No. 16-35457

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

v.

BNSF RAILWAY COMPANY,

Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Washington at Seattle
Civil Action No. 2:14-cv-01488-MJP

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLANT AND IN SUPPORT OF REVERSAL

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2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

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FEDERAL RULE 29(c)(5) STATEMENT

No counsel for a party authored this brief in whole or in part;

No party or counsel for a party contributed money that was intended to fund the preparation or submission of this brief; and

No person other than *amici curiae*, their members or their counsel contributed money that was intended to fund the preparation or submission of this brief.

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The Equal Employment Advisory Council and Chamber of Commerce of the United States of America respectfully submit this brief *amici curiae* with the consent of the parties.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the

courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the nation's business community.

Amici's members are employers, or representatives of employers, subject to the employment provisions of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 *et seq*., as amended, as well as other federal employment laws and regulations. As potential defendants to claims of workplace disability discrimination, *amici* have a direct and ongoing interest in the issues presented in this appeal. The district court incorrectly found that an employer that lawfully requests legitimate medical information in the process of finalizing a conditional offer of employment "facially" discriminates on the basis of disability by withdrawing that offer after the applicant fails to provide the requested information.

Because of their interest in the application of the nation's fair employment laws, EEAC and the Chamber have participated as *amicus curiae* in numerous cases before this Court, the U.S. Supreme Court and other courts of appeals, including in cases involving the proper interpretation of the ADA. Thus, *amici* have an interest in, and a familiarity with, the issues and policy concerns involved in this case.

STATEMENT OF THE CASE

Russell Holt was employed for five years as an Arkansas county patrol deputy and criminal investigator. *EEOC v. BNSF Rwy. Co.*, C.A. No. 2:14-cv-01488-MJP (W.D. Wash. Jan. 8, 2016) (Order on Cross-Motions for Summary Judgment, at 2). In 2007, he suffered a back injury for which he received treatment and care through 2011. *Id.* He did not miss any work as a police officer due to the injury, however. *Id.* at 3.

In 2011, Holt applied for a senior patrol officer position with BNSF. Opening Brief of Appellant at 4. Senior patrol officers are certified police officers with job duties similar to those of public service officers, including performance of physically demanding, safety-sensitive tasks such as physically subduing suspects and carrying individuals to safety. *Id.* After receiving a conditional job offer, Holt underwent a preemployment medical examination consisting of multiple steps, each of which was required to be completed to "pass" the overall medical evaluation. *Id.* at 33. As part of the process, he was required to complete a medical questionnaire containing several questions, including: "Have you ever had a back injury?" and "Do you currently have or have you ever had … [b]ack pain?" *Id.* at 7.

As a result of answering "yes" to both questions, BNSF requested that Holt undergo an additional medical examination and interview, during which Holt

discussed the nature of his back injury and the treatment he received. *Id.* at 5-6. Holt characterized his injury as a mild back strain resulting in a bulging disc, and told BNSF that he had been treated only with chiropractic care. *Id.* As part of this follow-up, Holt also submitted a copy of a 2007 magnetic resonance image (MRI) of his back and additional documentation from his treating physician and chiropractor. *Id.* at 8-9.

That information was submitted to BNSF's medical officer, Dr. Jarrard, who was responsible for making a final decision regarding Holt's fitness for the position. *Id.* at 13. Based on what appeared to be conflicting information in Holt's file, including the possible existence of a disc extrusion (as opposed to the bulging disc that Holt had reported), Dr. Jarrard asked Holt for additional documentation pertaining to the nature of his back problems, including pharmacy records, more-recent chiropractic treatment records, and copies of a current MRI report. *Id.* at 14. Holt's physician refused to approve an MRI because Holt reported that he was not currently experiencing any back issues. *Id.* at 18. As a result, the test would not be covered by insurance. *Id.*

BNSF refused to waive the requirement, and Holt failed to undergo an MRI at his own expense. *Id.* at 19. Holt also refused to provide any of the other information that Dr. Jarrard had requested. *Id.* As a result, he was treated as

having declined the job offer and was not placed in the senior patrol officer position. *Id.*

Holt subsequently filed a charge of disability discrimination with the Equal Employment Opportunity Commission (EEOC), which later sued BNSF in federal court on Holt's behalf. *Id.* at 22. The EEOC's complaint asserted that the company rescinded Holt's job offer because of his record of disability, unlawfully regarded him as having a disability, and subjected him to impermissible disability-related inquiries and job qualification standards that were not job-related and consistent with business necessity, all in violation of the ADA. *Id.*

