, the cases BNSF cites are inapposite.

BNSF's reliance on cases involving fitness-for-duty examinations of *existing* employees is misplaced, because those decisions are premised on a different legal standard. BNSF argues these cases show that an employer's request for more information about a psychiatric or medical condition, alone, does not establish that the employer regards the employee as disabled. *See, e.g.*, *Lanman v. Johnson Cnty.*, 393 F.3d 1151, 1156-57 (10th Cir. 2004); *Magdaleno v. Washington Cnty.*, 277 F. App'x 679, 681 (9th Cir. 2008); BNSF-Brf at 37-38 & cases cited at nn. 7 & 8. But in each of these cases, the court found the employer's request for a medical/psychiatric examination of an existing employee was justified as "job-related and consistent with business necessity" under 42 U.S.C. § 12112(d)(4)(A). Consequently, none of the plaintiffs could have established they were "regarded as disabled" even under the current ADA definition, because to fall within that definition, the employee must have an impairment that caused the employer to take

"an action prohibited under [the ADA]." *Id.* When an employer establishes that a medical request or inquiry of an existing employee was justified by business necessity, there has been no ADA violation; the statute prohibits only those medical examinations of employees that are *not* justified by business necessity. Because Holt was not yet an employee, BNSF's actions were governed under a different ADA provision that imposes a different legal standard, and these decisions are not useful.

BNSF cites two cases involving individuals who had received job offers from BNSF that it thereafter rescinded for not procuring requested follow-up medical tests. In both, the courts found no regarded-as coverage based on the absence of any evidence that a "physiological disorder or condition" existed, or that BNSF believed it existed, when BNSF rescinded the job offers. Moreover, the courts in both cases relied on a conclusion that morbid obesity is not an impairment, which is not an issue here. *See Morriss v. BNSF Ry. Co.*, 817 F.3d 104 (8th Cir. 2016); *Taylor v. Burlington N. R.R.*, 2016 WL 865350 (W.D. Wash. March 7, 2016) (obesity not an impairment and no evidence BNSF perceived Taylor as presently disabled due to his knees and back when he applied to BNSF), appeal pending No. 16-35205 (9th Cir.).[9]

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[9] EEOC filed an amicus brief in *Taylor* to argue that the district court relied on a

This case differs. As explained above, the evidence here shows that although Holt's 2007 back injury was asymptomatic in 2011, it was an ongoing anatomical disorder that constituted an impairment within the meaning of the ADA. *Morriss* and *Taylor* are, therefore, inapposite on this basis. Properly applying the broadened, ADAAA standard for coverage under the "regarded-as" prong, the district court correctly ruled that no reasonable jury could but find that BNSF regarded Holt as disabled under the ADA.

D. **The district court correctly ruled that BNSF violated the ADA.**

The discrimination prohibited by § 12112(a) of the ADA encompasses medical examinations and inquiries. That is, the ADA prohibits an employer from discriminating against a qualified job applicant on the basis of disability when it administers medical examinations, conducts medical inquiries, and relies on the results for its hiring decisions. *See* 42 U.S.C. §§ 12112(a), (d)(1), & (d)(3)(C). The district court correctly ruled that BNSF violated this prohibition by treating Holt's job application as withdrawn even though: Holt indicated he still wanted the job; the evidence in BNSF's possession from four distinct sources showed Holt was medically fit for the job; and BNSF failed to establish any of the ADA's available defenses.

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misreading of the EEOC's guidance on morbid obesity.

An employer may conduct a post-offer medical examination and may condition an offer of employment on the results of that examination as long as, among other limitations, "the results of such examination are used only in accordance with this subchapter." 42 U.S.C. § 12112(d)(3)(C). If an employer, based on information derived from a pre-employment medical examination, disqualifies a prospective employee for reasons related to an impairment—despite evidence that the individual has for years successfully performed a similar job and is currently medically fit for the job, and despite the absence of any evidence that he is unable to perform the job's essential functions—the employer has failed to use the results of the examination in accordance with the ADA. This is so because absent establishment of one of the ADA's affirmative defenses, § 12112(a) prohibits employers from discriminating against a qualified individual "on the basis of disability" in regard to "hiring."

