No. 16-35457

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EEOC,

Plaintiff - Appellee,

v.

BNSF Railway Company,

Defendant – Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WESTERN WASHINGTON, SEATTLE
D.C. NO. 2:14-CV-01488-MJP

OPENING BRIEF OF APPELLANT

Kenneth J. Diamond
Winterbauer & Diamond, PLLC
1200 Fifth Avenue, Suite 1700
Seattle, Washington 98101
ken@winterbauerdiamond.com
Telephone: (206) 676-8440
Facsimile: (206) 676-8441

Bryan P. Neal
Stephen F. Fink
Thompson & Knight LLP
1722 Routh Street, Suite 1500
Dallas, Texas 75201
bryan.neal@tklaw.com
stephen.fink@tklaw.com
Telephone: (214) 969-1700
Facsimile: (214) 969-1751

ATTORNEYS FOR APPELLANT BNSF RAILWAY COMPANY

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 26.1, BNSF Railway Company discloses that it is a Delaware corporation and a wholly-owned subsidiary of Burlington Northern Santa Fe, LLC, a Delaware limited liability company. National Indemnity Company ("NICO"), a Nebraska corporation, is the sole member of Burlington Northern Santa Fe, LLC. NICO is a subsidiary of OBH LLC ("OBH"), a Delaware limited liability company, and OBH is a subsidiary of Berkshire Hathaway Inc. ("Berkshire"), a public company. No public company owns more than 10% of Berkshire's stock.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 in that plaintiff EEOC filed this action under a federal statute, the Americans with Disabilities Act. RE.1578. This Court has jurisdiction under 28 U.S.C. § 1291 in that BNSF appeals from a final judgment (and related orders). RE.4.

The district court entered judgment on March 14, 2016, RE.4-5. BNSF timely filed a motion seeking relief under Federal Rules of Civil Procedure 59 and 60 on April 11, 2016. RE.172. BNSF's notice of appeal filed on May 31, 2016, RE.167, is timely in that BNSF filed it within 60 days after the district court's May 27, 2016 denial of BNSF's timely post-judgment motions. *See* Fed.R.App.P. 4(a)(1)(B),4(a)(4).

ISSUES PRESENTED FOR REVIEW

1. Did the district court err in granting summary judgment to EEOC on liability and denying summary judgment to BNSF in this disability-discrimination failure-to-hire case where there is no evidence of any ADA-covered "disability" and BNSF's physician permissibly sought post-offer follow-up medical information from an applicant, including an updated MRI, because the physician needed the information to evaluate the applicant's ability to safely perform the job at issue, yet the applicant failed to provide any of the information, claiming that he could not afford to provide an updated MRI and offering no explanation for his failure to provide the other requested information?

2. Did the district court err in entering a nationwide injunction against BNSF requiring it to pay the costs of requested follow-up medical testing of applicants where (1) the district court wholly failed to assess the injunction using the traditional four-factor equity test that the Supreme Court has in recent years held *must* be used for all injunctions, and (2) the district court's injunction applies to jobs other than the position at issue in this lawsuit and applies outside of its jurisdiction to other jurisdictions in which courts have held, or strongly indicated they would hold, that BNSF's approach here was lawful?

Addendum Statement:

BNSF has included with the brief an addendum containing applicable statutes and regulatory material.

INTRODUCTION

The district court's decision is both unprecedented and untethered to the statutory text, and its effect is to amend the ADA with two new judicially-created provisions, each of which could have been but was not adopted by Congress, and each of which no doubt surprised all employers. First, the district court made an employer's conditional offer of employment "irrevocable" after receipt of initial medical information except when the employer declines to hire an applicant because the applicant does not satisfy a hiring standard that is job-related and consistent with business necessity. Second, the district court required the employer—rather than the job-seeker, who would therefore normally be expected to invest time and money in the application process—to pay for follow-up information or testing needed to determine the applicant's qualifications for the job.

The district court appeared to be concerned that employers might use unreasonable demands for medical information to exclude applicants with disabilities. But the statute expressly prohibits that conduct—absent here in any event—by allowing applicants to challenge specific employer medical-examination requirements as based on unlawful discriminatory animus. Thus, the district court's judicial amendment of the statute was not just legally wrong but also unnecessary and contrary to the carefully calibrated statutory design. This Court should reverse.

STATEMENT OF THE CASE

A. Facts Relevant to the Issues on Appeal

1. Holt applies for employment

Russell Holt applied for a BNSF Senior Patrol Officer position. RE.1580. BNSF Patrol Officers are certified police officers with the right to use force to detain and arrest suspects. RE.457, 487. They have crime-prevention and other responsibilities and powers similar to those of government police officers. *Id.*; *see* 49 U.S.C. § 28101; 49 C.F.R. Pt. 207; *see also* RE.486-500, 504-07, 533-40, 597-98, 695-702 (describing job duties).

Holt attended a BNSF "hiring event" where he was interviewed. RE.1580, 458-60. Later he received an offer of employment—conditioned on him passing a background check and completing BNSF's post-offer medical-examination process. RE.460-61, 470-72, 1580.

2. Holt's history of back problems

Holt's back problems first developed in March 2007 and reportedly were the result of an injury, perhaps a work-related injury. RE.773-74, 814. He had an MRI, RE.730-31, 806-07, which showed a two-level disc extrusion. RE.731, 807. With an extruding disc "jellylike material" in the disc "actually comes out into the spinal canal." RE.731-32; *see also* RE.558-60 (describing disc extrusion in detail). An ex-

truded disc "is typically a very significant finding that usually [is] followed up by a neurosurgeon or neurologist…" RE.558-59; *see also* RE.732.

After initially deferring both surgery and epidural steroid injections ("ESI") in favor of chiropractic care, physical therapy, and medications, RE.813-14, 812, 808-09, Holt changed his mind in October and started a series of ESI treatments. RE.830, 828, 822, 820, 816. He also had regular chiropractic treatment, including throughout 2010 and 2011—the year he applied at BNSF. Holt paid for the chiropractic treatments himself, in cash, even though he had employer-sponsored insurance that covered his other treatment. RE.868.

In June 2009, Holt had a second MRI because of continuing back pain. RE.832, 836-37, 835, 834.[1] The 2009 MRI showed that his back condition "had progressed in a … non-positive direction in that the L4-5 level that had just been extruded or sticking out ha[d] now actually broken off and floated down his spinal canal and is free-floating." RE.605-06, 691. In other words, Holt's disc—which had been previously "pushing through the lining" and "kind of hanging out"—had "now fallen off or broken off" and was "floating." RE.609, *see also* RE.610, 900. A neurosurgeon discussed back surgery, but Holt declined that option. RE.838-39.

[1] The 2007 and 2009 MRIs cost $378 each—*before* Holt's insurance discount—and were fully paid for by insurance. *See* RE.1296-98.

Three months before he applied with BNSF, Holt saw a doctor with complaints of back pain and knee pain—pain so bad that it "[brought] him to his knees." RE.788, 789, 801-02, 840. His doctor noted that Holt "may need MRI." RE.840. Holt next saw his doctor six months later when he made an appointment to ask for his medical records and a letter for employment. RE.722, 785, 841-44. The doctor briefly examined Holt's back and provided a letter stating that Holt's "back pain had resolved." RE.722, 769-70, 841-44. That same day Holt reported back pain and received treatment from his chiropractor. RE.872. Yet the chiropractor—who Holt had been seeing regularly for months for reported back pain—also gave Holt a letter he sought for his BNSF employment efforts, stating that there was no current problem with Holt's back. RE.863.

3. BNSF's medical-evaluation process for the Senior Patrol Officer position

BNSF uses a contractor, Comprehensive Health Service ("CHS"), to coordinate its multi-step medical-evaluation process. RE.524-25, 929, 932-41, 943-44, 947-48. Candidates are first required to take a strength test, have a basic physical examination, and complete a CHS medical questionnaire. RE.527, 932-33, 943. Next, CHS nurses review the medical questionnaire and ask follow-up questions as needed. RE.527-29, 33-34. Then, each candidate has a basic clinical examination.

RE.934, 939-41, 943. Some questionnaire responses may prompt a specific follow-up request for information or focused medical examination. RE.529, 933-40, 943-46.

Completing part of the process does not mean the candidate has "passed" the medical-evaluation process; all the steps must be completed. *See* RE.529-30, 595-96, 940-41. For one thing, those involved in early steps do not typically have the information collected in later steps. *See* RE.529, 593-95. A final decision is reached in one of two ways: CHS either clears (or in limited cases rejects) the candidate or it sends the candidate's information to BNSF's Medical and Environmental Health ("MEH") Department for review and a decision, which may be clearing the candidate, not clearing the candidate, or seeking further information. *See* RE.527-32, 940-42, 945-46.

4. Holt's medical-evaluation process

Holt completed the CHS medical questionnaire and answered yes to the following questions: "Have you ever had a back injury?" and "Do you currently have or have you ever had … [b]ack pain?" RE.618-19. He added this explanation: "Bulging disk in 2007. Treated with chiropractic care." RE.618.

After reviewing Holt's responses, a CHS nurse interviewed him. RE.544. Holt reported that in 2007 he suffered a "non work related back strain," had an

MRI that showed a "bulging" disc, and was treated with four to six months of chiropractic care. RE.544-45, 634. CHS asked Holt to provide medical records about his back. RE.548, 973. Holt responded by providing only the brief letter from his doctor, clinic notes documenting his request for the letter, the letter from his chiropractor, and a report of the 2007 (but not the 2009) MRI. RE.462, 584-85, 676-83.

Holt then had a physical examination by Dr. Marcia Hixson. RE.1041, 1082-114, 463-64. Dr. Hixson worked for Concentra, a provider retained by CHS. RE.1035-36, 581. Dr. Hixson is a hand surgeon, not an expert on back or spine issues. RE.1027-28, 1033-35, 1039-41, 1070-71. Holt is the only BNSF applicant she remembers ever seeing. RE.1078. Holt told Dr. Hixson he had a "bulging disk" in 2007 not as a result of an injury, chiropractic treatment in 2007, and experienced "full recovery." RE.1060, 1062, 1098, 465-66.

Dr. Hixson completed the CHS Medical Examination and BNSF Occupational Assessment forms. RE.1053, 1066, 1090-94, 1098-99. She wrote that she found no abnormalities; no restrictions were needed; and Holt was not likely to experience any symptoms in the next two years impairing his performance or presenting a risk to the health and safety of himself or others. RE.1054-56, 1090-93, 1098. Dr. Hixson based her opinion solely on her examination and on information Holt

provided. RE.1069-79; *see also* RE.474-77. She had none of the medical records Holt provided to CHS or those that existed but Holt did not provide to CHS. RE.1047, 1114. Dr. Hixson did not have the 2007 or 2009 MRIs. RE. 1047, 1114. Nor she did have any of the ESI records. RE. 1047, 1114. Dr. Hixson also did not know about other treatment Holt received for his back from 2007 to 2009 beyond Holt's statement that he had seen a chiropractor. RE. 1047, 1114. Dr. Hixson testified that the true facts about Holt's back problems may have—or in some cases would have—made a difference to her determination, including that she may have asked for more information from Holt to determine the current status of his back. RE.1071-79.

5. Dr. Jarrard reviews medical information and requests additional information

CHS sent medical information about Holt to BNSF's MEH Department where it was reviewed by BNSF's medical officer, Dr. Michael Jarrard, an occupational medicine doctor with 17 years' experience in railroad work. RE.517-23, 542-43, 623-42. Dr. Jarrard did not have the 2009 MRI report because Holt had not provided it to CHS, despite CHS's request. RE.542-43, 554, 625-42. The same is true of the ESI records and the 2010-2011 chiropractic treatment records. RE. 542-43, 554, 625-42. In fact, there were *no* chiropractic records or any other medical

records except for the 2007 MRI report and clinic notes documenting Holt's request for a letter from his doctor. RE. 542-43, 554, 625-42.; *see generally* RE.1009-12.

Dr. Jarrard reviewed the CHS records, but decided he lacked sufficient information about whether Holt could perform the Senior Patrol Officer job safely. RE.551-54, 895-96, 899, 902, 913. He thus requested:

> (1) "[a] radiologist's report of a current MRI scan of your [l]umbar [s]pine with specific evaluation for arthritic or degenerative changes and disc pathology with comparison [to] the previous 2007 MRI"
>
> (2) "[p]harmacy records for the past 2 years, specifically for prescriptions related to treatment of your back pain"; and
>
> (3) "[a]ll additional medical records for the past two years including [c]hiropractic notes[.]"

RE.543, 623-42, 894. He needed them all to make a decision. RE.919-20; *see also* RE.920-21. With adequate information, Dr. Jarrard would have assessed Holt in light of the ADA's "direct threat" standard, had the facts warranted. RE.901-02, 907-08, 913. Dr. Jarrard had concerns about Holt's ability to perform the position safely based on the limited information provided. RE.551-54, 898-99. But he recognized that Holt's previous condition could have cleared up. RE.899 (noting "possibility that it could have healed or been resorbed"; *it's possible that it — that it could have been a nonissue in 2011. I just didn't know. That was the whole point*. In

2011, I didn't have enough information to know whether it was a continued — an ongoing issue then or not.")(emphasis added). *See also* RE.559-60, 574, 898 (similarly explaining that possibility).

Dr. Jarrard testified in great detail about what he saw—and did not see—from the limited records that made him want to understand the current status of Holt's back. RE.551-54; *see* RE.919 ("….[I]t's natural as a doctor to…try to understand where that condition is today; has it progressed, has it improved. So getting a current objective assessment, i.e., an MRI to equate to the MRI he had in 2007, is…a very appropriate thing in the role I had."); *see also* RE.898, 899, 913-14, 917, 919-20, 920-21. Dr. Jarrard also explained from a medical perspective what exactly in the 2007 MRI report raised concerns in his mind. RE.556-62, 565-75.

Dr. Hixson's assessment did not alleviate Dr. Jarrard's need for additional information because he understood the limited nature of her role and her necessary reliance on Holt's subjective report of the source, duration, and extent of his back problems. RE.583, 588-89, 591-93, 595-96. Dr. Jarrard also recognized that Dr. Hixson did not have the 2007 MRI or any other medical records when she conducted the physical examination. RE.588-89, 593-95.