The district court granted partial summary judgment to the EEOC as to ADA liability. While the court acknowledged that the ADA permits employers to request medical information regardless of whether it is a business necessity, it also noted that applicants may not be disqualified on the basis of a medical condition "unless the employer can identify a legitimate basis for excluding the applicant that is job-related and consistent with business necessity…." *EEOC v. BNSF Rwy. Co.*, C.A. No. 2:14-cv-01488-MJP (W.D. Wash. Jan. 8, 2016) (Order on Cross-Motions for Summary Judgment, at 9).

BNSF argued that it had revoked the job offer not because of Holt's alleged disability or the results of his medical examination, but rather because of his refusal to submit up-to-date medical test results and the other requested medical

information. *Id.* However, the district court appeared to reject that factual assertion because, in its view, BNSF already had enough medical information on which to base a decision regarding Holt's ability to perform the essential functions of the job. Having apparently made a factual determination that BNSF withdrew the conditional offer because of this information, the court stated that "[b]ecause 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, BNSF's withdrawal of Mr. Holt's job offer when he failed to supply an updated MRI at his own cost constituted *facial* 'discrimination.'" *Id.* at 15 (emphasis added). This appeal ensued.

SUMMARY OF ARGUMENT

Revoking a conditional job offer based on a candidate's refusal to comply with a lawful preemployment medical inquiry does not amount to unlawful discrimination because of disability. Accordingly, the district court's conclusion to the contrary is erroneous and should be reversed.

The Americans with Disabilities Act (ADA) prohibits discrimination against qualified applicants or employees on the basis of disability. 42 U.S.C. § 12112(a). This prohibition includes using results from the medical examination to withdraw a job offer, unless that withdrawal can be justified as job-related and consistent with

business necessity. 42 U.S.C. § 12112(d)(3)(C). Here, BNSF made a business judgment to revoke Holt's conditional offer because he refused to provide information needed to confirm his physical fitness. Yet, the district court concluded without evidentiary support that the revocation occurred because of Holt's disability.

In this case, BNSF initiated its post-offer, preemployment medical examination process but could not complete it because Holt failed to comply with its requests for relevant information. It revoked Holt's conditional job offer on that basis, not on the basis of the "results of the examination." Accordingly, because it had no "results" to use, it could not have acted on that basis.

The district court effectively concluded that employers may never withdraw a conditional job offer, even for reasons having nothing to do with disability, unless their actions can be justified by business necessity. Under that rule, anytime an employer merely possesses information from a permissible post-offer, preemployment medical inquiry, however conflicting or incomplete, any adverse action taken against the subject of that inquiry must be justified by business necessity. Such a restriction undermines the practical utility of post-offer medical examinations, and serves to discourage employers from conducting post-offer, pre-employment medical examinations at all, for fear that their rejection of candidates for legitimate reasons, such as a failure to cooperate or provide necessary

information, would nevertheless expose them to unwarranted challenge under the ADA.

The district court also erroneously found that employers have a legal obligation to reimburse the costs of post-offer medical tests and procedures. Neither the ADA nor its implementing regulations require it, and imposing such a rule would have significant practical implications – including substantial costs on employers large and small.

ARGUMENT

I. REVOCATION OF A CONDITIONAL JOB OFFER BASED ON A CANDIDATE'S FAILURE TO COOPERATE IN A LAWFUL, POST-OFFER, PREEMPLOYMENT MEDICAL INQUIRY DOES NOT AMOUNT TO A FACIAL VIOLATION OF THE ADA

In granting partial summary judgment to the EEOC, the court reasoned that BNSF (1) could not have withdrawn its conditional offer on the basis of Holt's failure to provide an MRI and (2) must have instead withdrawn the offer based on an unjustified reaction to Holt's medical history. Among other things, the court rejected BNSF's argument that the offer could be withdrawn for failure to cooperate because it believed Holt did not have a "cooperation obligation" to provide MRI results in the absence of BNSF offering to pay for the test. Order on Cross-Motions for Summary Judgment, at 14. And the court further stated that because "Mr. Holt had undergone an initial medical examination, provided a 2007

MRI that showed a two-level disc extrusion, and answered a questionnaire in which he admitted to a back injury," it was "[t]hose … results at issue here." *Id.*

This reasoning rests on a non-sequitur. The district court's mistaken belief that BNSF could not lawfully require Holt to pay for an MRI does not undercut, as a factual matter, BNSF's evidence that it withdrew the offer because of Holt's non-cooperation. Rather, since it was clearly possible that BNSF withdrew the offer because of Holt's failure to provide a current MRI – indeed, the court pointed to no factual material undercutting BNSF's evidence on this point – the court was required to accept this fact for the purpose deciding the summary judgment motion.