BNSF attempts to justify its conduct by characterizing it as "not making a decision about Holt's medical qualifications." *See, e.g.*, BNSF-Brf at 41. In fact, what BNSF did was revoke the job offer it had extended to Holt, for a reason plainly tied to his impairment: it rescinded the offer because Holt did not provide a current MRI, which BNSF demanded only because the pre-employment medical examination revealed Holt had an (asymptomatic) back impairment. As a matter of basic logic, this was "on the basis of disability," and the district court correctly

rejected BNSF's argument to the contrary.

The cases BNSF cites fail to support its contention that it did not act on the basis of Holt's disability. While the plaintiff in *Mendoza v. The Roman Catholic Archbishop of Los Angeles*, 824 F.3d 1148 (9th Cir. 2016) (*per curiam*), was out on extended disability leave, the defendant learned her job could be completed part-time. When she returned to work, she challenged her employer's alteration of her job from full-time to part-time as violating the ADA. But regardless of *how* the employer learned that her job could be accomplished in fewer hours, it was that knowledge—not the plaintiff's medical condition—that prompted the employer to convert the job to part-time. This Court correctly held that this was not discrimination "on the basis of disability." *Id.* at 1150.

Roberts v. City of Chicago, 817 F.3d 561 (7th Cir. 2016), offers a somewhat closer analogy, but is also distinguishable. As part of a court-ordered remediation of race discrimination in hiring, the City was ordered to produce a randomized list of all class members and to hire the first 111 who completed all of the designated hiring prerequisites, the last step of which was the medical clearance. Plaintiffs were numbers 181 and 302 on the list. They successfully completed the non-medical prerequisites and then underwent the medical review process, where both were required to provide additional documentation of, among other things, their pulmonary function. Both ultimately completed the process, but were not among

the first 111 and were not hired. *Id.* at 563. The court of appeals rejected the plaintiffs' claim that they were not hired because of their disabilities, stating it insufficient for the plaintiffs to show they were not hired "because of a delay in medical clearance, even if that delay was caused by their disabilities." *Id.* at 565.

Roberts's unique factual posture undermines the analogy BNSF seeks to draw. The City was hiring from a specified pool of race-discrimination claimants that far exceeded the number of job openings. *Id.* at 563. Furthermore, the City was under court order to proceed as quickly as possible and to hire the first 111 candidates who completed all steps, but the position (firefighter) required the City to ensure these candidates were medically qualified. *Id.* at 563-64. Under these unusual facts, it is not hard to understand why the Seventh Circuit ruled that the City's compliance with a district court's remedial order did not violate the ADA.[10]

Likewise, there is no merit to BNSF's contention that "the ADA's medical-examination provisions authorize" its conduct here. BNSF-Brf at 43-57. The Seventh Circuit did not, as BNSF incorrectly claims, "expressly … permit[] the very conduct the district court here found unlawful." BNSF-Brf at 60; *see also* BNSF-Brf 49-50 (discussing *O'Neal v. City of New Albany*, 293 F.3d 998 (7th Cir.

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[10] If an employer engaged in the same conduct as the City of Chicago apart from a court's remedial order, it might very well violate the ADA for the same reasons the district court ruled BNSF violated the ADA here.

2002)). Rather, the court never addressed the question.

There are superficial similarities between *O'Neal* and the present case: the employer in *O'Neal* extended O'Neal a job offer; conducted a pre-employment medical examination; demanded expensive additional medical testing at O'Neal's own expense which he did not undertake; and then failed to hire him on the ground that his medical examination was incomplete. *See O'Neal*, 293 F.3d at 1002.

But there is a critical distinction. *O'Neal* was a pre-ADAAA case, and so O'Neal did not and likely could not assert he was "disabled." *Id.* at 1007, 1010. The Seventh Circuit therefore never reached the legal question before this Court: whether the employer discriminated against a *disabled* individual. Specifically, the Seventh Circuit never ruled that the City's revocation of O'Neal's job offer for failing to procure a supplemental medical test comported with § 12112(d)(3)(C)'s requirement that the results of a pre-employment examination be used only in accordance with the ADA.

O'Neal's ruling that "[a] post-offer examination does not have to be job-related," *id.* at 1008, is a point the EEOC does not contest. *See* discussion *supra* at pp. 26-27. What the EEOC contests is BNSF's argument that the ADA permits it to revoke a job offer from an individual with an ADA disability who is qualified to do the job. Unless the employer can establish an ADA-authorized defense, that action is not "in accordance with" the ADA.