6. Holt fails to provide any of the additional information and is not hired

Holt did not provide *any* of the information Dr. Jarrard requested, including the MRI. RE.587, 922, 468. Holt claimed that he did not provide the MRI because his doctor would not approve it. RE.1580, 467. But his doctor testified that Holt never asked for an MRI and, in any event, that doctor claimed to be under the impression—based on Holt's statements—that Holt was not experiencing any back pain in late 2011. *See* RE.725 ("Q: [I]n September of 2011, did you discuss with Mr. Holt the need for an MRI for his back or spine? A: I did not.").

Holt also did not provide pharmacy records, RE.587, or records of his chiropractic treatment for the previous two years. RE.587; *see also generally* RE.964-1019.

When Holt did not provide the information Dr. Jarrard requested, BNSF treated him as having declined the conditional offer for the Senior Patrol Officer position. RE.587, 552-54, 950.

7. Holt moves to the Seattle area, continues his treatment, and has back surgery

Holt meanwhile moved to the Seattle area, RE.447, 450, where he promptly began seeing a chiropractor. RE.456; RE.1121-24. He received regular treatment for his back, and on one occasion for accompanying knee pain. RE.1121-34, 1142-44.

On his first visit, when Holt was reporting minimal back pain, RE.1127-28, the chiropractor ordered two sets of x-rays of Holt's back, and Holt complied. RE.1144.

Holt later moved to Oregon, RE.447, where he also received regular chiropractic treatment. *See* RE.1145-209. The new chiropractors ordered x-ray diagnostic tests as well. *See* RE.1150-51, 1153, 1210-11. They also requested that Holt provide them the reports from his 2007 and 2009 MRIs, which he immediately did. RE.1149, 1156, 1158-59.

The Oregon chiropractors told Holt he had a potential "surgical situation," warning him to watch for symptoms of "Caud[a] Equina," RE.1159, a condition where "disc material or some other foreign body presses on th[e] lower nerve roots that feed into [the] bowel and bladder" and may cause paralysis and incontinence, RE.599-600; *see also* RE.910. Dr. Jarrard was aware of that possibility too. RE.599-600, 604, 609, 909-10.

In December 2013, Holt experienced numbness and paresthesia in his leg, causing him to go to the emergency room. RE.454-55. He sought treatment first from a chiropractor, who ordered another x-ray, RE.1210, and then with a neurosurgeon, who ordered an additional MRI, RE.454-55; *see also* RE.1213-16. A week or so later, Holt had back surgery. RE.454-55, 1217, 1218-20, 1221.

Still, Holt continued to have problems with his back, resulting in a request by his doctor in March 2014 for yet another MRI, and Holt complied. RE.1222-24. The March 2014 MRI showed that although the surgery at the L5-S1 level had accomplished what was intended, the extrusion was not completely eliminated and continued to cause pain. RE.1225. Holt was diagnosed at the end of May 2014 with "postlaminectomy syndrome of lumbar region." RE.1223.

B. Procedural History

Holt filed a charge of discrimination with EEOC. RE.482. EEOC later sued BNSF alleging violations of the ADA. RE.1587. The district court denied BNSF's motion to dismiss. RE.159. After discovery, BNSF moved for summary judgment, RE.417, and EEOC moved for partial summary judgment, RE.1306. The district court denied BNSF's motion and granted EEOC's motion, finding BNSF liable under the ADA. RE.139. BNSF moved to reconsider; the district court denied the motion. RE.247, 136.

During pretrial proceedings, the parties submitted evidence and arguments on compensatory and punitive damages, with BNSF arguing that neither were available and EEOC arguing that both were available. The district court ruled that its decision on liability had found intentional discrimination within the meaning of the ADA and therefore that compensatory damages were available. RE.35-36. But

the district court ruled that punitive damages were not available. RE.34-35. The parties then reached an agreement on an amount to be awarded for compensatory damages (without waiving appeal rights). RE.131-34. The district court adopted that agreement. RE.131-34. The parties submitted back pay and injunctive relief to the district court through written submissions. RE.72, 188. The district court entered orders awarding back pay, RE.72, and injunctive relief, RE.6, and entered a final judgment, RE.4. BNSF moved to alter or amend the judgment. RE.172. The district court denied the motion. RE.1. BNSF appealed. RE.167.

SUMMARY OF ARGUMENT

The ADA allows an employer to require medical examinations of applicants during the hiring process and to evaluate the physical or medical qualification of applicants so long as it does so only after making a conditional job offer. This case involves an employer's ability to terminate the application process when an applicant fails to provide medical information and undergo medical testing as part of the post-offer medical-examination process.

The district court held that BNSF violated the ADA by asking that Holt provide an updated MRI of his spine, as well as pharmacy and treatment records, after he revealed in the post-offer medical-examination process that he had a previous back injury and provided a four-year-old MRI of his spine. The district court

reached that holding by creating law rather than applying it. Specifically, the court relied on the following principles it mistakenly derived from the ADA: (1) that an employer's conditional offer is irrevocable except for reasons that relate to an applicant's failure to satisfy an employer's hiring standard that is job-related and consistent with business necessity; and (2) an employer must pay the cost of any requested follow-up medical testing or information sought as part of a post-offer medical examination. The district court found BNSF liable because it withdrew Holt's conditional offer due to his failure to provide the information BNSF requested and Holt's stated reason for failing to do so was that he could not afford an MRI. This Court should reverse on one or all of three independent grounds.

First, the district court largely glossed over the "disability" analysis. The court ruled that because Holt had described a previous back condition and that led to BNSF's request for an MRI, BNSF regarded Holt as having an impairment. The district court failed to recognize that even under the ADA's expanded version of the "regarded-as" aspect of the definition of disability, an employer still must regard the individual as having a *currently existing* impairment. Yet BNSF requested more information precisely because it did not know the status of Holt's previous back condition. Holt claimed it was completely healed. BNSF's doctor recognized that was possible and sought the information to find out. As many courts have held,

when an employer—especially through its physician—seeks information to *determine whether* there is a medical condition currently affecting an individual, the employer has *not* regarded the individual as disabled. The district court erred in ruling otherwise.

Second, the district court fumbled the causation analysis. The court ruled that causation was satisfied because Holt's description of his previous back condition led to BNSF's request for additional information and BNSF declined to hire Holt due to his failure to provide that information. That analysis contradicts controlling law. The district court found that BNSF engaged in intentional disparate-treatment discrimination, which requires a showing that discriminatory animus toward the protected characteristic caused the challenged decision. EEOC offered no such evidence. Indeed, the evidence is that the *only* reason Holt was not hired is that he failed to provide the additional information BNSF requested. That is a legitimate, nondiscriminatory reason for BNSF's decision even though a reported previous medical condition led to the request for additional information. The district court erred in ruling otherwise.

Third, the district court misunderstood the law on medical examinations and erred in creating the two principles it relied on. Nothing in the ADA makes an employer's conditional offer "irrevocable" in any circumstances. An employer may

permissibly withdraw a conditional offer for many reasons, including dishonesty or other misconduct by the applicant during the medical-examination process or an applicant's decision on personal privacy grounds not to provide requested medical information. Numerous courts, including this Court, have recognized those grounds.

Nor was the district court correct in deciding 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. The district court effectively amended the ADA to add a substantive provision that Congress could have adopted but did not. Not only does no textual basis exist for the rule, EEOC itself has stated that an *employer* requiring a medical examination of an *employee* must pay the costs of the examination *only* when it directs the employee to see a particular healthcare provider. That employers may require examinations at the employee's expense strongly indicates that the district court's view about examination costs for *applicants* is wrong. The courts that have considered the issue have held just that.

The district court appeared to be concerned that employers could use required medical examinations to impose onerous requirements on applicants with medical conditions as a way to avoid hiring the applicant. Nothing in BNSF's position would allow that conduct. An applicant can always claim that an employer

sought medical information for such an improper purpose rather than for the purpose of evaluating the applicant. In other words, the applicant can always argue that the employer's stated reason for seeking the information is pretextual. That is not the theory on which the district court ruled (or that EEOC presented) and no evidence remotely supports it. Accordingly, the Court should reverse and render judgment for BNSF.

If the Court reaches the injunction, the Court should reverse. The district court applied a presumption in favor of an injunction derived from older discrimination cases that flatly contradicts more recent Supreme Court authority requiring that any injunction satisfy four traditional equity factors. EEOC did not try to satisfy those factors and no evidence indicates it could. Therefore, the Court should reverse the injunction in full. Alternatively, it should at least limit the injunction to the job at issue in this case and also limit it geographically to avoid interfering with other courts that interpret the law differently than the district court.

ARGUMENT

I. STANDARDS OF REVIEW

The Court reviews a district court's decision on cross-motions for summary judgment *de novo*. *Guatay Christian Fellowship v. County of San Diego*, 670 F.3d 957, 970 (9th Cir. 2011). Both the grant of summary judgment to the appellee and the

denial of summary judgment to the appellant are reviewable. *Id.*; *Padfield v. AIG Life Ins. Co.*, 290 F.3d 1121, 1124 (9th Cir. 2002). The Court reviews a district court's order granting permanent injunctive relief under an abuse-of-discretion standard except that legal issues involved in the injunction decision are reviewed *de novo*. *Ting v. AT&T*, 319 F.3d 1126, 1134-35 (9th Cir. 2003).

II. THE DISTRICT COURT'S NOVEL MISREADING OF THE AMERICANS WITH DISABILITIES ACT MUST BE REVERSED

The district court's legal errors occurred in the context of it granting summary judgment on liability against BNSF without notice on a ground not raised by EEOC in its summary-judgment motion. Therefore, it is important that this Court consider the legal theories and arguments presented by the parties before reaching the legal theory the district court created to impose liability.[2]

[2] The district court's approach violated Rule 56(f)(2), which permits granting summary judgment on grounds not argued, but only "after giving notice and a reasonable time to respond." Not complying with the rule is reversible error. *E.g.*, *Meridian Textiles, Inc. v. Topson Downs of California, Inc.*, 605 F. App'x. 671, 672-73 (9th Cir. 2015); *Schulman v. Wynn Las Vegas, LLC.*, 593 F. App'x 673, 673 (9th Cir. 2015); *Davis v. Patel*, 506 F. App'x 677, 679 (9th Cir. 2013). Because, however, BNSF is able to present its legal arguments fully to this Court, BNSF does not seek reversal based on the rule violation but does ask this Court to be especially vigilant in applying *de novo* review.

A. Legal Background and District Court's Liability Rulings

1. Hiring-related medical inquiries and examinations

"The ADA creates three categories of medical inquiries and examinations by employers: (1) those conducted prior to an offer of employment ('preemployment' inquiries and examinations); (2) those conducted 'after an offer of employment has been made' but 'prior to the commencement of…employment duties' ('employment entrance examinations'); and (3) those conducted at any point thereafter." *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1273 (9th Cir. 1998); *see* 42 U.S.C. § 12112(d)(2),(3),(4). At the pre-offer stage—the first category—employers are prohibited from making medical inquiries to or requiring medical examinations of applicants. 42 U.S.C. § 12112(d)(2). Medical examinations or inquiries to employees—the third category—are permitted only if job-related and consistent with business necessity. *Id.* § 12112(d)(4).

This case concerns the second category—employment-entrance examinations after an employer makes a conditional offer of employment. There are three requirements for such examinations: (A) all applicants in the same job category must be subjected to an entrance examination, 42 U.S.C. § 12112(d)(3)(A), 29 C.F.R. § 1630.14(b); (B) employers must keep the information obtained confidential, 42 U.S.C. § 12112(d)(3)(B); and (C) "the results of such examination [may be]

used only in accordance with this subchapter," *id.* § 12112(d)(3)(C). Provided that those requirements are met, employers "may condition an offer of employment on the results of" entrance examinations. *Id.* § 12112(d)(3).

"Unlike examinations conducted at any other time, an employment entrance examination need not be concerned solely with the individual's 'ability to perform job-related functions,' § 12112(d)(2); nor must it be 'job-related or consistent with business necessity,' § 12112(d)(4)." *Norman-Bloodsaw*, 135 F.3d at 1273. "[T]he ADA imposes no restriction on the scope of entrance examinations; it only guarantees the confidentiality of the information gathered…and restricts the use to which an employer may put the information…." *Id.* As EEOC explains in its interpretive guidance appended to the formal regulations, the limitation on the "use" of entrance-examination information applies to employer decisions *not to hire an applicant* based on the *results* of an examination. 29 C.F.R. § 1630.14(b) App'x.[3]

Moreover, an entrance examination is not limited to an initial inquiry or a single medical assessment. It includes follow-up inquiries and examinations, which may be tailored to the individual applicant as EEOC also explains in its enforcement guidance, using an example remarkably close to the facts of this case:

[3] EEOC's interpretive guidance is an appendix to the regulations contained at 29 C.F.R. Pt. 1630.

> After an employer has obtained basic medical information from all individuals who have been given conditional offers in a job category, may it ask specific individuals for more medical information?
>
> *Yes, if the follow-up examinations or questions are medically related to the previously obtained medical information.*
>
> …The employer may give medical examinations designed to diagnose back impairments to persons who stated that they had prior back injuries, *as long as these examinations are medically related to those injuries.*

Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (1995) (http://www.eeoc.gov/policy/docs/preemp.html) (emphasis added); *accord McDonald v. Webasto Roof Sys., Inc.*, 570 F. App'x. 474, 476 (6th Cir. 2014). Such follow-up inquiries and examinations are not a separate type of examination; they are a *part of* the employment-entrance examination, *id.*, and thus are subject to the general rules described above applicable to all entrance examinations.

In the district court BNSF argued that the ADA expressly and unambiguously permitted BNSF to decline to hire Holt based on his failure to complete the entrance examination. BNSF made Holt a conditional job offer and thereafter began his employment-entrance examination. RE.460-61, 470-72, 1580, 614-22, 544-45, 634. BNSF obtained medical information from Holt and required a physical examination and certain assessments of Holt and the other candidates in the same job category. RE.548, 973, 462, 584-85, 676-83, 1041-42, 1082-114, 463-64; *see* 42

U.S.C. § 12112(d)(3)(A), 29 C.F.R. § 1630.14(b). Because Holt reported a previous back condition, BNSF required an examination of Holt's back and that he provide specific information about his prior back treatment as part of the entrance examination. RE. 44-45, 634, 548, 973, 462, 584-85, 676-83.