Thus, at bottom, the district court's decision turns on the premise that BNSF was not permitted to require that Holt provide an MRI as a condition of finalizing its offer unless BNSF produced a legitimate business justification for doing so and paid for the test itself. Yet that premise cannot be reconciled with the requirements of the ADA. The ADA clearly permits employers to request medical information after a conditional offer is extended, and it imposes no requirement that the employer justify such a request by business necessity, pay the costs of obtaining this information, or waive its requests when the applicant fails to cooperate.

A. Revoking A Conditional Job Offer Based On Noncompliance With Preemployment Medical Examination Procedures Is, In Fact, Facially Nondiscriminatory

The ADA's general prohibition of discrimination against individuals with disabilities provides that:

> 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.

42 U.S.C. § 12112(a) (emphasis added); *see also Smith v. Clark City Sch. Dist.*, 727 F.3d 950, 955 (9th Cir. 2013) (to state a prima facie case under the ADA, a plaintiff "must show (1) that she is disabled within the meaning of the ADA; (2) that she is a qualified individual with a disability; and (3) that she was discriminated against *because of* her disability") (emphasis added). ADA causation requires more than proof that an individual with a disability suffered an adverse employment action; rather, the plaintiff must demonstrate that the employer acted *because of* disability. *Id.*; *see also Roberts v. City of Chicago*, 817 F.3d 561, 565 (7th Cir. 2016) ("to prove causation under the ADA, plaintiffs must show that they were not hired because of their disabilities, not because of a delay in medical clearance"). Here, BNSF did not withdraw Holt's offer because of disability, but because of his failure to cooperate with its standard, post-offer medical examinations process.

Quite simply, BNSF's decision was not made on the basis of disability. It made a sound business decision not to put an individual to work in a safety-sensitive job without knowing whether he could physically perform the job. This type of business decision is one that courts are cautioned not to second-guess; indeed, even a bad business decision is not a violation of the ADA as long as it is nondiscriminatory. As many courts have observed, courts must not "act as a super-personnel department that second guesses [an] employer's business judgments." *Hutchins v. DIRECTV Customer Serv., Inc.*, 963 F. Supp. 2d 1021, 1031 (D. Idaho 2013) (citations and internal quotations omitted). *See also Kincaid v. City of Omaha*, 378 F.3d 799, 805 (8th Cir. 2004) ("the employment-discrimination laws [including the ADA] have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination") (citation omitted); *Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1122 (10th Cir. 2004) ("In cases arising under the ADA, we do not sit 'as a "super personnel department" that second guesses employers' business judgments'") (quoting *Simms v. Okla. ex rel. Dep't of Mental Health and Substance Abuse Servs.*, 165 F.3d 1321, 1330 (10th Cir.1999)). In sum, "The personnel decisions of the company may not be good ones, sometimes even harsh, but unless they violate some aspect of federal law, for instance, age, race, or

gender discrimination, those business decisions are no business of this court." *Murphy v. ITT Educ. Servs., Inc.*, 176 F.3d 934, 938 (7th Cir. 1999) (citation omitted).

Courts must resolve all factual disputes in favor of the non-moving party at summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor") (citation omitted). Thus, the district court was required to accept BNSF's neutral explanation for its decision to withdraw Holt's offer even if there was evidence in the record to the contrary. However, it is worth noting that BNSF's explanation is particularly compelling because there was scant evidence to support the district court's alternative suggestion that BNSF was motivated by a concern that Holt was disabled. Moreover, it is entirely unclear whether Holt is, or ever was, an individual with a disability in any event. The employment provisions of the ADA prohibit discrimination "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." 42 U.S.C. § 12112(a) (emphasis added).