In its Answer, BNSF asserted a direct threat defense that it later abandoned. RE.1573, ¶ 4; RE.306-07; *see* 42 U.S.C. § 12113(b); 29 C.F.R. § 1630.15(b)(2). The district court correctly ruled that BNSF did not satisfy its burden to establish this defense in any event, RE.155-56, and BNSF does not assert it or any other ADA-authorized defense on appeal. What BNSF does argue on appeal is that the district court should have found it not liable because it acted based on a company practice unrelated to disability.

It is true that an employer may avoid liability under the ADA by demonstrating that it rejected an applicant for reasons unrelated to disability. For example, courts have recognized employers' right to rescind job offers upon learning that an applicant lied on the job application, *see Leonel*, 400 F.3d at 709 n.13, or was uncooperative during the pre-employment medical examination process by, for example, refusing to produce existing, available medical records, *Dukes v. Shinseki*, 671 F. Supp. 2d 106, 112 (D.D.C. 2009). *See also* cases cited in BNSF-Brf at 46-48 (dishonesty or lack of cooperation during hiring process); RE.152.

BNSF contends that its conduct toward Holt falls within this category of actions, based on its uniform rule of discontinuing the hiring process whenever an individual fails to cooperate. *E.g.* BNSF-Brf at 24, 40. But Holt was neither untruthful nor uncooperative: he disclosed his back condition to CHS during the

pre-employment medical examination, and he attempted (unsuccessfully) to procure a new MRI.[11] Indeed, BNSF did not dispute below that Holt (1) advised BNSF that his doctor would not order the MRI, (2) told BNSF he could not pay for it himself, and (3) asked BNSF to waive the requirement that he provide an MRI at his own cost. *Compare* RE.1315-16 (EEOC Facts ## 15, 17, 18) *with* RE.291-92 (disputing other portions of ##15 and 17 but not these points; no dispute over #18).

Additionally, the EEOC pointed out below that BNSF employee Joy George told Holt that Dr. Jarrard bases his determination of medical fitness not on Holt's current ability to perform the job but on the possibility of a future injury. RE.1315 (EEOC Fact #17). This evidence further demonstrates that BNSF's decision to demand a new MRI was premised on Holt's back impairment. *See Garrison*, 287 F.3d at 958-61. BNSF disputed this statement solely on the grounds that George could not recall speaking to Holt (notwithstanding she emailed Holt on 11/15/2011 asking him to call her, RE.1566-69) and did not believe she would make such a statement. RE.292 (BNSF response to ¶17). This constitutes an insufficient basis to dispute a proposed summary judgment fact. *See Federal*

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[11] Amici, in their brief, repeatedly mischaracterize the issue in this appeal as the lawfulness of revoking a conditional job offer when a candidate has *refused* to comply or *failed* to cooperate with a lawful pre-employment inquiry. *See, e.g.*, Amici-Brf at 5, 6, 7, 8. Because that reflects neither the facts of this case nor the district court's ruling, most of Amici's arguments are beside the point.

Election Comm'n v. Toledano, 317 F.3d 939, 950 (9th Cir. 2003) (failures of recollection insufficient to establish genuine factual dispute); *see also Hairston v. Vance-Cooks*, 773 F.3d 266, 272-73 (D.C. Cir. 2014) (same).

In any event, even without this one sentence, the record contains sufficient undisputed facts to affirm the district court's liability ruling. As the district court correctly held, a reasonable jury "could not escape the conclusion" that BNSF failed to use the results of Holt's pre-employment medical examination "in accordance with [the ADA]," *see* § 12112(d)(3)(C), because but for the results of that examination, BNSF would not have demanded a new MRI, and but for Holt's inability to procure the a MRI, BNSF "would not have treated Mr. Holt as though he had declined his offer, although he had not." RE.153.