Dr. Jarrard, BNSF's medical officer, reviewed the information Holt provided and decided that additional follow-up information was needed. Dr. Jarrard asked for: (1) a current MRI of Holt's back to be contrasted with the 2007 MRI Holt had provided; (2) prescription information on medication for Holt's back; and (3) records of treatment for Holt's back. RE.543, 623-42, 894. Holt provided *none* of the requested information. RE.587, 922, 468. Consequently, BNSF argued below that Holt failed to satisfy the condition applicable to his offer of employment that he successfully complete the entrance-examination process. *See* RE.587, 552-54, 950. Therefore, BNSF was allowed to withdraw the offer and could not be liable under the ADA for doing so.

2. EEOC's flawed theory under ADA Section 12112(b)(6)

EEOC relied heavily—and in its summary-judgment motion exclusively—on section 12112(b)(6) of the ADA. RE.1317, 1321-33, 345-60, 277-82. That provision states that "discriminate" as used in section 12112(a), the ADA's general prohibition on discrimination, includes the following:

> 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 unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity….

42 U.S.C. § 12112(b)(6). EEOC argued that BNSF's request for an updated MRI functioned as a "selection criterion" that screened out an individual with a disability and therefore had to be justified as job-related and consistent with business necessity. RE.1317, 1321-33, 345-60, 277-82. The district court accepted that view in denying BNSF's motion to dismiss. RE.162-64.

But on summary judgment BNSF pointed out two fatal flaws in EEOC's legal theory. First, section 12112(b)(6) is a disparate-impact, not a disparate-treatment, provision. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003); 29 C.F.R. § 1630.15(b)&(c) App'x.[4] The provision applies only to "uniformly applied criteria [that] have an adverse impact on an individual with a disability" or class of such individuals. 29 C.F.R. § 1630.15(b)&(c) App'x. Because BNSF did not require all candidates to obtain an MRI, RE.1581, the requirement that Holt provide an updated MRI was not subject to section 12112(b)(6). In other words, EEOC pleaded a

[4] *Accord Davidson v. America Online, Inc.*, 337 F.3d 1179, 1189 (10th Cir. 2003); *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1195-96 (7th Cir. 1997); *Monaco v. City of Jacksonville*, 51 F.Supp.3d 1251, 1268 (M.D. Fla. 2014).

disparate-treatment case but relied as statutory support on a disparate-impact provision, in contravention of well-established legal standards. *See Raytheon Co.*, 540 U.S. at 53 ("courts must be careful to distinguish between" disparate impact and disparate treatment).

Second, BNSF pointed out that an individualized request for medical information during an entrance examination *cannot* be a "selection criterion" under section 12112(b)(6). EEOC's interpretive guidance accompanying its regulations under the ADA makes that point clear:

> [I]f an employer withdraws an offer of employment because the medical examination reveals that the employee *does not satisfy certain employment criteria*, either the *exclusionary criteria* must not screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, or *they* must be job-related and consistent with business necessity.

29 C.F.R. § 1630.14(b) App'x. (emphasis added); *see also id.* § 1630.10(a) App'x.

In other words, "selection criteria" are the *substantive* criteria applied to assess whether the *results* of an examination disqualify an applicant. Thus, if an airline employer has a selection criterion precluding the employment of pilots who have a seizure disorder (the selection criterion) and the entrance examination, including any follow-up testing or inquiries, reveals such a disorder (the results) so the pilot applicant is not hired, the airline must justify its no-seizure-disorder section criteri-

on as job-related and consistent with business necessity because the criterion has screened out an individual with a disability.

3. The district court's rulings and rationale

BNSF moved for summary judgment on all of EEOC's claims. RE.417. EEOC moved for summary judgment on liability. RE.1306. EEOC argued only its sole theory in the litigation—that BNSF's requirement that Holt provide an updated MRI "functioned" as a selection criterion under section 12112(b)(6) requiring BNSF to justify the request as job-related and consistent with business necessity. RE. RE.1317, 1321-33, 345-60, 277-82. As a result of that theory, the parties also argued about whether BNSF could satisfy the job-related-and-consistent-with-business-necessity standard and exactly what that showing would entail in this context. RE.1329, 437-440, 355-58, 279-81, 267-68.

The district court addressed EEOC's theory under section 12112(b)(6) and agreed with BNSF. Specifically, the court confirmed that section 12112(b)(6) is a disparate-impact provision applicable only to uniformly applied standards and thus EEOC could not "shoehorn the request into § 12112(b)(6)…." RE.148-49.

The district court also ruled that the ADA permitted BNSF to request the updated MRI and BNSF did not need to show that the request was medically justified. RE.150. The court agreed with BNSF's reliance on the EEOC enforcement

guidance authorizing employers to seek follow-up information, including follow-up examinations, as part of the ADA's entrance-examination process. RE.150. Therefore, the court ruled, "there is no material fact, disputed or otherwise, with respect to the medical justification for Dr. Jarrard's request for an updated MRI." RE.151.

The court went on, however, to hold that although the enforcement guidance permitted BNSF to "ask" for more medical information, it did not permit an employer to require an applicant "to pay for costly additional information as a condition of proceeding through the hiring process." RE.151. Thus, the court distinguished the concept of *requesting* additional information, which it held BNSF was permitted to do, from *requiring* additional information, which it held was not permissible. RE.150-52; *see also id.* RE.150 ("Request Versus Requirement for Additional Medical Information").

The crux of the district court's reasoning was an *inference* from the wording of a passage from the EEOC guidance. RE.151. The guidance is silent about payment for requested follow-up information. But the court read the phrase "may **give** medical examinations" to mean "that the employer or its agent will **conduct** the medical examination," which the court inferred meant that the employer must pay the cost of the examination. *Id.* (bolding added).

The preceding analysis led the district court to state that BNSF had "not necessarily escaped liability on the EEOC's generic § 12112(a) claim." RE.150. The court then proceeded to rule that BNSF was liable as a matter of law under section 12112(a), which the court referred to as the "generic" provision, noting that EEOC had asserted a "generic" claim in its complaint (though not in its summary-judgment motion). RE.150.

The court addressed each element of the ADA claim: (1) that Holt was disabled, (2) that Holt was a qualified individual, and (3) that BNSF discriminated against Holt because of his disability. The court began with the third element. It explained its view that under the ADA's medical-examination provisions, "employers may withdraw conditional offers based only on the applicant's failure to meet standards that are job-related and consistent with business necessity and only where performance of the essential job functions cannot be accomplished with reasonable accommodation." RE.153. As authority for that view, the district court relied on *Garrison v. Baker Hughes Oilfield Operations, Inc.*, 287 F.3d 955 (10th Cir. 2002). *See* RE.146-47, 153. Based on *Garrison*'s citation and description of 29 C.F.R. § 1630.14(b)(3), the district court determined that a conditional offer is "irrevocable" unless "the employer can identify a legitimate basis for excluding the applicant that is job-related and consistent with business necessity." RE.147.

Because BNSF had withdrawn Holt's job offer when he failed to supply the updated MRI at his own cost, rather than for his failing to meet a hiring standard that was job-related and consistent with business necessity, the court ruled that BNSF had engaged in "facial 'discrimination.'" RE.153. Causation was satisfied as to the failure-to-hire claim, the district court ruled, given that BNSF sought the updated MRI because Holt reported his previous back injury and provided a 2007 MRI and BNSF had withdrawn the job offer because Holt failed to provide the updated MRI. RE.153.

Turning to the "disability" element, the district court relied on the regarded-as portion of the ADA's "disability" definition. *See* 42 U.S.C. § 12102(1)(C). The court noted that the ADA Amendments Act of 2008 expanded the regarded-as provision by eliminating the requirement that an employer have perceived the individual to have an impairment that substantially limited the performance of a major life activity: "An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this chapter 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." RE.154 (quoting 42 U.S.C. § 12102(3)(emphasis added by district court). The court rejected BNSF's argument that it did not regard Holt

as disabled because it was seeking information to determine whether he continued to have a back condition and if so the nature of the condition. RE.154-55. Instead, because Holt had reported the previous back injury and provided the 2007 MRI, the district court ruled that BNSF had regarded Holt as disabled. RE.154.

BNSF immediately moved for reconsideration. RE.247. It addressed the district court's reliance on the EEOC enforcement guidance and, specifically, the court's focus on the "may give" language to draw an inference that the employer must pay for additional examinations. RE.249, 251. BNSF pointed out, among other things, that the focus on "may give" was contrary to the statutory language stating that an employer "may **require** a medical examination." 42 U.S.C. § 12112(d)(3). Therefore, the district court's inference from the "may give" phrase to negate the ordinary meaning of "require" as to costs was incorrect. RE.249, 251.

In a telephone conference on BNSF's motion to reconsider, however, the district judge explained that the issue of who pays the cost of additional requested testing was *not* the basis for her order:

> I think both sides have misunderstood, perhaps, you know, that this — I'm finding that this is not an issue about whether or not BNSF has to pay. The issue is, once BNSF asks, they have a right to get the information, and they can't stop the process without completing it. In oth-

> er words, they called it off. They can't withdraw the offer without completing it.
>
> If that means they have to pay for it, they have to pay for it. That means if the applicant is willing to pay for it, that's another issue. But you have to complete the process.
>
> So everybody has been fixated on who pays, and that's not the gist of the order that I wrote. The gist of the order is that if you find something, you're allowed to ask about it, you're allowed to have an examination, and then you do the analysis as to whether or not somebody is capable of handling the job.

RE.19; *accord* RE.32, 84.

After further proceedings resolving damages and back-pay issues, EEOC sought injunctive relief, and the parties presented that issue to the district court in a joint submission. RE.188. BNSF observed in passing that, notwithstanding the district court's ruling on stopping the post-offer medical-examination process, this Court has approved termination of the process without a substantive medical-qualification determination. RE.198. In its order on injunctive relief, the district court then reverted to the cost issue as the focus:

> Specifically, once BNSF determines based on an initial medical examination that additional medical information is needed about an applicant who received a conditional job offer, *BNSF must bear the cost of procuring any additional information it deems necessary to complete a medical qualification evaluation*.

RE.9 (emphasis added). While repeating that BNSF must complete the medical-examination process by making a medical-qualification decision whether or not it

chooses to obtain the additional information, *id.*, the court provided a significant exception:

> If, after being told that BNSF will bear the cost of procuring the additional medical information, an applicant chooses not to submit additional medical information that is medically related to the previously obtained information (i.e., chooses not to sit for a follow-up examination or chooses not to answer follow-up questions), *nothing in this injunction requires BNSF to complete the hiring process for that applicant*.

Id. (emphasis added). In other words, BNSF is *not* prohibited from failing to complete the process after all. Should the applicant fail to cooperate for any reason *other* than the cost of additional testing, BNSF can freely revoke the previously labeled "irrevocable" job offer.

B. The District Court's Liability Rulings were Erroneous as a Matter of Law

1. The district court erred in ruling that Holt met the definition of "disability."

A "regarded-as" disability means that the individual "has been subjected to an action prohibited under [the ADA] due to an *actual or perceived physical or mental impairment* whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C. § 12102(1)(C),(3)(emphasis added). BNSF did not decline to hire Holt because of a regarded-as disability because BNSF *did not know* when it declined to hire him whether his back constituted an actual impairment, and BNSF

did not perceive that it was an impairment. *Id.* § 12101(3).[5] What BNSF had was information about a *previous back condition* and *questions* about the current state of Holt's back. BNSF had no idea whether he had an impairment. Indeed, that was the point of its request for additional information and an updated MRI.

The district court rejected BNSF's argument, pointing to the expanded ADAAA approach to regarded-as disability. The court suggested that BNSF's argument was based on pre-ADAAA cases that relied on the old requirement that an employer regard an individual as having a substantially limiting impairment. RE.154. It was not. BNSF understands that the ADAAA eliminated the substantial-limitation requirement from regarded-as cases. But even though the ADAAA eliminated the need for a perception of a substantially limiting impairment, it did not change the need for a perception of a *currently existing* impairment. The Eighth Circuit recently confirmed that view when it upheld BNSF's decision not to hire an applicant based on the applicant's obesity, a physical characteristic that does not meet the definition of "impairment" under the ADA. That court emphasized that even though BNSF's decision was based on a concern about the development of *future* impairments it did not come within the ADA because the law requires a per-

[5] As relevant to this case, "impairment" is defined as "[a]ny physiological disorder or condition … affecting one or more body systems…." 29 C.F.R. § 1630.2(h).

ception of a *current* impairment.[6] *Morriss v. BNSF Ry. Co.*, 817 F.3d 1104, 1113 (8th Cir. 2016)("the plain language of the ADA prohibits actions based on an *existing* impairment or the perception of an *existing* impairment")(emphasis added).

The legal requirement of an actual or perception of an existing impairment is dispositive here: there is no evidence that at the time of its decision BNSF perceived Holt as having a then-existing impairment. Dr. Jarrard had before him information from Holt reporting a *previous* condition, an MRI from four years earlier describing that condition, and Holt's claim the condition had resolved. Dr. Jarrard testified that Holt's condition in fact was one that could have resolved and he sought the additional information precisely because *he did not know* whether the condition had resolved as Holt stated or still existed. RE.899 (noting "possibility that it could have healed or been resorbed"; *it's possible that it — that it could have been a nonissue in 2011. I just didn't know. That was the whole point*. In 2011, I didn't have enough information to know whether it was a continued — an ongoing issue then or not.")(emphasis added); *see also* RE.559-60, 574. Because he did not know and was seeking to determine the answer to that question, there is no evidence

[6] *See also Neely v. Benchmark Family Servs.*, 640 F. App'x. 429, 435-36 (6th Cir. 2016)(employer's awareness of sleep problems did not show a perception of an ADA-defined impairment and therefore did not support a regarded-as finding even under the relaxed ADAAA standards).

BNSF acted because of a known or perceived *currently existing* impairment and BNSF thus is entitled to summary judgment.