Disability can be established in one of three ways; the plaintiff must show that he or she either: (1) has a physical or mental impairment that substantially

limits one or more major life activities ("actual" disability); (2) has a record of such impairment ("record of" disability); or (3) is regarded as having an actual or perceived impairment that is not transitory and minor ("regarded as" disability). 42 U.S.C. § 12102(1). The EEOC does not suggest that Holt is presently substantially limited in one or more major life activities and instead claims that BNSF discriminated against Holt on the basis of a "record" of or, alternatively, a perceived ("regarded as") disability. *EEOC v. BNSF Rwy. Co.*, C.A. No. 2:14-cv-01488-MJP (W.D. Wash. Nov. 17, 2014) (First Amended Complaint ¶¶ 9, 12).

Yet at the time that BNSF withdrew Holt's conditional job offer, BNSF knew only that Holt had experienced a back injury in 2007, but was unaware of the extent to which it may have interfered with his performance of one or more major life activities. Even assuming that Holt's back injury can truly be considered a physical impairment, the EEOC cannot show that it *substantially limited* his performance of a major life activity under the legal standards in effect at that time.[1] *See also* EEOC Compl. Man. § 902 *Definition of the Term "Disability,"* 902.4 Substantially Limits (Aug. 2009).

[1] The Americans with Disabilities Act Amendments Act (ADAAA), which expanded considerably the meaning of "substantially limited," became effective on January 1, 2009, and "does not apply retroactively." *Becerril v. Pima Cnty. Assessor's Office*, 587 F.3d 1162, 1164 (9th Cir. 2009). Therefore, in order to establish that Holt has a "record of" disability based on his condition in 2007, the EEOC must meet the pre-ADAAA elements that were in effect at that time.

Specifically, to be considered disabled, an individual must have had an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. Importantly, the "impact" of the impairment "must also be permanent or long term." *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008). As the EEOC concedes, Holt missed no work as a result of his injury, and there is no other evidence reflecting that Holt was in any way significantly or severely restricted in his performance of a major life activity in 2007 or since. Accordingly, EEOC cannot show that Holt has a "record of" disability.[2]

Nor can the EEOC show that BNSF regarded Holt as disabled. The ADA Amendments Act, Pub. L. No. 110- 325, 122 Stat. 3553 (2008), amended the ADA to prohibit discrimination on the basis of an actual or perceived physical or mental impairment. The statute provides:

> 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.

[2] Although the ADAAA expanded the meaning of the "substantially limited" standard, it did not relieve plaintiffs of having to demonstrate substantial limitation under the new standard. *See Weaving v. City of Hillsboro*, 763 F.3d 1106, 1102 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 1500 (2015). "In other words, though the ADAAA makes it *easier* to prove a disability, it does not *absolve* a party from proving one." *Neely v. PSEG Tex., Ltd. P'ship*, 735 F.3d 242, 245 (5th Cir. 2013).

42 U.S.C. § 12102(3)(A). However, the "regarded as" provision "shall not apply to impairments that are transitory and minor." 42 U.S.C. § 12102(3)(B). When Holt presented for his medical examination, he claimed that his prior back condition had been resolved, stating that he experienced "full recovery." Brief of Appellant at 8. Thus, there is little evidence to suggest that BNSF regarded Holt as disabled, and there is certainly no basis for the district court to disregard clear evidence that BNSF withdrew the offer for non-cooperation and to resolve this factual matter against BNSF at the summary judgment stage.

B. The ADA Expressly Permits Employers To Request Disability-Related Information After A Conditional Job Offer Is Extended

1. Section 12112(d)(3) authorizes post-offer, preemployment medical inquiries to assess a candidate's fitness to safely perform the job's essential functions

Title I of the ADA prohibits discrimination "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." 42 U.S.C. § 12112(a). "The term 'qualified individual' means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). As this Court has noted, "'If a disabled person cannot perform a job's 'essential functions'

(even with a reasonable accommodation), then the ADA's employment protections do not apply.'" *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 989 (9th Cir. 2007) (quoting *Cripe v. City of San Jose*, 261 F.3d 877, 884-85 (9th Cir. 2001)). Thus, in order to sustain a claim under the ADA, it is not enough to satisfy the definition of disability; the plaintiff also must prove that he or she is a "qualified individual" who suffered an adverse employment action *because of* disability. *See Smith v. Clark City Sch. Dist.*, 727 F.3d 950, 955 (9th Cir. 2013).