The court did not, as BNSF and Amici wrongly contend, hold that a conditional job offer is "irrevocable" even for a reason having nothing to do with disability, unless the reason is "job-related and consistent with business necessity." BNSF-Brf at 43-44; Amici-Brf at 7, 9. To the contrary, the court's liability and injunction rulings both acknowledge that applicants have a "generic cooperation obligation." RE.152; RE.9 ¶ 2; *see also Garrison*, 287 F.3d at 961 n.5 (ADA permits "withdrawing conditional job offers from entering employees who lie on medical questionnaires"). As the court's liability, damages, and injunctive orders demonstrate, the court held that BNSF violated the ADA by rescinding Holt's job

offer for reasons relating to his ADA impairment and in the absence of any ADA defense. The district court did not misread *Garrison* (BNSF-Brf at 44); it applied the same reasoning as the Tenth Circuit in that case. *Compare* RE.153 *with Garrison*, 287 F.3d at 960-61 (evidence was sufficient for jury to conclude defendant withdrew job offer based on a discriminatory use of medical exam results—*i.e.*, speculation that plaintiff's perceived disability created future risk of injury).

The text, structure, context, and purpose of the ADA's distinct medical examination provisions—one governing existing employees, the other two governing applicants—support the district court's decision. BNSF's argument to the contrary (BNSF-Brf at 53-57) rests on two steps, both of which are flawed. First, BNSF notes that employers that meet the statutory condition to "require" a medical examination of an existing employee under § 12112(d)(4)(A) may discharge an employee who refuses to cooperate (noting that a handful of courts have also held the employer may require the employee to pay for the examination). *See* BNSF-Brf at 51-53 and cases cited in nn.16-20. Second, BNSF argues that Congress's use of the same word "require" in the pre-employment medical examination provision ("may require a medical examination") "must mean that an *applicant*'s failure to attend a medical examination … (and even pay for it if required) is a legitimate, non-discriminatory reason not to start an employment

relationship." BNSF-Brf at 53-54. BNSF further argues that Congress must have wished to extend more protections to existing employees, who are presumptively medically qualified (given they have been performing the job), so if existing employees can be fired for not undergoing a required medical examination, surely applicants can be rejected for that reason as well. *Id.* at 54-57.

BNSF's textual argument has numerous flaws, but primarily it fails because it ignores a critical difference between the two statutory provisions: it omits mention of the significant statutory condition an employer must satisfy before compelling an existing employee to attend a medical/psychological examination or risk discharge under § 12112(d)(4)(A): the employer must show the examination or inquiry is "job-related and consistent with business necessity."

The protection from intrusive medical inquiries that existing employees receive under the "business necessity" standard does not extend to initial examinations of applicants under § 12112(d)(3). *See* 29 C.F.R. § 1630.14(b)(3) ("Medical examinations [of applicants] do not have to be job-related and consistent with business necessity"). But this does not mean the statute provides applicants *no* protections in this regard. They are protected, instead, when the employer seeks to use information garnered during the pre-employment medical examination process to reject the applicant, because any criteria used to screen out an individual with a disability as a result of the pre-employment examination or inquiry "must be

job-related and consistent with business necessity." *Id.*; *see also* 29 C.F.R. § 1630.15(b).

The cases BNSF cites on pages 51-53 of its brief all involved medical examinations of existing employees where the courts found the employer had established business necessity, a standard this Court describes as "quite high." *Brownfield v. City of Yakima*, 612 F.3d 1140, 1145 (9th Cir. 2010). The fact that employers may discharge an existing employee who refuses to undergo a fitness-for-duty examination under such circumstances sheds no light on whether BNSF could lawfully revoke Holt's job offer where he tried, but was unable, to comply with the request for a new MRI. Likewise, the fact that one circuit upheld an employer's requirement that the employee pay for an examination that was justified by business necessity does not suggest BNSF could refuse to hire Holt where he was unable to pay for the MRI, particularly where ample evidence showed he was medically qualified, and BNSF established no ADA defense to the failure to hire.[12]

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[12] BNSF's reliance on EEOC's interpretive guidance for medical examinations of *employees* (BNSF-Brf at 50-51) is similarly inapplicable here. BNSF mischaracterizes what the guidance says in questions 11 and 12 about when employers must bear the cost of an examination. More importantly, however, the guidance is inapplicable because it rests on the specific considerations that govern an existing employee's request for reasonable accommodation (question 11) or direct threat (question 12), not an employer's requirement of a pre-employment

BNSF and Amici also misrepresent the district court's decision when they assert the court held that an employer "must pay the cost of any requested follow-up medical testing or information sought as part of a post-offer medical examination." BNSF-Brf at 44; *see, e.g.*, Amici-Brf at 8, 29-30. This is not so. Rather, the court gave BNSF a choice: pay for the test, or make a hiring decision without it. RE.9.