Another district court in Seattle recently used that exact reasoning to reject a claim and grant summary judgment to BNSF in a disability-discrimination case under Washington law. *See Taylor v. Burlington N. R.R.*, 2016 WL 632077 (W.D. Wash. Feb. 17, 2016)(appeal filed). In *Taylor*, just as here, Dr. Jarrard had declined to make a medical-qualification decision because he did not have sufficient information to do so and, like here, stated that Taylor could provide additional medical information (at his own expense). *Id.*, *2. After initially granting summary judgment to BNSF on two claims, the court addressed in a second order Taylor's claim that BNSF perceived him as disabled based on the request for information about Taylor's reported previous knee and back problems. *See* Taylor v. Burlingt*on* N. R.R., 2016 WL 865350 (W.D. Wash. March 7, 2016)(appeal filed). Looking to ADA case law in the absence of relevant state law, the district court held that when *BNS*F sought information to determine the current status of Taylor's reported knee and back problems, BNSF did *not* regard Taylor as having an impairment. *Id.*, *1. Because "[t]he evidence shows that BNSF knew about Mr. Taylor's past knee and back problems and was uncertain of the current status of his knees and back,"

id., *2, the evidence did not support a perception of a current disability, thus warranting summary judgment. *Id.*

Many other cases, both before and after the ADAAA, including a decision from this Court, *Magdaleno v. Washington County*, 277 F. App'x. 679, 681 (9th Cir. 2008), make the same point.[7] Some of the pre-ADAAA cases do reference the substantial-limitation component of pre-ADAAA regarded-as claims. But in none of them was the substantial-limitation issue the crux of the analysis. They all instead recognize that employer medical inquiries in the face of uncertainty are inevitable and necessary where possible impairments and disabilities are concerned and thus cannot, consistently with the ADA's approval of medical examinations and inquiries, by themselves constitute regarding the applicant or employee as having an impairment or disability. The Tenth Circuit's *Lanman* decision, for example, illus-

[7] *See Barnum v. Ohio State Univ. Med. Ctr.*, 642 F. App'x. 525, 532 (6th Cir. 2016); *Coursey v. Univ. of Md. Eastern Shore*, 577 F. App'x. 167 (4th Cir. 2014); *Lanman v. Johnson County, Kansas*, 393 F.3d 1151, 1157 (10th Cir. 2004); *Tice v. Central Area Transportation Authority*, 247 F.3d 506, 508-09 (3rd Cir. 2001); *Sullivan v. River Valley School District*, 197 F.3d 804, 811 (6th Cir. 1999); *Cody v. CIGNA Healthcare of St. Louis, Inc.*, 139 F.3d 595, 599 (8th Cir. 1998); *see also Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 647 (2nd Cir. 1998)("[T]hat the County perceived a need to require the exams suggests no more than that…[the plaintiffs'] physical condition was an open question."); *Watt v. City of Crystal*, 2015 WL 7760166, *6 (D. Minn. 2015); *Peña v. City of Flushing*, 2015 WL 5697680, *9-11 (E.D. Mich. 2015); *Grassel v. Department of Educ. of City of New York*, 2015 WL 5657343, *9 n.9 (E.D. N.Y. Sept. 24, 2015).

trates how, aside from the substantial-limitation issue, asking for medical information does not evidence a perception of an ADA impairment. The court divided the "regarded as" question into two parts: first, did the medical-examination request constitute regarding the plaintiff as having an *impairment*, and second, even if it did, was it a substantially limiting impairment? *Lanman*, 393 F.3d at 1157. Those cases together show that a medical examination or inquiry by itself suggests only an *open mind* about the existence or extent of an impairment.[8] Others hold that rationale conclusive when the person requesting the information is a physician, like Dr. Jarrard, given that the very purpose of the ADA is for individuals "to be judged based on the relevant medical evidence…."[9]

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[8] *See Graham v. Boehringer Ingelheim Pharm., Inc.,* 451 F.Supp.2d 360, 372 (D. Conn. 2006)("At most, such evidence suggests that the company regarded Mr. Graham's…condition as an open question that required assessment by a professional."); *see also Tice*, 247 F.3d at 515 ("A request for such an appropriately-tailored examination [*i.e.* one job-related and consistent with business necessity, since the case involved an employee] only establishes that the employer harbors *doubts* (not certainties)…[and] [d]oubts alone do not demonstrate that the employee was held in any particular regard….").

[9] *Smith v. Chrysler Corp.*, 155 F.3d 799, 805 (6th Cir. 1998)(quoting Senator Tom Harkin, sponsor of the ADA); *see also Wisbey v. City of Lincoln, Neb.*, 612 F.3d 667, 672-73 (8th Cir. 2010)("If a restriction is based upon the recommendations of physicians, then it is not based upon myths or stereotypes about the disabled and does not establish a perception of disability.").

Together, all of the cases confirm the accuracy of BNSF's argument: when Dr. Jarrard asked for information to determine the current status of Holt's reported previous back condition he was not perceiving Holt as having a current ADA impairment and therefore was not regarding Holt as disabled. Therefore, judgment in BNSF's favor is appropriate.[10]

2. The district court erred in ruling that EEOC satisfied the required causation standard.

The ADA prohibits "discriminat[ion] on the basis of disability." 42 U.S.C. § 12112(a). As with any discrimination statute, EEOC could prove disparate treatment only by showing that BNSF intentionally took the adverse action—declining

[10] Although the district court did not reach the "record-of" aspect of the disability definition, EEOC offered no evidence to support its "record of" theory and that theory fails for reasons similar to the regarded-as theory. A "record-of" disability is a "record" of "a physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. § 12102(1)(B). BNSF did not know the extent of Holt's previous back condition, much less whether it was substantially limiting. BNSF knew that Holt had a previous back condition and had the MRI providing some limited information about the condition as of 2007, but it had no information indicating whether or how that condition had affected Holt in 2007. RE.898-99, 551-54. Absent knowledge of the alleged record of a substantially limiting impairment, BNSF could not have acted on that basis. *See, e.g., Collings v. Longview Fibre Co.*, 63 F.3d 828, 834 (9th Cir. 1995); *EEOC v. Exxon Corp.*, 124 F.Supp.2d 987, 996 (N.D. Tex. 2000).

to hire Holt—from a discriminatory motive. *See Mendoza v. The Roman Catholic Archbishop of Los Angeles*, 824 F.3d 1148, 1150 (9th Cir. 2016).[11]

The *only* evidence as to BNSF's motive is that it did not hire Holt because he failed to provide the additional information BNSF requested. BNSF's MSJ, RE.587, 552-54, 950. There is no evidence suggesting that reason was a pretext to discriminate against Holt or otherwise suggesting discriminatory animus. *See id.*; *Curley v. City of North Las Vegas*, 772 F.3d 629, 632 (9th Cir. 2014). Indeed, EEOC made no effort to prove discriminatory motive because its efforts were focused solely on its flawed theory under section 12112(b)(6).

Nevertheless, the district court ruled that BNSF failed to hire Holt because of his alleged impairment. RE.153.[12] The court's causation analysis was that because the reported prior back condition led to the request for more information

[11] *See also Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2513 (2015)(emphasis added)(citing *Ricci v. DeStefano*, 129 S.Ct. 2658, 2672 (2009))("In contrast to a disparate-treatment case, '*where a plaintiff must establish that the defendant had a discriminatory intent or motive*,' a plaintiff bringing a disparate-impact claim challenges practices that have a 'disproportionately adverse effect…' and are otherwise unjustified by a legitimate rationale.")(emphasis added).

[12] The district court also noted that the applicable causation standard was "motivating factor." RE.152. That standard did not survive *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013), but it is not necessary to resolve that dispute to reject causation here. *See Mendoza*, 824 F.3d at 1150 n.1; *see also Bukiri v. Lynch*, 648 F. App'x. 729, 731 n.1 (9th Cir. 2016) (citing other cases).

BNSF's decision not to hire Holt for failing to provide that information satisfied the causation requirement. That approach to causation is legally wrong.

This Court held as much in *Mendoza*. There, the employee took a lengthy disability leave during which her employer learned that her job could be performed by a part-time employee. When at the end of her disability leave the employee declined to accept a part-time position, her employer refused to allow her to return to her previous job, and she sued for disparate-treatment disability discrimination. She contended in essence, to paraphrase the district court's causation reasoning in its summary-judgment order, RE.153, that a "reasonable jury could not escape the conclusion that in the absence of [her disability leave] [her employer] would not have [learned that her job could be performed by a part-time employee] and would not have [refused to take her back full-time]." The Court rejected the argument, finding no evidence of discrimination. *Mendoza*, 824 F.3d at 1149.

Here the district court did not mention or find discriminatory animus by BNSF. Yet it concluded that BNSF not making a decision about Holt's medical qualifications constituted "disparate-treatment" "discrimination." The court held in effect that any action taken by an employer on the basis of a previous medical condition is the equivalent of an action taken on the basis of race, sex, or national origin. Even setting aside that a previous medical condition is not a current ADA

impairment, that superficially appealing analogy is mistaken. An applicant's *medical condition*, including ADA impairments, may be relevant to *job qualifications* in an way that the applicant's race, sex, and national origin almost never are. So an employer acting on the basis of an applicant's (or employee's) medical condition, at least to the extent of lawfully requesting information about the condition, not only is *not* "facial discrimination," as it might be with race, sex, and national origin, it is expressly authorized by the ADA. 42 U.S.C. § 12112(d)(3)&(4).[13]

The Seventh Circuit recently rejected the exact reasoning used by the district court here in a factually similar case:

> In their complaint, plaintiffs claim that the City discriminated against them by subjecting them to a battery of medical tests and record requests that prevented them from being hired. *They allege that these tests and requests were caused by plaintiffs' disabilities and that the resulting delay in obtaining medical clearance sounded the death knell of their employment prospects*….
>
> *These allegations, however, do not plausibly state that the City discriminated against Hill and Roberts because of their disabilities.* Certainly, plaintiffs' disabilities disadvantaged them in this first-come-first-serve hiring process ordered by the *Lewis* court because their medical issues delayed their medical clearance. *But to prove causation under the ADA, plaintiffs must show that they were not hired because of their disabilities,*

[13] Without a finding of discriminatory animus BNSF's conduct likewise was not, contrary to the district court's holding otherwise, RE.35-36, "unlawful intentional discrimination" within the meaning of 42 U.S.C. § 1981a(a)(2). Nor was it done "intentionally" within the meaning of 42 U.S.C. § 2000e-5(g).

> *not because of a delay in medical clearance,* ***even if that delay was caused by their disabilities.***

Roberts v. City of Chicago, 817 F.3d 561, 565 (7th Cir. 2016)(emphasis added); *see also id.*, 566 ("Hill and Roberts allege that the City failed to hire them not because of their disabilities, but rather due to the extensive medical requests that were a *consequence* of their disabilities."). The same approach applies here: declining to hire Holt because he failed to provide medical information does not satisfy the causation requirement under the ADA—even if that medical information had been requested because of a covered disability.

3. The district court erred in its liability determination because the ADA's medical-examination provisions authorize BNSF's challenged conduct.

BNSF argued in the district court that it could not be liable because the ADA expressly permitted it to require Holt to undergo a post-offer medical examination, an examination that included all medically-related follow-ups, and to decline to hire him when he failed to satisfy the requirements of that examination. The district court's contrary reading of the law rests on two unprecedented principles: (1) that a conditional offer is irrevocable except for reasons that relate to an applicant's failure to satisfy a hiring standard that is job-related and consistent with business ne-

cessity; and (2) an employer must pay the cost of any requested follow-up medical testing or information sought as part of a post-offer medical examination.

a. The district court erred in ruling that conditional offers are "irrevocable" and may be withdrawn only for reasons that are job-related and consistent with business necessity.

The text of § 12112(d)(3) does not state that conditional offers of employment are "irrevocable" or that an employer may withdraw the offer *only* for reasons that are job-related and consistent with business necessity. No court but the district court has ever held that conditional offers are "irrevocable." The district court simply misread *Garrison v. Baker Hughes Oilfield Operations, Inc.*, 287 F.3d 955 (10th Cir. 2002)—and disregarded contrary decisions of this Court—in reaching that conclusion. *See* RE.146-47, 153.

Garrison does include this sentence:

> Under § 12112(d)(3)(C), an employer's reasons for withdrawing a conditional job offer must be "job-related and consistent with business necessity." 29 C.F.R. § 1630.14(b)(3).

287 F.3d at 960. But the court was just providing a shorthand summary of 29 C.F.R. § 1630.14(b)(3). That regulation deals with—as explained earlier—the assessment of results of medical examinations against substantive hiring standards (*i.e.*, selection criteria) under 42 U.S.C. § 12112(b)(6). Only "if *certain criteria are*

used to screen out an employee or employees with disabilities…[must] the *exclusionary criteria*…be job-related and consistent with business necessity…. (*See* § 1630.15(b) Defenses to charges of discriminatory application of *selection criteria*.)." 29 C.F.R. 1630.14(b)(3)(emphasis added). EEOC's interpretive guidance says the same. 29 C.F.R. § 1630.14(b) App'x. (only "exclusionary criteria" the medical information shows an applicant not to meet must be justified).[14] In using shorthand to describe the requirements applicable to the more common scenario when a job offer is withdrawn, *Garrison* was not adopting a new substantive rule that a conditional offer is "irrevocable" and may be withdrawn *only* when an applicant fails to meet a hiring standard that is job-related and consistent with business necessity. Proof of that fact is found in *Garrison* itself, which holds that an employer may withdraw a conditional offer based on the applicant's *dishonesty* about information requested. *Garrison*, 287 F.3d at 960-61 & n.5.

In addition, as the previous paragraph and BNSF's earlier discussion of EEOC's flawed selection-criteria theory under 42 U.S.C. § 12112(b)(6) make plain,

[14] *See also EEOC Technical Assistance Manual* § 6.1 ("If an individual is not hired *because* [not "when"] a post-offer medical examination or inquiry reveals a disability, the reason(s) for not hiring must be job-related and necessary for the business.")(emphasis added). *Compare id.,* § 9.8 ("An employer may refuse to hire…a person who knowingly provides a false answer to a lawful post-offer inquiry about his/her condition….").

the regulation *Garrison* was discussing—29 C.F.R. § 1630.14(b)(3)—is the regulation applicable to section 12112(b)(6) claims. Yet the district court expressly ruled that section 12112(b)(6) did not apply in this case. The court apparently failed to recognize that connection and so ended up relying on legal standards under section 12112(b)(6) even after correctly holding that the section does not apply to this case.

In *Leonel v. American Airlines, Inc.*, 400 F.3d 702 (9th Cir. 2003), this Court observed, without mentioning the job-related-and-consistent-with-business-necessity standard:

> We do not suggest that, when a medical examination is conducted at the proper time and in the proper manner, an applicant has an option to lie, or that the employer is foreclosed from refusing to hire an applicant who does.