The ADA places restrictions on an employer's ability to require applicants and employees to undergo medical examinations or submit to disability-related inquiries. 42 U.S.C. § 12112(d). Such requirements are prohibited at the pre-offer stage. 42 U.S.C. § 12112(d)(2). However, employers expressly are permitted to "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 …." 42 U.S.C. § 12112(d)(3). Once employment commences, employers may require medical examinations or disability-related inquiries only if job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(4).

In permitting post-offer medical examinations and inquiries, Congress did not intend to remove consideration of disability-related information from the hiring process entirely, but rather sought to ensure that such inquiries occur only after a

conditional job offer has been extended, and before employment begins. It was especially concerned that because "[h]istorically, employment application forms and employment interviews requested information concerning an applicant's physical or mental condition," individuals were being excluded on the basis of disability "before their ability to perform the job was even evaluated." S. Rep. No. 101-116, at 39 (1989); *see also* H.R. Rep. No. 101-485, pt. 3, at 41 (1990); EEOC, *Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations* (Oct. 10, 1995)[3] ("Congress established a process within the ADA to isolate an employer's consideration of an applicant's non-medical qualifications from any consideration of the applicant's medical condition," in order to "help[] ensure that an applicant's possible hidden disability (including a prior history of a disability) is not considered before the employer evaluates an applicant's non-medical qualifications"). Confining medical examinations to the post-offer stage serves to balance the law's goal of "assur[ing] that misconceptions do not bias the employment selection process [with] the employer's need to discover possible disabilities that do limit the person's ability to do the job …." S. Rep. 101-116, at 39 (1989).

As one commentator observed:

[3] *Available at* https://www.eeoc.gov/policy/docs/preemp.html (last visited Oct. 18, 2016).

> [T]he ADA is designed to enable individuals to demonstrate their abilities before employers can learn of their disabilities. Thus, under the ADA, the permissible scope of employer medical examinations and inquiries depends on the stage of employment, with pre-offer medical examinations and inquiries prohibited and other medical assessments permitted but limited. The effect of the ADA is to refine the legal and practical parameters of workplace medical evaluations.

Mark A. Rothstein, *et al.*, *Limiting Occupational Medical Evaluations Under the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act*, 41 Am. J.L. & Med. 523, 526 (2015) (footnote omitted).

2. Section 12112(d)(3) does not require that post-offer, preemployment medical inquiries be justified by business necessity

In this case, the district court concluded that BNSF was obligated to justify its revocation of Holt's job offer by business necessity even though its actions were based on Holt's conduct, not on any medical information – however incomplete or inconclusive – he provided. As this Court has made clear, however, "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). Thus, the ADA imposes no restriction on the scope of entrance examinations." *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1273 (9th Cir. 1998). In other words, at the post-offer, preemployment stage of the selection process,

employers generally are free under the ADA to conduct medical examinations without any requirement that they be justified by business necessity. 42 U.S.C. § 12112(d)(3).

Indeed:

> After a conditional job offer has been made…[t]here is no "job-validation" requirement for [post-offer] examinations or inquiries. … Under the ADA, an employer could legally ask an applicant about every possible past and current medical condition.

Chai R. Feldblum, *Medical Examinations and Inquiries Under the Americans with Disabilities Act: A View from the Inside*, 64 Temp. L. Rev. 521, 537-38 (1991). The district court's ruling below thus represents a fundamental misapplication of the law and undermines the aims and purposes underlying Congress's choice to allow post-offer, preemployment medical inquiries.

Giving broad latitude to employers at the post-offer, preemployment stage allows them to evaluate whether an otherwise-qualified candidate is able to perform the essential functions of the position in question. That in turn assures all applicants, especially those with disabilities, that "*as long as they can perform the job's essential tasks*, they will be hired." *Leonel v. American Airlines, Inc.*, 400 F.3d 702, 709 (9th Cir. 2005) (emphasis added); *see also* EEOC, *Technical Assistance Manual: Title I of the ADA* (1992 & Supp. 2002).[4] Accordingly, there

[4] *Available at* https://askjan.org/links/ADAtam1.html.

is no requirement under the ADA that post-offer, preemployment medical examinations or inquiries be justified by anything, let alone business necessity.

What is more, the EEOC itself has interpreted the ADA as permitting employers to request additional information by making follow-up requests, which also need not be justified by business necessity.[5] According to the agency, employers may ask for additional information, so long as "the follow-up examinations or questions are medically related to the previously obtained medical information." EEOC, *Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations* (Oct 10, 1995) ("The Post-Offer Stage") (footnote omitted). Addressing the very question presented here regarding whether an employer may "ask specific individuals for more medical information?" *Id.*

> At the post-offer stage, an employer asks new hires whether they have had back injuries, and learns that some of the individuals have had such injuries. 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.