Finally, BNSF wrongly argues it can only be held liable under the ADA if the EEOC establishes that BNSF's asserted reason for not hiring Holt (failure to procure a current MRI) was a "pretext" for a motive based on discriminatory "animus." BNSF-Brf at 39-43 & n.13; *see also id.* at 56-57. Pretext analysis applies only when the parties dispute what reason prompted an employer to impose an adverse action on an individual with a disability. *E.g.*, *Curley v. City of N. Las Vegas*, 772 F.3d 629, 632 (9th Cir. 2014) (applying pretext analysis where plaintiff alleged termination because of his hearing impairment and City alleged termination was because of plaintiff's past threats to other employees). Where undisputed evidence shows the action was taken because of the impairment, neither a pretext analysis nor proof of "animus" is necessary. *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 988 (9th Cir. 2007); *cf. Monette v. Elec. Data Sys.*

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medical examination. The EEOC's Pre-employment Guidance, discussed *supra* at pp.26-27, is the relevant guidance governing the present case.

Corp., 90 F.3d 1173, 1182-83 (6th Cir. 1996) (burden-shifting framework used sometimes in disparate treatment claims is unnecessary where employer admits taking disability into account), *abrogated on other grounds by Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 314-17 (6th Cir. 2012) (en banc).

In sum, the district court properly granted summary judgment to the EEOC on liability because undisputed evidence establishes BNSF violated the ADA: the available medical evidence showed Holt was medically fit for the job; BNSF required a new MRI only because of Holt's back impairment; Holt tried to procure the MRI but was unable to because of cost; and BNSF established no ADA-authorized defense for not hiring Holt. Summary judgment on liability should be affirmed.

E. BNSF also violated the ADA's prohibition against using qualification standards that screen out a person with a disability and are not justified by business necessity.

The legal theory under which the EEOC sought partial summary judgment on liability provides an alternative ground for affirming the district court. As noted above, the disability-based discrimination prohibited by § 12112(a) includes using "qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability" unless the employer can demonstrate that the qualification standard or selection criteria is "job-related for the position in question" and "consistent with business necessity." 42 U.S.C.

§ 12112(b)(6).

In denying BNSF's motion to dismiss, the district court noted that "BNSF's requirement that Holt procure a follow-up MRI after the post-offer, pre-employment examination" served, in effect, as "a screening criterion that screened out an applicant with a disability," namely Holt, "by imposing an expensive additional requirement not imposed on other applicants." RE.163. Therefore, as the EEOC argued below, under § 12112(b)(6), BNSF's refusal to hire Holt where he tried, but was unable, to obtain a new MRI violated the ADA unless BNSF demonstrated that the insistence on a current MRI was "job-related for the position in question" and "consistent with business necessity." *See* RE.1322-23.

Employers bear the burden of proving both that the selection criterion or standard is "job-related" and that its use is based on "business necessity." *Cripe v. City of San Jose*, 261 F.3d 877, 890 (9th Cir. 2001). Showing job-relatedness requires evidence "that the qualification standard fairly and accurately measures the individual's actual ability to perform the essential functions of the job." *Bates*, 511 F.3d at 996 (employer must show "significant correlation" between the criterion applied and actual performance of the job). The standard for establishing business necessity under this provision is "quite high." *Cripe*, 261 F.3d at 890. As this Court explained, it is not enough to show "mere expediency"; the employer must demonstrate that the qualification standard "is *necessary* for the operation of

the employer's business," *id.* (emphasis added), and that it "'substantially promote[s]' the business's needs." *Bates*, 511 F.3d at 996 (quoting *Cripe*, 261 F.3d at 890).

Nothing in the record establishes either job-relatedness or business necessity for a new MRI. Indeed, BNSF did not even attempt to make such a showing. It argued instead that it has no obligation to justify requesting the MRI and then not hiring Holt based on his inability to procure it. BNSF is half correct. Employers have the right to request any medically-related supplemental information as part of the post-offer, pre-employment medical examination process. *See, e.g.*, 29 C.F.R. § 1630.14(b)(3); Pre-Employment Guidance, text accompanying n.22. But once BNSF decided not to hire Holt because he failed to satisfy the selection criterion it imposed on him (procuring a new MRI), the plain language of 42 U.S.C. § 12112(b)(6) obligated BNSF to demonstrate it had a business necessity for employing this selection criterion, a statutory obligation BNSF has not satisfied.