Id., 709 n.13. Other courts agree that conditional offers may be withdrawn for reasons that are not the application of substantive job standards which are job-related and consistent with business necessity. *See Roberts v. City of Chicago*, 817 F.3d at 566 (tardy follow-up medical information); *Hartman v. City of Petaluma*, 841 F. Supp. 946, 949-50 (N.D. Cal. 1994)(dishonesty); *Garlitz v. Alpena Regional Med. Ctr.*, 834 F. Supp. 2d 668, 676-77 (E.D. Mich. 2011)(applicant misconduct); *Martin v. Cunningham Children's Home*, 2010 WL 1241819, *3 (C.D. Ill. March 22, 2010)(failure to secure letter from personal doctor concerning medication); *Dukes*

v. Shinseki, 671 F.Supp.2d 106, 112 (D.D.C. 2009)(refusing to produce records based on privacy objection); *see also Garrison*, 287 F.3d 955, 961 n. 5, 964 (dishonesty).

The Seventh Circuit's recent decision in *Roberts* is particularly relevant. There the employer did not complete the process for one of the plaintiffs yet the Seventh Circuit held that the plaintiff did not state a viable ADA claim. *Roberts*, 817 F.3d at 565-66 (rejecting arguments that employer "cannot 'structure the hiring process as an obstacle course in which individuals with disabilities are given no reasonable opportunity to demonstrate, in a timely manner that they are qualified to be hired despite their disabilities'" because "the statute does not state that these medical requests must be reasonable or that employers must give disabled applicants sufficient time to comply").

This Court has also held, as a necessary corollary of applicant dishonesty being a lawful reason not to hire, that an applicant at the post-offer, pre-employment stage must provide all information requested by the employer, even over privacy objections, in order to be considered for the position sought:

> Many hidden medical conditions, like HIV, make individuals vulnerable to discrimination once revealed. The ADA…allow[s] applicants to keep those conditions private *until the last stage of the hiring process*. Applicants may then *choose whether or not to disclose their medical infor-*

> *mation* once they have been assured that as long as they can perform the job's essential tasks, they will be hired.

Leonel, 400 F.3d at 709 (emphasis added); *see also Fredenburg v. Contra Costa Cnty. Dep't of Health Servs.*, 172 F.3d 1176, 1182 (9th Cir. 1999)(assuming applicant with HIV could be required to disclose status during hiring process). As just discussed, the Court noted in *Leonel* that an applicant cannot lie about a hidden medical condition. But if choosing not to disclose the condition is an option, any issue about honesty is moot: applicants can simply not provide information to which they object and the employer has no recourse. This Court thus necessarily held that at "the last stage of the process" an applicant, even one with a hidden disability, is *required* to cooperate with the employer's requests for information or accept disqualification.

That outcome follows from the text of § 12112(d)(3), which says—contrary to the district court's understanding—that an employer may "require" an examination not just "give" or "request" one. *Compare* RE.150-51. The ADA does not define the word "require" and the ordinary and natural meaning of "require" is "to impose a compulsion or command on: compel."[15] Again, EEOC's Technical

[15] Merriam-Webster, "Require": (http://www.merriam-webster.com/dictionary/require).

Assistance Manual agrees. Section 6.5 begins "[T]he ADA does not limit the nature or extent of post-offer medical examinations and inquiries…." Finding a right of applicants to refuse to cooperate with such examinations and inquiries would, by definition, "limit" their "nature" and "extent." *Cf. Norman-Bloodsaw*, 135 F.3d at 1273 ("the ADA imposes no restriction on the scope of entrance examinations…").

Consequently, under controlling authority of this Court an employer may, without violating the ADA, refuse to proceed with the post-offer, pre-employment medical-examination process when an applicant "fails to provide…requested documentation" in response to a lawful request, without regard to whether the employer's request for information or its resulting refusal to proceed is job-related and consistent with business necessity.

b. The Seventh Circuit has held, with respect to an applicant, that an employer's request for a follow-up medical test at a cost to the applicant of $1500 was permissible under the ADA.

In *O'Neal v. City of New Albany*, 293 F.3d 998 (7th Cir. 2002), a case cited and relied on by this Court in *Leonel*, 400 F.3d at 709, a physician, Dr. Pope, examined O'Neal, an applicant. O'Neal "flunked" the medical examination because of heart problems, but he provided additional information and underwent additional

testing leading Dr. Pope to conclude that O'Neal did not suffer from coronary heart disease. "Nonetheless," the court explained, "Dr. Pope refused to certify O'Neal as having passed the examination without additional medical tests that would have cost O'Neal $1500." O'Neal did not have those tests performed, and the employer did not hire him. *Id.*, 1002.

On appeal, O'Neal conceded that he did not have a disability and—despite not being hired because the city stopped considering him based on the incomplete results of the medical examination—did not argue that the city regarded him as disabled. *Id.*, 1010. Noting that other courts of appeals had allowed non-disabled applicants to sue after being "subjected to *illegal* medical examinations and disclosures," the Seventh Circuit held that "[h]ere, unlike in [those cases], we are faced with *a permissible post-offer inquiry*." *Id.*, n.2 (emphasis added). In other words, although the absence of a disability is not an impediment in (most) cases involving an illegal medical examination, the case before it involved a *permissible* examination. That was true even though the applicant would have had to pay $1,500 before the employer could or would complete the medical-review process.

That approach is consistent with enforcement guidance issued by EEOC. In the only guidance of any sort the agency has provided on the question of costs involved in medical examinations, EEOC addressed the question of who must pay

when an employer sends an *employee* for an examination. *See* EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act, Questions 11 and 12 (http://www.eeoc.gov/policy/docs/guidance-inquiries.html). EEOC explains that an employer is obligated to pay for an employee examination *only* if the employer directs the employee to see a particular healthcare provider. *Id.* In other words, an employer can, when it meets the standard for requiring a medical examination of an employee, require an employee to undergo medical testing *at the employee's cost* so long as the employer does not direct the employee to a particular provider. As further explained in the following sections, it is not plausible to suggest that the law allows that approach for *employees* already working for an employer but does not allow it for *applicants* who have no relationship with the employer but are seeking to enter into one.

c. All courts agree that employers may "require" *employees* in certain circumstances, as they may "require" applicants unconditionally, to undergo medical examinations and that an employee's non-cooperation is a legitimate reason to discharge the employee, even when the employer requires the employee to pay for requested medical information.

Several courts of appeals, including this Court, *Brownfield v. City of Yakima*, 612 F.3d 1140, 1145-47 & n.2 (9th Cir. 2010), have held that if the employer meets

the statutory condition to "require" a medical examination of an *employee* and the employee fails or refuses to cooperate by attending an examination or providing requested records, the employee's action is a legitimate, non-discriminatory reason for the employer to discharge the employee or otherwise consider the employee's employment terminated.[16] At least one court of appeals reached the same conclusion when the employer required the employee to pay the cost of complying with the employer's request.[17]

Many district courts also have held that an employee's failure to attend a medical examination or provide medical records when properly required by the employer is a legitimate, non-discriminatory reason to discharge the employee.[18]

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[16] *See also Thomas v. Corwin*, 483 F.3d 516, 527-28, 529, 531 (8th Cir. 2007); *Henderson v. Ford Motor Co.*, 403 F.3d 1026, 1034-35 (8th Cir. 2005); *Sullivan v. River Valley School District*, 197 F.3d 804, 810-813 (6th Cir. 1999); *Porter v. United States Alumoweld Co., Inc.*, 125 F.3d 243, 246-49 (4th Cir. 1997); *see also Coursey v. University of Md. Eastern Shore*, 577 F. App'x. 167, 172-76 (4th Cir. 2014).

[17] *Porter*, 125 F.3d at 245 ("Alumoweld informed Porter that he would be responsible for paying for the evaluation"). Another court of appeals suggested it would likely also reach that same result. *Sullivan*, 197 F.3d at 811 ("Though we need not decide today whether the district could require Sullivan to pay for the examination, we note that the Fourth Circuit has upheld a dismissal where the employee refused to pay for a fitness-for-return-to-duty exam shortly after obtaining a general release to work from his own physician similar to Sullivan's.").

[18] *E.g.*, *Watt v. City of Crystal*, 2015 WL 7760166 at * 6-7, 10 (D. Minn. 2015); *Small v. Memphis-Shelby Cty. Airport Auth.*, 2015 WL 7776605 at * 17-18 (W.D. Tenn. 2015); *Peña v. City of Flushing*, 2015 WL 5697680 at *7-10 (E.D. Mich. 2015); *Sosa*

One district court pointed out that the employee's loss of employment in that situation is more correctly defined as job abandonment, because it was the employee's choice not to attend the exam or provide the requested information.[19] District courts, like courts of appeals, have also ruled, consistently with the EEOC guidance discussed in the previous section, that an employer may require the employee to bear all or some of the *cost* of obtaining required examinations or documents.[20]

d. The text, structure, context, and purpose of ADA § 12112(d)(3) allow employers to condition job offers on an *applicant* obtaining (and paying for if necessary) information needed to respond to medical inquiries, making the applicant's failure or refusal a legitimate, non-discriminatory reason to end the medical examination and not proceed with the hire.

i. The statutory text and structure.

For *applicants*, § 12112(d)(3) says employers "may **require**" medical examinations. For *employees*, § 12112(d)(4)(A) says employers "shall not **require**" such

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v. New York Division of Human Rights, 2015 WL 5191205 at * 11 (E.D.N.Y. 2015); *Leonard v. Electro-Mechanical Corp.*, 36 F.Supp.3d 679, 685-90 (W.D. Va. 2014); *Dengel v. Waukesha Cty.*, 16 F.Supp.3d 983, 992-97 (E.D. Wisc. 2014); *Lyons v. Miami-Dade Cty.*, 791 F.Supp.2d 1221, 1226-27 (S.D. Fla. 2011); *Johnson v. Goodwill Indus. of E.N.C., Inc.*, 1998 WL 1119856, *4 (E.D.N.C. 1998)(citing earlier cases).

[19] *Dengel*, 16 F.Supp.3d at 997 & n.8 ("caused his own termination" "can likely be said to have abandoned his employment").

[20] *Blackwell v. SecTek*, 61 F.Supp.3d 149, 159 (D.D.C. 2014)(citing *Porter* and *Sullivan* but also earlier cases).

examinations and inquiries "**unless**…job-related and consistent with business necessity." The same word used in two connected and related paragraphs of the same section of the same statute is strongly presumed to have the same meaning. *See Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980). Thus, if "**require**" in (d)(4) means—as every court to consider the issue has held it does—that an *employee*'s failure to attend a medical examination or provide requested medical information (and even pay for it if required) is a legitimate, non-discriminatory reason to end the employment relationship, the same word "**require**" in (d)(3) must mean that an *applicant*'s failure to attend a medical examination or provide requested medical information (and even pay for it if required) is a legitimate, non-discriminatory reason not to start an employment relationship.

ii. The statutory context.

This Court has noted and explained one reason for the ADA's differing treatment of applicants and employees with respect to permissible medical examinations and inquiries:

> An employee, who has worked for a company, has more invested in that employment, including benefits, than an applicant for employment. Therefore, the employee has more to lose by job termination than an applicant, and the employee also effectively has been penalized for a medical absence, when his or her job is lost upon return to work.

Indergard v. Georgia-Pacific Corp., 582 F.3d. 1049, 1057 n.3 (9th Cir. 2009). That reason suggests two others. First, the ordinary meaning of the word "applicant"—"someone who requests something, a petitioner,"[21]—implies carrying a burden of proof. If situations exist in which an applicant for anything—a job, a license, a permit, or membership in an organization—can require the provider of the benefit to fund the application process, they are difficult to imagine. Moreover, it is equally difficult to imagine a limiting principle: must an employer pay for transportation, postage, internet connection, and lost time as well as for medical testing of a job applicant with a reported past medical condition?

Second, an employee, "who has worked for the company," is presumptively medically qualified to perform the employer's exact job: they have been performing it. Most job applicants, even ones experienced with work of the same general kind as the employer's, cannot point to the same presumptive medical qualification as a current employee. They start the hiring process presumptively not yet qualified *medically*—although at the post-offer, pre-employment stage they are presumptive-

[21] BLACK'S LAW DICTIONARY, 120 (Tenth ed. 2014); *accord Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937, 941 (8th Cir. 2014), *aff'd by equally divided court*, 135 S. Ct. 1492 (2016)("To 'apply' means to make an appeal or request esp[cially] formally and often in writing an usu[ally] for something of benefit to oneself. Webster's Third New International Dictionary 105 (2002))."

ly *otherwise* qualified. Many, perhaps most, employers have minimal medical qualifications for their employees and see no need for medical entrance examinations. For the rest, § 12112(d)(3) authorizes—the employer "may require"—such examinations. The greater stake of employees compared with applicants in the employment relationship noted by the Court as well as the practical differences between applicants and employees with respect to their medical qualifications as reflected in § 12112(d)(3) and (4) confirm that Congress intended that employers have *more* leeway with applicants than with employees.

iii. The statutory purposes.

The Court has noted that the primary purpose of the ADA's division of the application process into pre-offer and post-offer stages is to isolate for a rejected applicant whether the employer relied on medical or non-medical reasons for the disqualification. *Leonel*, 400 F.3d at 709. That purpose is satisfied when the employer halts the application process in the post-offer, pre-employment stage because the applicant declines to cooperate with a request for additional medical information. The applicant knows that the employer's reason relates to his medical rather than his non-medical qualifications. Moreover, the applicant could still prove discrimination, as noted in many of the employee cases cited above, by show-

ing that the employer's stated reason is a pretext for deliberate discrimination rooted in animus toward applicants with a disability.

In sum, the statutory text, structure, and context, consistently with the cited regulatory and guidance materials, allow an employer to halt the application process in the post-offer, pre-employment stage when the applicant declines to comply with a request for additional medical information—even if compliance is at the applicant's cost—leaving the applicant the option of showing a violation of the ADA by proving that the employer's otherwise permissible decision to halt the process was a pretext for disability discrimination. That outcome is also consistent with the relevant statutory purposes. Every other court to decide the issue has agreed. The district court erred in holding otherwise.

For the above reasons, BNSF asks the Court to reverse and render judgment in favor of BNSF on any or all of the three independent grounds presented above. Or, if the Court finds a fact issue on one of those grounds, it should reverse and remand for further proceedings.

III. ALTERNATIVELY, THE DISTRICT COURT'S INJUNCTION MUST BE REVERSED

A. The District Court Failed to Consider Recent Supreme Court Decisions that Rendered Inapplicable the Caselaw EEOC Relied On.