[5] The district court properly rejected the EEOC's attempt to characterize BNSF's follow-up request as an unlawful job qualification standard under Section 12112(b)(6). As the district court correctly noted, the plain language of Section 12112(b)(6) limits its reach to situations in which a facially nondiscriminatory qualification standard is applied to an entire class of individuals. *EEOC v. BNSF Rwy. Co.*, C.A. No. 2:14-cv-01488-MJP (W.D. Wash. Jan. 8, 2016) (Order on Cross-Motions for Summary Judgment, at 10-11). Here, the district court noted that BNSF's follow-up request for an MRI did not apply "across-the-board" to all applicants and therefore could not be characterized as a qualification standard that must be shown to be job-related and consistent with business necessity. *Id.* at 11.

Id.; see also McDonald v. Webasto Roof Sys., Inc., 570 F. App'x 474, 476 (6th Cir. 2014) (*per curiam*) (employer permissibly "required a second medical examination only after the first revealed a history of '[l]umbar bulging discs,'" noting that "EEOC guidance condones follow-up examinations when the first reveals pertinent medical concerns").

In this case, BNSF complied fully with the ADA as to both its initial and follow-up medical examinations and inquiries. After extending a conditional job offer, it undertook to investigate whether Holt could perform the essential functions of the physically demanding, safety-sensitive senior patrol officer position. It was able to discern only that Holt at some point had suffered a back injury and accompanying back pain, and that a four-year-old MRI indicated what could have been two extruded discs; however, the company was unable to resolve conflicting information about the true nature of his injury – which Holt downplayed. The limited (and at times conflicting) information initially provided by Holt prevented BNSF from determining whether Holt had any existing back issues that could interfere with his ability to safely perform the senior patrol officer job. Its follow-up request for additional documentation pertaining to his back injury, including pharmacy records, chiropractic treatment records, and a current MRI, was reasonable and fell squarely within the scope of Section 12112(d)(3).

3. BNSF did not have any "results" to "use"

Because Holt failed to comply with BNSF's follow-up requests, BNSF had a clear, nondiscriminatory basis for withdrawing the offer – non-cooperation by the applicant. The district court had no basis for disregarding this explanation at summary judgment. Accordingly, the district court had no basis to apply the standard that governs how employers *use* the results of a preemployment examination.

The ADA requires that the results of preemployment medical examinations and inquiries be "used only in accordance with this subchapter." 42 U.S.C. § 12112(d)(3)(C). In other words, employers cannot *use* the results of a post-offer medical examination or inquiry to *discriminate* against an individual on the basis of disability; to do so would run afoul of the ADA's general prohibition on discrimination against individuals with disabilities. 42 U.S.C. § 12112(d)(1). Thus, "if the results of the examination exclude an individual on the basis of disability, the exclusionary criteria themselves must be job-related and consistent with business necessity." *Norman-Bloodsaw*, 135 F.3d at 1273 (citation omitted); *see also* EEOC, *Technical Assistance Manual: Title I of the ADA*, Section 6.1 (1992 & Supp. 2002) [6] ("If an individual is not hired because a post-offer medical

[6] *Available at* https://askjan.org/links/ADAtam1.html#VI (last visited Oct. 18, 2016).

examination or inquiry reveals a disability, the reason(s) for not hiring must be job-related and necessary for the business"). In sum, in the post-offer preemployment context, an employer *only* must show that its actions were job-related and consistent with business necessity if it *uses* the results of its examinations.

The terms "results" and "used" as employed in § 12112(d)(3)(C) are not defined in the ADA or its implementing regulations and therefore take on their ordinary meaning. In common parlance, the term "results" refers to "the consequence or outcome of an action," and to "use" typically means "to bring or put into service or action." *Webster's II New College Dictionary* (1999). Here, the district court treated Holt's 2007 MRI and questionnaire responses, contrary to the general meaning of the term, as examination "results," Order on Cross-Motions for Summary Judgment, at 14, rather than as individual components of a broader medical examinations process that, had it been completed, may have produced "results," that is, a "consequence" or "outcome." For example, institutions of higher education commonly use scores from standardized tests like the SAT to make admissions decisions. Rather than rely on individual Math or Reading section scores, the student's *cumulative* score is the test "result" on which an admission decision may be based. Likewise, fans of a football team do not say that their team won or lost a game based on the score after the first half of play; they wait until the entire game has concluded to consider the game's "results." As these

examples illustrate, the district court's notion of what constitutes "results" is nonsensical not just in the ADA context, but also as to how the term is commonly understood.