Significantly, Dr. Jarrard demanded a new MRI against a backdrop of evidence from four separate sources that Holt *could* perform the job duties of a Senior Patrol Officer. Holt had informed BNSF that despite injuring his back in 2007, he worked consistently as a law enforcement officer over the next four years without missing any work due to back pain or needing light duty or any other accommodation. BNSF could have readily confirmed the accuracy of this

representation if it chose to.

BNSF also had letters from Holt's personal physician stating Holt was asymptomatic and from his chiropractor stating he could perform the job. And BNSF had the opinion of its own contract doctor, who found no functional limitations and deemed Holt able to perform the job without injury for at least the next two years, an opinion she rendered only after performing an extensive physical and medical examination that included a test designed specifically to measure the fitness of an individual's back.

Given affirmative evidence of medical fitness from three doctors, Holt's ability to perform a virtually identical job, and no medical evidence to the contrary, BNSF established *no* business necessity for making a new MRI an unwaivable condition for proceeding with the hiring process. In essence, BNSF's actions here shifted the burden onto Holt to disprove, at his own expense, that when BNSF made its decision, he posed a direct threat. The ADA does not work that way. *See Echazabal v. Chevron USA, Inc.*, 336 F.3d 1023, 1027, 1030 (9th Cir. 2003) (direct threat is an affirmative defense that employer bears the burden of establishing and requires consideration of more than "generalized statements of potential harm").

The fact that Holt required back surgery two years after BNSF revoked his job offer is immaterial to whether BNSF violated the ADA when it made that decision in December 2011. As this Court has explained, an employer's conduct

must be judged based on the evidence it had at that time, and not based on circumstances that materialized years later. *See Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1248 (9th Cir. 1999) (medical evidence of plaintiff's condition two years after her termination was insufficient to justify employer's decision); *cf. Basden v. Prof'l Transp., Inc.*, 714 F.3d 1034, 1037 (7th Cir. 2013) (whether an individual is qualified under the ADA should be assessed as of the time of the relevant employment decision).

The selection criterion BNSF applied to Holt (procurement of a new MRI) screened him out when he could not comply, despite trying. BNSF was thus obligated to demonstrate a business necessity for applying this criterion to Holt. Because it did not do so, BNSF's rescission of Holt's job offer constitutes "discriminat[ion] against a qualified individual on the basis of disability" in violation of the ADA. 42 U.S.C. § 12112(b); 29 C.F.R. § 1630.14(b)(3). *See Bates*, 511 F.3d at 994; *EEOC v. Am. Tool & Mold, Inc.*, 21 F. Supp. 3d 1268, 1282-85 (M.D. Fla. 2014) (employer violated ADA by revoking job offer based on plaintiff's inability to produce requested supplemental medical document where request was not justified by business necessity).

This Court's reliance on § 12112(b)(6) as a basis for the ADA violation in *Bates* demonstrates that § 12112(b)(6) is not limited to cases of disparate impact, as BNSF incorrectly argued below and the district court mistakenly believed.

RE.148-49. As this Court explained, the hearing standard UPS used to screen job applicants was "a *facially discriminatory* qualification standard because it focuse[d] directly on an individual's disabling or potentially disabling condition."[13] *Bates*, 511 F.3d at 988. *Bates* itself reconfirmed existing circuit precedent that the "ADA's business necessity defense may be asserted to defend against disparate treatment [and] disparate impact" claims under the ADA. *Id.* at 995 n.10.

Although in *Bates* the same selection criterion applied to every applicant, nothing in the language of § 12112(b)(6) restricts its application to such situations. Rather, § 12112(b)(6) applies even where a selection criterion screens out only a single individual with a disability. *See* 42 U.S.C. §12112(b)(6) ("screen out … an individual with a disability"). Indeed, to read the provision otherwise would create a significant loophole: unscrupulous employers could individually tailor their selection criteria to screen out a specific individual applicant with a disability, and then claim nothing in the ADA prohibits such tactics. Such an outcome flies in the face of the ADA's basic purpose that "persons with disabilities should not be excluded from job opportunities unless they are actually unable to do the job." H.R. Rep. No. 101-485 (III), at 31 (1990), *reprinted at* 1990 U.S.C.C.A.N. 445, 454.