EEOC, citing several older cases, argued that an injunction was mandatory unless BNSF proved that there is no danger that the violation the district court found would be repeated. RE.189-90. But the Supreme Court has recently emphasized that, unless a statute clearly says otherwise, whether to grant permanent injunctive relief is determined by traditional equitable principles, the plaintiff has the burden of proof, and there is no thumb on the scale in favor of an injunction. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)("According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief."). In *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157-58 (2010), the Court reiterated that view and specifically rejected the rationale relied on in many older Title VII cases:

> An injunction should issue only if the traditional four-factor test is satisfied…. In contrast, the statements quoted above appear to presume that an injunction is the proper remedy for a [National Environmental Policy Act] violation except in unusual circumstances. No such thumb on the scales is warranted…. It is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should not issue; rather, a court must determine that an injunction should issue under the traditional four-factor test set out above.

Id., 157-58; *see also Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 192-93 (2000); *cf. Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003)(normal rules apply under Title VII in the absence of statutory language otherwise).

Because the earlier Ninth Circuit cases EEOC cited that formed the framework for the district court's analysis[22] were not ADA cases and, in any event, are inconsistent with recent Supreme Court cases, the district court erred. This Court should rule that the more recent Supreme Court cases have changed the law and that EEOC may obtain injunctive relief *only* by satisfying traditional equitable principles. *See Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003)(en banc)(intervening higher authority controls); *BNSF Ry. Co. v. O'Dea*, 572 F.3d 785, 791 (9th Cir. 2009)(holding that later Supreme Court decision effectively overruled Ninth Circuit case). Specifically:

> A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

[22] *U.S. v. W.T. Grant Co.*, 345 U.S. 629 (1953), cited by EEOC and the district court, also does not support the injunction. The reference to a burden on the defendant concerned an argument that the case was moot, not injunctive relief.

eBay Inc., 547 U.S. at 391.

EEOC has made no effort to satisfy that test, and the district court erred in not requiring it to do so. Nor could EEOC meet the test. There is no evidence that the injury EEOC claimed was irreparable or that monetary relief was inadequate. Accordingly, the Court should reverse the injunction in its entirety.

B. At a Minimum, the Injunction Should be Limited Geographically and to the Position at Issue in this Case.

An injunction must be narrowly tailored to the specific harm at issue. *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd*, 762 F.3d 829, 840 (9th Cir. 2014); *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1176 (9th Cir. 2010). Here, the case involved an applicant for a Senior Patrol Officer position in Seattle. Yet the district court's injunction applies to all applicants nationwide for any BNSF job. If allowed to stand at all, the Court should limit the injunction to Senior Patrol Officer positions within the Western District of Washington, or at most the Ninth Circuit. *See EEOC v. AutoZone, Inc.*, 707 F.3d 824, 842-43 (7th Cir. 2013)(limiting injunction to particular position at issue and the district court's judicial district).

A geographic restriction is particularly appropriate given the caselaw in other jurisdictions. BNSF has shown above that some jurisdictions (the Seventh Circuit) expressly have permitted the very conduct the district court here found unlawful,

and many other courts have issued rulings strongly indicating that they would do the same. As a matter of inter-circuit relations, it would not be appropriate for one circuit to enjoin conduct that another does or may permit. This Court so held in reversing another overly broad district court injunction issued under the ADA at the request of a government agency. *See United States v. AMC Entm't, Inc.*, 549 F.3d 760 (9th Cir. 2008). There, the district court issued a geographically broad injunction that included the Fifth Circuit even though that circuit had adopted a contrary legal view. The Court held that was error. *Id.*, 773. Likewise, here, because the Seventh Circuit has ruled contrary to the district court, and numerous other circuits have rejected the principles on which the district court based its ruling, an injunction beyond the boundaries of the Western District of Washington or at most the Ninth Circuit is overbroad and should be reversed. *Id.*; *see also AutoZone, Inc.*, 707 F.3d at 842-43.

CONCLUSION

The Court should reverse and render judgment for BNSF or, alternatively, remand for further proceedings. Should the Court reach the issue it should also reverse the injunction.

STATEMENT OF RELATED CASES

Taylor v. Burlington N. R.R. Holdings, Inc., No. 16-35205, cited in this brief, meets the definition of a related case as described in Circuit Rule 28-2.6(c) but only on the issue of whether asking for updated information about a previous medical condition is "perceiving" the person to whom the request is made as having a current ADA impairment.

Dated: October 11, 2016.

Respectfully submitted,

s/ Bryan P. Neal
Bryan P. Neal
Texas Bar No. 00788106
Stephen F. Fink
Texas Bar No. 07013500
THOMPSON & KNIGHT LLP
1722 Routh Street, Suite 1500
Dallas, Texas 75201
bryan.neal@tklaw.com
stephen.fink@tklaw.com
Telephone: (214) 969-1700
Facsimile: (214) 969-1751

Kenneth J. Diamond, Attorney
Winterbauer & Diamond, PLLC
1200 Fifth Avenue, Suite 1700
Seattle, Washington 98101
ken@winterbauerdiamond.com
Telephone: (206) 676-8440
Facsimile: (206) 676-8441

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 11, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Bryan P. Neal
Bryan P. Neal

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Certificate of Compliance with Type-Volume Limitation,
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1. The brief complies with the type-volume limitations of Fed. R. App. P. 28.1(e)(2)(B) because: this brief contains 13,776 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. The 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: this brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in Equity Text A, 14 point.

s/Bryan P. Neal
Bryan P. Neal

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ADDENDUM

Table of Contents

TAB 1

42 U.S.C.A. § 12102

§ 12102. Definition of disability

Effective: January 1, 2009

Currentness

As used in this chapter:

(1) Disability

The term "disability" means, with respect to an individual--

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

***

(3) Regarded as having such an impairment

For purposes of paragraph (1)(C):

(A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter 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.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

(4) Rules of construction regarding the definition of disability

The definition of "disability" in paragraph (1) shall be construed in accordance with the following:

(A) The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.

(B) The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as--

(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.

(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(iii) As used in this subparagraph--

(I) the term "ordinary eyeglasses or contact lenses" means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

(II) the term "low-vision devices" means devices that magnify, enhance, or otherwise augment a visual image.

CREDIT(S)

(Pub.L. 101-336, § 3, July 26, 1990, 104 Stat. 329; Pub.L. 110-325, § 4(a), Sept. 25, 2008, 122 Stat. 3555.)

42 U.S.C.A. § 12102
Current through P.L. 114-222. Also includes P.L. 114-224, 114-226, and 114-227.

End of Document

TAB 2

42 U.S.C.A. § 12112

§ 12112. Discrimination

Effective: January 1, 2009

Currentness

(a) General rule

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate against a qualified individual on the basis of disability" includes--

***

(6) 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 unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

***

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if--

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that--

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to

the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

CREDIT(S)

(Pub.L. 101-336, Title I, § 102, July 26, 1990, 104 Stat. 331; Pub.L. 102-166, Title I, § 109(b)(2), Nov. 21, 1991, 105 Stat. 1077; Pub.L. 110-325, § 5(a), Sept. 25, 2008, 122 Stat. 3557.)

42 U.S.C.A. § 12112
Current through P.L. 114-222. Also includes P.L. 114-224, 114-226, and 114-227.

End of Document

TAB 3

providing fringe benefits to an employee of the covered entity; or an organization providing training and apprenticeship programs.

(c) *Application*. This section applies to a covered entity, with respect to its own applicants or employees, whether the entity offered the contract or initiated the relationship, or whether the entity accepted the contract or acceded to the relationship. A covered entity is not liable for the actions of the other party or parties to the contract which only affect that other party's employees or applicants.

§ 1630.7 Standards, criteria, or methods of administration.

It is unlawful for a covered entity to use standards, criteria, or methods of administration, which are not job-related and consistent with business necessity, and:

(a) That have the effect of discriminating on the basis of disability; or

(b) That perpetuate the discrimination of others who are subject to common administrative control.

§ 1630.8 Relationship or association with an individual with a disability.

It is unlawful for a covered entity to exclude or deny equal jobs or benefits to, or otherwise discriminate against, a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association.

§ 1630.9 Not making reasonable accommodation.

(a) It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

(b) It is unlawful for a covered entity to deny employment opportunities to an otherwise qualified job applicant or employee with a disability based on the need of such covered entity to make reasonable accommodation to such individual's physical or mental impairments.

(c) A covered entity shall not be excused from the requirements of this part because of any failure to receive technical assistance authorized by section 507 of the ADA, including any failure in the development or dissemination of any technical assistance manual authorized by that Act.

(d) An individual with a disability is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered qualified.

(e) A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of disability under the ''actual disability'' prong (§ 1630.2(g)(1)(i)), or ''record of'' prong (§ 1630.2(g)(1)(ii)), but is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the ''regarded as'' prong (§ 1630.2(g)(1)(iii)).

[56 FR 35734, July 26, 1991, as amended at 76 FR 17002, Mar. 25, 2011]

§ 1630.10 Qualification standards, tests, and other selection criteria.

(a) *In general*. It is unlawful for a covered entity to use 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, on the basis of disability, unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job related for the position in question and is consistent with business necessity.

(b) *Qualification standards and tests related to uncorrected vision*. Notwithstanding § 1630.2(j)(1)(vi) of this part, a covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the

standard, test, or other selection criterion, as used by the covered entity, is shown to be job related for the position in question and is consistent with business necessity. An individual challenging a covered entity's application of a qualification standard, test, or other criterion based on uncorrected vision need not be a person with a disability, but must be adversely affected by the application of the standard, test, or other criterion.

[76 FR 17002, Mar. 25, 2011]

§ 1630.11 Administration of tests.

It is unlawful for a covered entity to fail to select and administer tests concerning employment in the most effective manner to ensure that, when a test is administered to a job applicant or employee who has a disability that impairs sensory, manual or speaking skills, the test results accurately reflect the skills, aptitude, or whatever other factor of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

§ 1630.12 Retaliation and coercion.

(a) *Retaliation.* It is unlawful to discriminate against any individual because that individual has opposed any act or practice made unlawful by this part or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing to enforce any provision contained in this part.

(b) *Coercion, interference or intimidation.* It is unlawful to coerce, intimidate, threaten, harass or interfere with any individual in the exercise or enjoyment of, or because that individual aided or encouraged any other individual in the exercise of, any right granted or protected by this part.

§ 1630.13 Prohibited medical examinations and inquiries.

(a) *Pre-employment examination or inquiry.* Except as permitted by § 1630.14, it is unlawful for a covered entity to conduct a medical examination of an applicant or to make inquiries as to whether an applicant is an individual with a disability or as to the nature or severity of such disability.

(b) *Examination or inquiry of employees.* Except as permitted by § 1630.14, it is unlawful for a covered entity to require a medical examination of an employee or to make inquiries as to whether an employee is an individual with a disability or as to the nature or severity of such disability.

§ 1630.14 Medical examinations and inquiries specifically permitted.

(a) *Acceptable pre-employment inquiry.* A covered entity may make pre-employment inquiries into the ability of an applicant to perform job-related functions, and/or may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions.

(b) *Employment entrance examination.* A covered entity may require a medical examination (and/or inquiry) after making an offer of employment to a job applicant and before the applicant begins his or her employment duties, and may condition an offer of employment on the results of such examination (and/or inquiry), if all entering employees in the same job category are subjected to such an examination (and/or inquiry) regardless of disability.

(1) Information obtained under paragraph (b) of this section regarding the medical condition or history of the applicant shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

(i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) Government officials investigating compliance with this part shall be provided relevant information on request.

(2) The results of such examination shall not be used for any purpose inconsistent with this part.

(3) Medical examinations conducted in accordance with this section do not

have to be job-related and consistent with business necessity. However, if certain criteria are used 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, and performance of the essential job functions cannot be accomplished with reasonable accommodation as required in this part. (See §1630.15(b) Defenses to charges of discriminatory application of selection criteria.)

(c) *Examination of employees.* A covered entity may require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(1) Information obtained under paragraph (c) of this section regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

(i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) Government officials investigating compliance with this part shall be provided relevant information on request.

(2) Information obtained under paragraph (c) of this section regarding the medical condition or history of any employee shall not be used for any purpose inconsistent with this part.

(d) *Other acceptable examinations and inquiries.* A covered entity may conduct voluntary medical examinations and activities, including voluntary medical histories, which are part of an employee health program available to employees at the work site.

(1) Information obtained under paragraph (d) of this section regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

(i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) Government officials investigating compliance with this part shall be provided relevant information on request.

(2) Information obtained under paragraph (d) of this section regarding the medical condition or history of any employee shall not be used for any purpose inconsistent with this part.

EFFECTIVE DATE NOTE: At 81 FR 31139, May 17, 2016, effective July 18, 2016, §1630.14 was amended by:

a. Redesignating paragraph (d)(1) introductory text as paragraph (d)(4)(i) with the subject heading *Confidentiality;*

b. Adding new paragraph (d)(1) introductory text;

c. Redesignating paragraphs (d)(1)(i), (ii), and (iii) as (d)(4)(i)(A), (B), and (C);

d. Redesignating paragraph (d)(2) as paragraph (d)(4)(ii);

e. Adding new paragraph (d)(2) and paragraph (d)(3);

f. Adding paragraphs (d)(4)(iii) and (d)(4)(iv); and

g. Adding paragraphs (d)(5) and (6).

For the convenience of the user, the added text is set forth as follows:

§ 1630.14 Medical examinations and inquiries specifically permitted.

* * * * *

(d) * * *

(1) *Employee health program.* An employee health program, including any disability-related inquiries or medical examinations that are part of such program, must be reasonably designed to promote health or prevent disease. A program satisfies this standard if it has a reasonable chance of improving the health of, or preventing disease in, participating employees, and it is not overly burdensome, is not a subterfuge for violating the ADA or other laws prohibiting employment discrimination, and is not highly suspect in the method chosen to promote health or prevent disease. A program consisting of a measurement, test, screening, or collection

of health-related information without providing results, follow-up information, or advice designed to improve the health of participating employees is not reasonably designed to promote health or prevent disease, unless the collected information actually is used to design a program that addresses at least a subset of the conditions identified. A program also is not reasonably designed if it exists mainly to shift costs from the covered entity to targeted employees based on their health or simply to give an employer information to estimate future health care costs. Whether an employee health program is reasonably designed to promote health or prevent disease is evaluated in light of all the relevant facts and circumstances.