In this case, the district court did not find that BNSF revoked Holt's conditional job offer based on "the results of the examination." Order on Cross-Motions for Summary Judgment, at 9. To the contrary, it found that BNSF revoked the offer when Holt "failed to supply an updated MRI at his own cost, [which it held] constituted facial discrimination." *Id.* at 15.

In doing so, it misapplied a Tenth Circuit decision that found the defendant employer to have improperly withdrawn a conditional job offer based on speculation that the applicant's prior injuries would lead to future injuries. *Garrison v. Baker Hughes Oilfield Operations, Inc.*, 287 F.3d 955, 958 (10th Cir. 2002). The *Garrison* court held that the employer had in fact *used* results gathered from its post-offer medical examination to conclude that the applicant's prior injuries put him "in a position to likely be injured again and we don't do that." *Id.*

It thus correctly observed, "Under § 12112(d)(3)(C), an employer's reasons for withdrawing a conditional job offer must be 'job-related and consistent with business necessity.'" *Id.* at 960 (citation omitted). Importantly, however, it went on to point out that § 12112(d)(3)(C) cannot be violated unless the plaintiff proves

that the employer actually used results from a medical examination or inquiry to discriminate:

> [A] violation of § 12112(d)(3)(C) is contingent not only upon whether an employer conducted a post-offer medical examination, but *also upon the entering employee's ability to demonstrate use of collected information* not "in accordance" with subchapter I of the Americans with Disabilities Act. 42 U.S.C. § 12112(d)(3)(C).

Id. at 960 n.4 (emphasis added). *See also Chedwick v. UPMC*, No. 2:07-cv-00806-TFM, 2011 WL 1559792, at *13 (W.D. Pa. Apr. 21, 2011) (unpublished) (plaintiff "cannot prevail in an improper 'use' claim brought pursuant to § 12112(d)(3)(C) without establishing tha[t] an employer 'used collected medical information to discriminate on the basis of a disability'") (citation omitted).

Unlike in *Garrison*, here there is simply no evidence that BNSF *used* any results; in fact, BNSF cannot be said to have had any "results," as it was still awaiting answers from Holt to three of its requests. It follows that BNSF could not have withdrawn Holt's job offer based on the results of information it had yet to receive. Rather, Holt's conditional job offer was revoked for legitimate, nondiscriminatory reasons, to wit, his failure to supply information needed to determine his physical fitness for the job. The *Garrison* court in fact explicitly acknowledged that there may be permissible, non-disability-related reasons for withdrawing a conditional job offer, noting for instance, "We do not hold the Americans with Disabilities Act forbids withdrawing conditional job offers from

entering employees who lie on medical questionnaires." 287 F.3d at 961 n.5. Here, on summary judgment, there is certainly no basis for the district court to have rejected BNSF's evidence of its legitimate, nondiscriminatory explanation.

The district court's conclusion that "a conditional offer becomes irrevocable after the medical examination unless the employer can identify a legitimate basis for excluding the applicant that is job-related and consistent with business necessity," Order on Cross-Motions for Summary Judgment, at 9, thus assumes, wrongly, that a medical examination had been *completed* and the employer had used the medical information obtained in the examination.

By ignoring the distinction between withdrawing an offer based on the results of a medical examination and withdrawing an offer for non-cooperation or another reason unrelated to the use of medical information, the district court treated a conditional offer as irrevocable for *any* reason absent business necessity. Such a construction of Section 12112(d)(3) is inconsistent with the ADA's plain text, and is untenable as a practical matter. For example, such a standard would prevent an employer from withdrawing an offer based on an applicant's failure to adhere to neutral rules, such as responding to medical inquiries within a specified timeframe. This erroneous formulation ignores entirely the fact that the ADA requires a plaintiff to *show* – not merely *presume* – that an employer's actions were taken because of disability.

According to the district court, the ADA obligates an employer that conducts post-offer medical examinations to either find within the information it already has at hand, no matter how limited or outdated, a rationale for withdrawing the offer that is job-related and consistent with business necessity, or place the individual in the job despite a failure to provide information requested to eliminate doubts about his or her physical fitness.