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[13] The district court misunderstood *Bates* when it stated it was not a disparate treatment case. *See* RE.149.

II. The District Court Acted Within its Discretion by Imposing a Nationwide Injunction on BNSF to Prevent BNSF from Continuing to Violate the ADA.

After ruling that BNSF's conduct violated the ADA, the district court enjoined BNSF from continuing to engage in this unlawful, company-wide practice. R.160. This Court reviews a district court's grant of injunctive relief for abuse of discretion and the application of correct legal principles. *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1519 (9th Cir. 1989), *overruled on other grounds by Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

BNSF argues that the district court applied the wrong legal standard or, alternatively, abused its discretion by entering an injunction that was geographically too broad. BNSF-Brf at 58-61. BNSF is wrong on both accounts. The court applied longstanding circuit standards that remain controlling law. Its order requiring BNSF to cease conduct the court found unlawful, and which BNSF admits it follows nationwide, falls well within the court's discretionary authority under the ADA.

First, the injunction is statutorily authorized. The ADA incorporates the statutory remedies of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 12117(a). Those remedies expressly authorize district courts to enjoin employers that intentionally engage in unlawful employment practices from continuing to engage in such conduct, and further authorize courts to "order such affirmative

action as may be appropriate." 42 U.S.C. § 2000e-5(g)(1).

Second, on this factual record, the injunction is solidly grounded in longstanding circuit and Supreme Court precedent. In contrast to other federal statutes, district courts acting under Title VII (and, therefore, the ADA) have both the power and the duty to issue remedial orders that not only eliminate the effects of past discrimination but also bar similar discrimination in the future. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). Consistent with this principle, this Court has held that "[g]enerally, a person subjected to employment discrimination is entitled to an injunction against future discrimination, … unless the employer proves it is unlikely to repeat the practice." *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1544 (9th Cir. 1987) (citations omitted); *see also United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *Hacienda Hotel*, 881 F.2d at 1518-19. Other circuits apply the same test. *See, e.g.*, *EEOC v. Autozone, Inc.*, 707 F.3d 824, 840-41 (7th Cir. 2013). Where the EEOC is the plaintiff, the EEOC acts "not merely [as] a proxy for the victims of discrimination" but "also to vindicate the public interest in preventing employment discrimination." *General Tel. Co. v. EEOC*, 446 U.S. 318, 326 (1980); *see also EEOC v. Waffle House, Inc.*, 534 U.S. 279, 296 (2002) (same).

The injunction here is necessary to prevent future discrimination in BNSF's hiring process and thereby vindicate the public interest because, as the district

court noted, BNSF offered no assurance that it intended to cease this practice. *See* RE.8. As the court pointed out, "BNSF's briefing … includes not a single affirmative assurance that BNSF will not repeat the conduct the Court found unlawful in this case, or that BNSF has made any changes whatsoever to any of its policies or practices." *Id.* Instead, when it moved for reconsideration on liability, BNSF argued only how difficult it would be to conform its company practices to the court's ruling. *See* RE.250 (characterizing compliance as requiring "a fundamental reordering of [BNSF's] post-offer medical-examination process"); RE.253 (describing impact of the court's liability finding on BNSF as "sweeping").

BNSF admitted that its practice of requesting follow-up medical information is inevitably directed at applicants who have conditions that "do or may fit the definition of an ADA 'impairment.'" RE.252-53. BNSF has also stated that when an applicant fails to provide requested supplemental information for any reason, including cost, BNSF does not determine medical fitness based on the information it has but treats the individual as having declined the job offer. *See* RE.8 (citing R.143 at 6 (SER.11)).

BNSF's representations reflect "conduct the Court found unlawful in this case." *Id.* Given BNSF's failure to indicate any intention to alter its practices voluntarily, the district court had the discretion to enjoin such unlawful conduct in the future. As the court explained: "Without even a single assurance that BNSF's

policies or practices have changed or will change, the Court cannot conclude that 'there is no reasonable expectation that the wrong will be repeated.'" *Id*. (quoting *Grant*, 345 U.S. at 633). The injunction is well-grounded on this factual record and should be affirmed.

BNSF wrongly faults the EEOC for citing Title VII cases in support of injunctive relief. BNSF-Brf at 59. As the Supreme Court observed in *Waffle House*, "Congress has directed the EEOC to exercise the same enforcement powers, remedies, and procedures that are set forth in Title VII … when it is enforcing the ADA's prohibitions against employment discrimination on the basis of disability." *Waffle House*, 534 U.S. at 285. The district court properly relied on these cases in granting the injunction. *See* RE.7-8.