(2) *Voluntary*. An employee health program that includes disability-related inquiries or medical examinations (including disability-related inquiries or medical examinations that are part of a health risk assessment) is voluntary as long as a covered entity:

(i) Does not require employees to participate;

(ii) Does not deny coverage under any of its group health plans or particular benefits packages within a group health plan for non-participation, or limit the extent of benefits (except as allowed under paragraph (d)(3) of this section) for employees who do not participate;

(iii) Does not take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees within the meaning of Section 503 of the ADA, codified at 42 U.S.C. 12203; and

(iv) Provides employees with a notice that:

(A) Is written so that the employee from whom medical information is being obtained is reasonably likely to understand it;

(B) Describes the type of medical information that will be obtained and the specific purposes for which the medical information will be used; and

(C) Describes the restrictions on the disclosure of the employee's medical information, the employer representatives or other parties with whom the information will be shared, and the methods that the covered entity will use to ensure that medical information is not improperly disclosed (including whether it complies with the measures set forth in the HIPAA regulations codified at 45 CFR parts 160 and 164).

(3) *Incentives offered for employee wellness programs*. The use of incentives (financial or in-kind) in an employee wellness program, whether in the form of a reward or penalty, will not render the program involuntary if the maximum allowable incentive available under the program (whether the program is a participatory program or a health-contingent program, or some combination of the two, as those terms are defined in regulations at 26 CFR 54.9802–1(f)(1)(ii) and (iii), 29 CFR 2590.702(f)(1)(ii) and (iii), and 45 CFR 146.121(f)(1)(ii) and (iii), respectively) does not exceed:

(i) Thirty percent of the total cost of self-only coverage (including both the employee's and employer's contribution) of the group health plan in which the employee is enrolled when participation in the wellness program is limited to employees enrolled in the plan;

(ii) Thirty percent of the total cost of self-only coverage under the covered entity's group health plan, where the covered entity offers only one group health plan and participation in a wellness program is offered to all employees regardless of whether they are enrolled in the plan;

(iii) Thirty percent of the total cost of the lowest cost self-only coverage under a major medical group health plan where the covered entity offers more than one group health plan but participation in the wellness program is offered to employees whether or not they are enrolled in a particular plan; and

(iv) Thirty percent of the cost of self-only coverage under the second lowest cost Silver Plan for a 40-year-old non-smoker on the state or federal health care Exchange in the location that the covered entity identifies as its principal place of business if the covered entity does not offer a group health plan or group health insurance coverage.

(4) * * *

(iii) Except as permitted under paragraph (d)(4)(i) of this section and as is necessary to administer the health plan, information obtained under this paragraph (d) regarding the medical information or history of any individual may only be provided to an ADA covered entity in aggregate terms that do not disclose, or are not reasonably likely to disclose, the identity of any employee.

(iv) A covered entity shall not require an employee to agree to the sale, exchange, sharing, transfer, or other disclosure of medical information (except to the extent permitted by this part to carry out specific activities related to the wellness program), or to waive any confidentiality protections in this part as a condition for participating in a wellness program or for earning any incentive the covered entity offers in connection with such a program.

(5) Compliance with the requirements of this paragraph (d), including the limit on incentives under the ADA, does not relieve a covered entity from the obligation to comply in all respects with the nondiscrimination provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, the Equal Pay Act of 1963, 29 U.S.C. 206(d), the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, Title II of the Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. 2000ff, *et seq.*, or other sections of Title I of the ADA.

(6) The ''safe harbor'' provisions in §1630.16(f) of this part applicable to health

insurance, life insurance, and other benefit plans do not apply to wellness programs, even if such plans are part of a covered entity's health plan.

§ 1630.15 Defenses.

Defenses to an allegation of discrimination under this part may include, but are not limited to, the following:

(a) *Disparate treatment charges.* It may be a defense to a charge of disparate treatment brought under §§ 1630.4 through 1630.8 and 1630.11 through 1630.12 that the challenged action is justified by a legitimate, nondiscriminatory reason.

(b) *Charges of discriminatory application of selection criteria*—(1) *In general.* It may be a defense to a charge of discrimination, as described in § 1630.10, that an alleged application of qualification standards, tests, or selection criteria that screens out or tends to screen out or otherwise denies a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished with reasonable accommodation, as required in this part.

(2) *Direct threat as a qualification standard.* The term ''qualification standard'' may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace. (See § 1630.2(r) defining direct threat.)

(c) *Other disparate impact charges.* It may be a defense to a charge of discrimination brought under this part that a uniformly applied standard, criterion, or policy has a disparate impact on an individual with a disability or a class of individuals with disabilities that the challenged standard, criterion or policy has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished with reasonable accommodation, as required in this part.

(d) *Charges of not making reasonable accommodation.* It may be a defense to a charge of discrimination, as described in § 1630.9, that a requested or necessary accommodation would impose an undue hardship on the operation of the covered entity's business.

(e) *Conflict with other Federal laws.* It may be a defense to a charge of discrimination under this part that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required by this part.

(f) *Claims based on transitory and minor impairments under the ''regarded as'' prong.* It may be a defense to a charge of discrimination by an individual claiming coverage under the ''regarded as'' prong of the definition of disability that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment) ''transitory and minor.'' To establish this defense, a covered entity must demonstrate that the impairment is both ''transitory'' and ''minor.'' Whether the impairment at issue is or would be ''transitory and minor'' is to be determined objectively. A covered entity may not defeat ''regarded as'' coverage of an individual simply by demonstrating that it subjectively believed the impairment was transitory and minor; rather, the covered entity must demonstrate that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment) both transitory and minor. For purposes of this section, ''transitory'' is defined as lasting or expected to last six months or less.

(g) *Additional defenses.* It may be a defense to a charge of discrimination under this part that the alleged discriminatory action is specifically permitted by § 1630.14 or § 1630.16.

[56 FR 35734, July 26, 1991, as amended at 76 FR 17003, Mar. 25, 2011]

§ 1630.16 Specific activities permitted.

(a) *Religious entities.* A religious corporation, association, educational institution, or society is permitted to give preference in employment to individuals of a particular religion to perform work connected with the carrying on by that corporation, association, educational institution, or society of its activities. A religious entity may require that all applicants and employees conform to the religious tenets of such organization. However, a religious entity may not discriminate against a qualified individual, who satisfies the

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a qualified individual without a disability over an equally qualified individual with a disability merely because the individual with a disability will require a reasonable accommodation. In other words, an individual's need for an accommodation cannot enter into the employer's or other covered entity's decision regarding hiring, discharge, promotion, or other similar employment decisions, unless the accommodation would impose an undue hardship on the employer. See House Labor Report at 70.

Section 1630.9(d)

The purpose of this provision is to clarify that an employer or other covered entity may not compel an individual with a disability to accept an accommodation, where that accommodation is neither requested nor needed by the individual. However, if a necessary reasonable accommodation is refused, the individual may not be considered qualified. For example, an individual with a visual impairment that restricts his or her field of vision but who is able to read unaided would not be required to accept a reader as an accommodation. However, if the individual were not able to read unaided and reading was an essential function of the job, the individual would not be qualified for the job if he or she refused a reasonable accommodation that would enable him or her to read. See Senate Report at 34; House Labor Report at 65; House Judiciary Report at 71–72.

Section 1630.9(e)

The purpose of this provision is to incorporate the clarification made in the ADA Amendments Act of 2008 that an individual is not entitled to reasonable accommodation under the ADA if the individual is only covered under the ''regarded as'' prong of the definition of ''individual with a disability.'' However, if the individual is covered under both the ''regarded as'' prong and one or both of the other two prongs of the definition of disability, the ordinary rules concerning the provision of reasonable accommodation apply.

Section 1630.10 Qualification Standards, Tests, and Other Selection Criteria

Section 1630.10(a)—In General

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. It is to ensure that there is a fit between job criteria and an applicant's (or employee's) actual ability to do the job. Accordingly, job criteria that even unintentionally screen out, or tend to screen out, an individual with a disability or a class of individuals with disabilities because of their disability may not be used unless the employer demonstrates that those criteria, as used by the employer, are job related for the position to which they are being applied and are consistent with business necessity. The concept of ''business necessity'' has the same meaning as the concept of ''business necessity'' under section 504 of the Rehabilitation Act of 1973.

Selection criteria that exclude, or tend to exclude, an individual with a disability or a class of individuals with disabilities because of their disability but do not concern an essential function of the job would not be consistent with business necessity.

The use of selection criteria that are related to an essential function of the job may be consistent with business necessity. However, selection criteria that are related to an essential function of the job may not be used to exclude an individual with a disability if that individual could satisfy the criteria with the provision of a reasonable accommodation. Experience under a similar provision of the regulations implementing section 504 of the Rehabilitation Act indicates that challenges to selection criteria are, in fact, often resolved by reasonable accommodation.

This provision is applicable to all types of selection criteria, including safety requirements, vision or hearing requirements, walking requirements, lifting requirements, and employment tests. See 1989 Senate Report at 37–39; House Labor Report at 70–72; House Judiciary Report at 42. As previously noted, however, it is not the intent of this part to second guess an employer's business judgment with regard to production standards. See §1630.2(n) (Essential Functions). Consequently, production standards will generally not be subject to a challenge under this provision.

The Uniform Guidelines on Employee Selection Procedures (UGESP) 29 CFR part 1607 do not apply to the Rehabilitation Act and are similarly inapplicable to this part.

Section 1630.10(b)—Qualification Standards and Tests Related to Uncorrected Vision

This provision allows challenges to qualification standards based on uncorrected vision, even where the person excluded by a standard has fully corrected vision with ordinary eyeglasses or contact lenses. An individual challenging a covered entity's application of a qualification standard, test, or other criterion based on uncorrected vision need not be a person with a disability. In order to have standing to challenge such a standard, test, or criterion, however, a person must be adversely affected by such standard, test or criterion. The Commission also believes that such individuals will usually be covered under the ''regarded as'' prong of the definition of disability. Someone who wears eyeglasses or contact lenses

to correct vision will still have an impairment, and a qualification standard that screens the individual out because of the impairment by requiring a certain level of uncorrected vision to perform a job will amount to an action prohibited by the ADA based on an impairment. (See §1630.2(l); appendix to §1630.2(l).)

In either case, a covered entity may still defend a qualification standard requiring a certain level of uncorrected vision by showing that it is job related and consistent with business necessity. For example, an applicant or employee with uncorrected vision of 20/100 who wears glasses that fully correct his vision may challenge a police department's qualification standard that requires all officers to have uncorrected vision of no less than 20/40 in one eye and 20/100 in the other, and visual acuity of 20/20 in both eyes with correction. The department would then have to establish that the standard is job related and consistent with business necessity.

Section 1630.11 Administration of Tests

The intent of this provision is to further emphasize that individuals with disabilities are not to be excluded from jobs that they can actually perform merely because a disability prevents them from taking a test, or negatively influences the results of a test, that is a prerequisite to the job. Read together with the reasonable accommodation requirement of section 1630.9, this provision requires that employment tests be administered to eligible applicants or employees with disabilities that impair sensory, manual, or speaking skills in formats that do not require the use of the impaired skill.

The employer or other covered entity is, generally, only required to provide such reasonable accommodation if it knows, prior to the administration of the test, that the individual is disabled and that the disability impairs sensory, manual or speaking skills. Thus, for example, it would be unlawful to administer a written employment test to an individual who has informed the employer, prior to the administration of the test, that he is disabled with dyslexia and unable to read. In such a case, as a reasonable accommodation and in accordance with this provision, an alternative oral test should be administered to that individual. By the same token, a written test may need to be substituted for an oral test if the applicant taking the test is an individual with a disability that impairs speaking skills or impairs the processing of auditory information.

Occasionally, an individual with a disability may not realize, prior to the administration of a test, that he or she will need an accommodation to take that particular test. In such a situation, the individual with a disability, upon becoming aware of the need for an accommodation, must so inform the employer or other covered entity. For example, suppose an individual with a disabling visual impairment does not request an accommodation for a written examination because he or she is usually able to take written tests with the aid of his or her own specially designed lens. When the test is distributed, the individual with a disability discovers that the lens is insufficient to distinguish the words of the test because of the unusually low color contrast between the paper and the ink, the individual would be entitled, at that point, to request an accommodation. The employer or other covered entity would, thereupon, have to provide a test with higher contrast, schedule a retest, or provide any other effective accommodation unless to do so would impose an undue hardship.

Other alternative or accessible test modes or formats include the administration of tests in large print or braille, or via a reader or sign interpreter. Where it is not possible to test in an alternative format, the employer may be required, as a reasonable accommodation, to evaluate the skill to be tested in another manner (*e.g.*, through an interview, or through education license, or work experience requirements). An employer may also be required, as a reasonable accommodation, to allow more time to complete the test. In addition, the employer's obligation to make reasonable accommodation extends to ensuring that the test site is accessible. (See §1630.9 Not Making Reasonable Accommodation) See Senate Report at 37–38; House Labor Report at 70–72; House Judiciary Report at 42; see also *Stutts* v. *Freeman*, 694 F.2d 666 (11th Cir. 1983); *Crane* v. *Dole*, 617 F. Supp. 156 (D.D.C. 1985).

This provision does not require that an employer offer every applicant his or her choice of test format. Rather, this provision only requires that an employer provide, upon advance request, alternative, accessible tests to individuals with disabilities that impair sensory, manual, or speaking skills needed to take the test.

This provision does not apply to employment tests that require the use of sensory, manual, or speaking skills where the tests are intended to measure those skills. Thus, an employer could require that an applicant with dyslexia take a written test for a particular position if the ability to read is the skill the test is designed to measure. Similarly, an employer could require that an applicant complete a test within established time frames if speed were one of the skills for which the applicant was being tested. However, the results of such a test could not be used to exclude an individual with a disability unless the skill was necessary to perform an essential function of the position and no reasonable accommodation was available to enable the individual to perform that function, or the necessary accommodation would impose an undue hardship.

Section 1630.13 Prohibited Medical Examinations and Inquiries

Section 1630.13(a) Pre-employment Examination or Inquiry

This provision makes clear that an employer cannot inquire as to whether an individual has a disability at the pre-offer stage of the selection process. Nor can an employer inquire at the pre-offer stage about an applicant's workers' compensation history.