Instead of making its decision on the basis of outdated and potentially unreliable information, and faced with an individual who did not provide responses to any of its three follow-up requests, BNSF lawfully withdrew its conditional job offer for reasons unrelated to disability. Accordingly, the district court's conclusion that BNSF violated the ADA by (1) revoking Holt's job offer, even for reasons unrelated to disability and (2) failing to justify its actions by business necessity was plainly erroneous and therefore should be reversed.

C. Limiting An Employer's Ability To Assess All Relevant Medical Information Prior To Commencement Of Employment Undermines The Practical Utility Of Such Inquiries

The district court below effectively held that once any medical information is received, the employer will be presumed to have relied on it if a conditional job offer subsequently is revoked, and will be deemed to have violated the ADA if it cannot justify its actions by business necessity. Such an interpretation unduly interferes with meaningful and legitimate efforts to assess an applicant's physical

fitness for a particular job, and thus threatens to undermine the utility of conducting post-offer, preemployment medical examinations and inquiries in the first place. In particular, it would discourage employers from engaging in fulsome assessments of medical information to confirm, or rule out, a candidate's present ability to perform the essential job functions, fearful that their requests will fail the business necessity test.

That, in turn, would elevate the risk of placing into a job an individual who, because of an undiscovered or undisclosed physical or mental disability, is unable to safely perform the job's essential functions. In such a circumstance, both parties would suffer setbacks: the employer would be forced to restart what likely was a costly and time-consuming recruitment and selection process, and the individual would suffer the financial and emotional toll of job termination days, weeks, or months into his or her employment.

While employers are obligated to, and routinely do, consider possible reasonable accommodations before removing an individual from the job, that obligation only extends to those who are otherwise qualified – that is, able to perform the essential functions of the job with or without reasonable accommodation. 42 U.S.C. § 12111(8). Restricting the extent to which an employer may inquire as to a candidate's fitness prior to the commencement of his

or her employment irresponsibly delays consideration of whether reasonable accommodations are in order.

As noted, the district court's construction also disregards the careful balance that Congress struck in reserving broad medical examinations and inquiries for the post-offer, preemployment stage. Whereas Congress intended for employers to be able to conduct post-offer, preemployment medical inquiries and examinations without a business necessity limitation, the district court's ruling severely restricts that ability by imposing an unwarranted requirement that such inquiries be justified by business necessity.

II. THE ADA DOES NOT REQUIRE EMPLOYERS TO PAY FOR POST-OFFER MEDICAL EXAMINATIONS

At bottom, it appears that the district court may have been motivated by the view that BNSF somehow was under a legal obligation to cover the costs of Holt's updated MRI upon learning that the test would not be covered by insurance. Indeed, the court noted that "nowhere does [the EEOC] endorse the practice of requiring the *applicant* to pay for costly additional information." Order on Cross-Motions for Summary Judgment, at 13. Yet the district court did not directly defend this rationale as a basis for liability, and for good reason: neither the ADA nor the EEOC's interpretations of it require an *employer* to reimburse the out-of-pocket costs associated with its lawful post-offer medical inquiries.

Although BNSF certainly could have chosen to pay for the MRI (and indeed some employers may voluntarily elect to absorb such costs), the ADA does not mandate that it do so. Applicants expect to spend time and some resources in order to secure a job. For example, it is not unusual for an applicant to travel at his or her own expense for a job interview. The mere fact that some employers may offer to reimburse the applicant's costs does not mean that all employers must do so.

Further, requiring employers to pay for such examinations would impose enormous cost burdens on employers of all sizes. A large employer that makes thousands of hires annually for physically demanding positions could find itself paying for any number of examinations every year, whereas a smaller employer might be forced to abandon hiring plans entirely, unable to afford such an expense at all.

An employer is indisputably permitted to ask applicants to submit to legitimate medical inquiries at their own expense following a conditional job offer. And as shown above, the employer may correspondingly withdraw the offer because of an applicant's failure to cooperate. That is all that is required to reverse the district court's grant of summary judgment in this case.

CONCLUSION

For all of the foregoing reasons, the Equal Employment Advisory Council and Chamber of Commerce of the United States of America respectfully urge the Court to reverse the district's court's decision below.

Respectfully, submitted,

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