BNSF is incorrect when it argues that this Court's longstanding precedent has been implicitly overturned by Supreme Court cases applying the traditional four-factor test for injunctive relief under entirely different statutory schemes. BNSF-Brf at 58-59. Implicit overruling occurs only when the theory or reasoning of circuit precedent is "clearly irreconcilable" with subsequent Supreme Court decisions. *Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003). That was the case in *BNSF Railway Co. v. O'Dea*, 572 F.3d 785, 789-91 (9th Cir. 2009). It is not the case here. The reasoning underlying the injunctions upheld in the Ninth Circuit decisions relied upon by the district court rests on the importance of

eliminating unlawful discrimination from the workplace once a violation has been found. *See, e.g.*, *Hacienda Hotel*, 881 F.2d at 1519 (recognizing EEOC seeks injunctive relief to "deter[] future unlawful discrimination" and "promote[] *public* policy"). The reasoning of these cases is not "clearly irreconcilable" with the Supreme Court decisions that BNSF cites, none of which addressed violations of civil rights statutes. *See* BNSF-Brf at 58-59. There was no need for the district court to abandon the standards this Court established in *Goodyear Aerospace* and *Hacienda Hotel* in favor of a four-factor test that governs injunctions in other contexts.

Finally, the scope of this injunction is not overbroad, geographically or otherwise. BNSF cites cases for the proposition that an injunction must be narrowly tailored to the specific harm at issue, *see* BNSF-Brf at 60, but that is exactly what the district court did here. The court declined to order the training, posting, and reporting injunction requests to which BNSF objected. *Compare* RE.192 *and* RE.196-97 *to* RE.8-10. Instead, the court enjoined BNSF from engaging in the specific conduct the court found unlawful—conduct BNSF acknowledges is its established company policy. And the injunction expressly provides that nothing in the order requires BNSF to proceed with an application if the individual fails to cooperate.

BNSF wrongly argues that the injunction extends into jurisdictions where

other courts "expressly have permitted the very conduct the district court here found lawful." BNSF-Brf at 60. Unlike what was apparently the situation in *United States v. AMC Entertainment*, 549 F.3d 760 (9th Cir. 2008), the Seventh Circuit never ruled on the legal issue on which the injunction is based, so the decision BNSF references in no way authorizes the conduct the district court found unlawful here.[14] And although BNSF has litigated many other cases with varying facts—each one decided based on the specific circumstances—it points to no case within or outside this Circuit where a court held that the practice enjoined in this case is lawful. Thus, BNSF's claim that geographic restriction is needed to avoid circuit conflicts is simply untrue.

It also makes no sense in these circumstances. BNSF operates under a single chief medical officer located at its Texas headquarters, under whose direction all of these medical fitness determinations are reviewed and decided, irrespective of where the job, or the medical contractor who conducted the medical examination, is located. Given this centralization of decision making, it would undermine the ADA's goals and purposes if Dr. Jarrard, with a stack of medical files on his desk, could determine whether he was required to comply with the ADA or not based solely on where a particular job opening is located.

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[14] Presumably BNSF is referring to *O'Neal* (*see* BNSF-Brf at 49-50). As explained *supra* at pp.40-41, *O'Neal* is wholly inapposite.

The district court's injunction order properly addresses the ADA violation the court found in this case, and no more. Because halting discriminatory workplace conduct is critical to achievement of the important nondiscrimination purposes of the ADA, *Hacienda Hotel*, 881 F.2d at 1519, the order should be affirmed.

CONCLUSION

For the foregoing reasons, the EEOC respectfully urges this Court to affirm the district court's judgment.

STATEMENT OF RELATED CASES

The undersigned knows of no related cases pending before this Court.

Respectfully submitted,

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Dated: December 12, 2016

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,994 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman for both text and footnotes.

/s/ Susan R. Oxford

Dated: December 12, 2016 Susan R. Oxford

CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2016, I filed the EEOC's opening brief with the Clerk of the Court, U.S. Court of Appeals for the Ninth Circuit, using the court's electronic case filing (ECF) system and, on this same date, served the counsel noted below, also by using the Court's ECF system:

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