Employers may ask questions that relate to the applicant's ability to perform job-related functions. However, these questions should not be phrased in terms of disability. An employer, for example, may ask whether the applicant has a driver's license, if driving is a job function, but may not ask whether the applicant has a visual disability. Employers may ask about an applicant's ability to perform both essential and marginal job functions. Employers, though, may not refuse to hire an applicant with a disability because the applicant's disability prevents him or her from performing marginal functions. See Senate Report at 39; House Labor Report at 72–73; House Judiciary Report at 42–43.

Section 1630.13(b) Examination or Inquiry of Employees

The purpose of this provision is to prevent the administration to employees of medical tests or inquiries that do not serve a legitimate business purpose. For example, if an employee suddenly starts to use increased amounts of sick leave or starts to appear sickly, an employer could not require that employee to be tested for AIDS, HIV infection, or cancer unless the employer can demonstrate that such testing is job-related and consistent with business necessity. See Senate Report at 39; House Labor Report at 75; House Judiciary Report at 44.

Section 1630.14 Medical Examinations and Inquiries Specifically Permitted

Section 1630.14(a) Pre-employment Inquiry

Employers are permitted to make pre-employment inquiries into the ability of an applicant to perform job-related functions. This inquiry must be narrowly tailored. The employer may describe or demonstrate the job function and inquire whether or not the applicant can perform that function with or without reasonable accommodation. For example, an employer may explain that the job requires assembling small parts and ask if the individual will be able to perform that function, with or without reasonable accommodation. See Senate Report at 39; House Labor Report at 73; House Judiciary Report at 43.

An employer may also ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions. Such a request may be made of all applicants in the same job category regardless of disability. Such a request may also be made of an applicant whose known disability may interfere with or prevent the performance of a job-related function, whether or not the employer routinely makes such a request of all applicants in the job category. For example, an employer may ask an individual with one leg who applies for a position as a home washing machine repairman to demonstrate or to explain how, with or without reasonable accommodation, he would be able to transport himself and his tools down basement stairs. However, the employer may not inquire as to the nature or severity of the disability. Therefore, for example, the employer cannot ask how the individual lost the leg or whether the loss of the leg is indicative of an underlying impairment.

On the other hand, if the known disability of an applicant will not interfere with or prevent the performance of a job-related function, the employer may only request a description or demonstration by the applicant if it routinely makes such a request of all applicants in the same job category. So, for example, it would not be permitted for an employer to request that an applicant with one leg demonstrate his ability to assemble small parts while seated at a table, if the employer does not routinely request that all applicants provide such a demonstration.

An employer that requires an applicant with a disability to demonstrate how he or she will perform a job-related function must either provide the reasonable accommodation the applicant needs to perform the function or permit the applicant to explain how, with the accommodation, he or she will perform the function. If the job-related function is not an essential function, the employer may not exclude the applicant with a disability because of the applicant's inability to perform that function. Rather, the employer must, as a reasonable accommodation, either provide an accommodation that will enable the individual to perform the function, transfer the function to another position, or exchange the function for one the applicant is able to perform.

An employer may not use an application form that lists a number of potentially disabling impairments and ask the applicant to check any of the impairments he or she may have. In addition, as noted above, an employer may not ask how a particular individual became disabled or the prognosis of the individual's disability. The employer is also prohibited from asking how often the individual will require leave for treatment or

use leave as a result of incapacitation because of the disability. However, the employer may state the attendance requirements of the job and inquire whether the applicant can meet them.

An employer is permitted to ask, on a test announcement or application form, that individuals with disabilities who will require a reasonable accommodation in order to take the test so inform the employer within a reasonable established time period prior to the administration of the test. The employer may also request that documentation of the need for the accommodation accompany the request. Requested accommodations may include accessible testing sites, modified testing conditions and accessible test formats. (See §1630.11 Administration of Tests).

Physical agility tests are not medical examinations and so may be given at any point in the application or employment process. Such tests must be given to all similarly situated applicants or employees regardless of disability. If such tests screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, the employer would have to demonstrate that the test is job-related and consistent with business necessity and that performance cannot be achieved with reasonable accommodation. (See §1630.9 Not Making Reasonable Accommodation: Process of Determining the Appropriate Reasonable Accommodation).

As previously noted, collecting information and inviting individuals to identify themselves as individuals with disabilities as required to satisfy the affirmative action requirements of section 503 of the Rehabilitation Act is not restricted by this part. (See §1630.1 (b) and (c) Applicability and Construction).

Section 1630.14(b) Employment Entrance Examination

An employer is permitted to require post-offer medical examinations before the employee actually starts working. The employer may condition the offer of employment on the results of the examination, provided that all entering employees in the same job category are subjected to such an examination, regardless of disability, and that the confidentiality requirements specified in this part are met.

This provision recognizes that in many industries, such as air transportation or construction, applicants for certain positions are chosen on the basis of many factors including physical and psychological criteria, some of which may be identified as a result of post-offer medical examinations given prior to entry on duty. Only those employees who meet the employer's physical and psychological criteria for the job, with or without reasonable accommodation, will be qualified to receive confirmed offers of employment and begin working.

Medical examinations permitted by this section are not required to be job-related and consistent with business necessity. However, if an employer withdraws an offer of employment because the medical examination reveals that the employee does not satisfy certain employment criteria, either the exclusionary criteria must not screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, or they must be job-related and consistent with business necessity. As part of the showing that an exclusionary criteria is job-related and consistent with business necessity, the employer must also demonstrate that there is no reasonable accommodation that will enable the individual with a disability to perform the essential functions of the job. See Conference Report at 59–60; Senate Report at 39; House Labor Report at 73–74; House Judiciary Report at 43.

As an example, suppose an employer makes a conditional offer of employment to an applicant, and it is an essential function of the job that the incumbent be available to work every day for the next three months. An employment entrance examination then reveals that the applicant has a disabling impairment that, according to reasonable medical judgment that relies on the most current medical knowledge, will require treatment that will render the applicant unable to work for a portion of the three month period. Under these circumstances, the employer would be able to withdraw the employment offer without violating this part.

The information obtained in the course of a permitted entrance examination or inquiry is to be treated as a confidential medical record and may only be used in a manner not inconsistent with this part. State workers' compensation laws are not preempted by the ADA or this part. These laws require the collection of information from individuals for State administrative purposes that do not conflict with the ADA or this part. Consequently, employers or other covered entities may submit information to State workers' compensation offices or second injury funds in accordance with State workers' compensation laws without violating this part.

Consistent with this section and with §1630.16(f) of this part, information obtained in the course of a permitted entrance examination or inquiry may be used for insurance purposes described in §1630.16(f).

Section 1630.14(c) Examination of Employees

This provision permits employers to make inquiries or require medical examinations (fitness for duty exams) when there is a need to determine whether an employee is still able to perform the essential functions of his or her job. The provision permits employers or other covered entities to make inquiries

or require medical examinations necessary to the reasonable accommodation process described in this part. This provision also permits periodic physicals to determine fitness for duty or other medical monitoring if such physicals or monitoring are required by medical standards or requirements established by Federal, State, or local law that are consistent with the ADA and this part (or in the case of a Federal standard, with section 504 of the Rehabilitation Act) in that they are job-related and consistent with business necessity.

Such standards may include Federal safety regulations that regulate bus and truck driver qualifications, as well as laws establishing medical requirements for pilots or other air transportation personnel. These standards also include health standards promulgated pursuant to the Occupational Safety and Health Act of 1970, the Federal Coal Mine Health and Safety Act of 1969, or other similar statutes that require that employees exposed to certain toxic and hazardous substances be medically monitored at specific intervals. See House Labor Report at 74–75.

The information obtained in the course of such examination or inquiries is to be treated as a confidential medical record and may only be used in a manner not inconsistent with this part.

Section 1630.14(d) Other Acceptable Examinations and Inquiries

Part 1630 permits voluntary medical examinations, including voluntary medical histories, as part of employee health programs. These programs often include, for example, medical screening for high blood pressure, weight control counseling, and cancer detection. Voluntary activities, such as blood pressure monitoring and the administering of prescription drugs, such as insulin, are also permitted. It should be noted, however, that the medical records developed in the course of such activities must be maintained in the confidential manner required by this part and must not be used for any purpose in violation of this part, such as limiting health insurance eligibility. House Labor Report at 75; House Judiciary Report at 43–44.

Section 1630.15 Defenses

The section on defenses in part 1630 is not intended to be exhaustive. However, it is intended to inform employers of some of the potential defenses available to a charge of discrimination under the ADA and this part.

Section 1630.15(a) Disparate Treatment Defenses

The ''traditional'' defense to a charge of disparate treatment under title VII, as expressed in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), and their progeny, may be applicable to charges of disparate treatment brought under the ADA. See *Prewitt* v. *U.S. Postal Service*, 662 F.2d 292 (5th Cir. 1981). Disparate treatment means, with respect to title I of the ADA, that an individual was treated differently on the basis of his or her disability. For example, disparate treatment has occurred where an employer excludes an employee with a severe facial disfigurement from staff meetings because the employer does not like to look at the employee. The individual is being treated differently because of the employer's attitude towards his or her perceived disability. Disparate treatment has also occurred where an employer has a policy of not hiring individuals with AIDS regardless of the individuals' qualifications.

The crux of the defense to this type of charge is that the individual was treated differently not because of his or her disability but for a legitimate nondiscriminatory reason such as poor performance unrelated to the individual's disability. The fact that the individual's disability is not covered by the employer's current insurance plan or would cause the employer's insurance premiums or workers' compensation costs to increase, would not be a legitimate nondiscriminatory reason justifying disparate treatment of an individual with a disability. Senate Report at 85; House Labor Report at 136 and House Judiciary Report at 70. The defense of a legitimate nondiscriminatory reason is rebutted if the alleged nondiscriminatory reason is shown to be pretextual.

Section 1630.15 (b) and (c) Disparate Impact Defenses

Disparate impact means, with respect to title I of the ADA and this part, that uniformly applied criteria have an adverse impact on an individual with a disability or a disproportionately negative impact on a class of individuals with disabilities. Section 1630.15(b) clarifies that an employer may use selection criteria that have such a disparate impact, *i.e.*, that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities only when they are job-related and consistent with business necessity.

For example, an employer interviews two candidates for a position, one of whom is blind. Both are equally qualified. The employer decides that while it is not essential to the job it would be convenient to have an employee who has a driver's license and so could occasionally be asked to run errands by car. The employer hires the individual who is sighted because this individual has a driver's license. This is an example of a uniformly applied criterion, having a driver's permit, that screens out an individual who has a disability that makes it impossible to

obtain a driver's permit. The employer would, thus, have to show that this criterion is job-related and consistent with business necessity. See House Labor Report at 55.

However, even if the criterion is job-related and consistent with business necessity, an employer could not exclude an individual with a disability if the criterion could be met or job performance accomplished with a reasonable accommodation. For example, suppose an employer requires, as part of its application process, an interview that is job-related and consistent with business necessity. The employer would not be able to refuse to hire a hearing impaired applicant because he or she could not be interviewed. This is so because an interpreter could be provided as a reasonable accommodation that would allow the individual to be interviewed, and thus satisfy the selection criterion.

With regard to safety requirements that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, an employer must demonstrate that the requirement, as applied to the individual, satisfies the ''direct threat'' standard in §1630.2(r) in order to show that the requirement is job-related and consistent with business necessity.

Section 1630.15(c) clarifies that there may be uniformly applied standards, criteria and policies not relating to selection that may also screen out or tend to screen out an individual with a disability or a class of individuals with disabilities. Like selection criteria that have a disparate impact, non-selection criteria having such an impact may also have to be job-related and consistent with business necessity, subject to consideration of reasonable accommodation.

It should be noted, however, that some uniformly applied employment policies or practices, such as leave policies, are not subject to challenge under the adverse impact theory. ''No-leave'' policies (*e.g.*, no leave during the first six months of employment) are likewise not subject to challenge under the adverse impact theory. However, an employer, in spite of its ''no-leave'' policy, may, in appropriate circumstances, have to consider the provision of leave to an employee with a disability as a reasonable accommodation, unless the provision of leave would impose an undue hardship. See discussion at §1630.5 Limiting, Segregating and Classifying, and §1630.10 Qualification Standards, Tests, and Other Selection Criteria.

Section 1630.15(d) Defense To Not Making Reasonable Accommodation

An employer or other covered entity alleged to have discriminated because it did not make a reasonable accommodation, as required by this part, may offer as a defense that it would have been an undue hardship to make the accommodation.

It should be noted, however, that an employer cannot simply assert that a needed accommodation will cause it undue hardship, as defined in §1630.2(p), and thereupon be relieved of the duty to provide accommodation. Rather, an employer will have to present evidence and demonstrate that the accommodation will, in fact, cause it undue hardship. Whether a particular accommodation will impose an undue hardship for a particular employer is determined on a case by case basis. Consequently, an accommodation that poses an undue hardship for one employer at a particular time may not pose an undue hardship for another employer, or even for the same employer at another time. Likewise, an accommodation that poses an undue hardship for one employer in a particular job setting, such as a temporary construction worksite, may not pose an undue hardship for another employer, or even for the same employer at a permanent worksite. See House Judiciary Report at 42.

The concept of undue hardship that has evolved under section 504 of the Rehabilitation Act and is embodied in this part is unlike the ''undue hardship'' defense associated with the provision of religious accommodation under title VII of the Civil Rights Act of 1964. To demonstrate undue hardship pursuant to the ADA and this part, an employer must show substantially more difficulty or expense than would be needed to satisfy the ''de minimis'' title VII standard of undue hardship. For example, to demonstrate that the cost of an accommodation poses an undue hardship, an employer would have to show that the cost is undue as compared to the employer's budget. Simply comparing the cost of the accommodation to the salary of the individual with a disability in need of the accommodation will not suffice. Moreover, even if it is determined that the cost of an accommodation would unduly burden an employer, the employer cannot avoid making the accommodation if the individual with a disability can arrange to cover that portion of the cost that rises to the undue hardship level, or can otherwise arrange to provide the accommodation. Under such circumstances, the necessary accommodation would no longer pose an undue hardship. See Senate Report at 36; House Labor Report at 68–69; House Judiciary Report at 40–41.

Excessive cost is only one of several possible bases upon which an employer might be able to demonstrate undue hardship. Alternatively, for example, an employer could demonstrate that the provision of a particular accommodation would be unduly disruptive to its other employees or to the functioning of its business. The terms of a collective bargaining agreement may be relevant to this determination. By way of illustration, an employer would likely be able to show undue hardship if the employer could show that the requested accommodation of