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

BRIEF *AMICUS CURIAE* OF THE WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND SUPPORT OF AFFIRMANCE

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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 Washington Employment Lawyers Association respectfully submits this brief with the consent of the parties.

I. INTEREST OF AMICUS CURIAE

The Washington Employment Lawyers Association (WELA) is a chapter of the National Employment Lawyers Association. WELA is comprised of more than 160 attorneys who are admitted to practice law in the State of Washington. WELA advocates in favor of employee rights in recognition that employment with fairness and dignity is fundamental to the quality of life. WELA has appeared as amicus curiae in dozens of cases in Washington State appellate courts.

II. INTRODUCTION

The Equal Employment Opportunities Commission ("EEOC") brings this claim under the Americans with Disabilities Act ("ADA") against Burlington Northern Sante Fe Rail Road ("BNSF") on behalf of Russell Holt, who applied for a position as a senior patrol officer with BNSF in 2011. After his initial interview with BNSF he was offered a conditional job subject to passing a medical examination and criminal background check. Mr. Holt responded to a post-offer questionnaire that he had a prior back injury, and upon request he provided BNSF additional medical documentation. A medical contractor hired by BNSF initially concluded that Plaintiff had 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 him or others. A subsequent medical review by a BNSF medical officer determined he lacked sufficient information to determine whether Plaintiff could perform the job safely, and required that Mr. Holt obtain a radiologist's report of a current MRI, a prior MRI, and additional medical and pharmacy records for the past two years.

Mr. Holt's physician would not approve a new MRI because it was unrelated to a current condition. His insurance would not pay for the test, which cost approximately $2,000, and Mr. Holt was unable to pay for it. Mr. Holt explained the circumstances to BNSF, but it refused to waive the medical testing requirement. Because Mr. Holt did not provide the required testing and other information, the company treated him as having declined the position even though he had not.

The EEOC filed suit on behalf of Mr. Holt alleging that BNSF violated the ADA, 42 U.S.C. § 12101, *et seq*., when it revoked Plaintiff's job offer as a senior patrol officer. Both sides moved for summary judgment. The District Court granted summary judgment to the EEOC: "Because BNSF withdrew its conditional offer to Mr. Holt on grounds not sanctioned by the ADA and its accompanying regulations, the EEOC provided sufficient undisputed evidence to establish a prima

facie case for disparate treatment under § 12112(a), and BNSF failed to offer evidence in support of the affirmative defense of a direct threat . . . ." ECF 122, at 19. The District Court determined that BNSF's withdrawal of Mr. Holt's job offer when he failed to supply an updated MRI at his own cost constituted "facial discrimination." ECF 122, at 15. The Court impliedly ruled that although an employer may require testing which is medically related to previously obtained medical information, the employee is not obligated to pay for it. The Court thereafter ordered a nationwide injunction requiring BNSF to pay the costs of requested follow-up medical testing of job applicants. BNSF appealed.

III. SUMMARY OF ARGUMENT

Title I of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq*., was enacted to allow disabled individuals, those who are "regarded as" disabled, and those who have a "record of a disability" to become employed and contribute to society. Toward that end, the statute requires a broad interpretation to implement its purpose. A requirement that post-offer job applicants pay for employer required medical testing will frustrate the purpose of the statute, and open the door to excluding protected individuals from the workforce.

To fulfill its mandate, the ADA severely limits the types of questions that an employer may ask a job applicant prior to being offered a position. After the

applicant has been conditionally offered a job, the employer may inquire about the applicant's medical condition and require medical examinations which do not have to be job-related and consistent with medical necessity. 29 C.F.R § 1630.14(c)(3). A request for additional medical testing need only be "medically related to the previously obtained medical information." EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (1995). Significantly, the statute and implementing regulations are silent on who must pay for the medical testing.

An employer's request for additional medical records or testing is not unbounded. The employer cannot create conditions so burdensome on job applicants so as to effectively foreclose their ability to comply. One, but not the only, condition that forecloses the ability of job applicants to comply is the cost of medical testing. Although an employee must cooperate with an employer's request for additional medical testing, an employee's inability to pay for expensive medical testing that the employer requires does not constitute a failure to cooperate.

Job applicants are frequently unemployed at the time of their job application. Almost by definition, many of those individuals cannot afford to pay for expensive medical testing. Assuming that such individuals have medical insurance at all,

insurance will not pay for medical testing that is unnecessary for purposes of treatment. Unless the prospective employer is required to pay for the medical testing that it requires, those individuals will be excluded from the workplace, contrary to the purposes of the ADA. Job applicants who are employed at the time of the job application may or may not be able to afford additional medical testing. But this is a subjective judgment and is dependent upon the financial condition of the applicant and the cost of the medical testing. The ability of an applicant to afford employer required medical testing is not a workable legal standard. The financial burden for medical testing required by the employer should be placed on the employer.

Employers invariably seek to maximize their profit and diminish their perceived potential costs of labor. A disabled employee or one with a medical history of being disabled is perceived by employers to have a greater probability to require a reasonable accommodation, take FMLA leave, file claims for worker compensation, or have greater absenteeism. These protected individuals present a greater risk of future associated costs to the employer as compared to those who have no disability or who have no history of having a disability. The greater risk of future costs causes employers to avoid hiring protected applicants with a medical history. The ADA was enacted to protect them.

A requirement that job applicants pay for the cost of medical testing that employers demand creates an obvious opportunity for employers to exclude protected job applicants and to minimize potential labor costs, especially considering the low bar required for additional medical testing. Indeed, such a requirement undercuts the very reason that employers are unable to inquire about medical conditions and disabilities until after they make a conditional job offer. A broad interpretation of the statute mandates that employers be required to pay for the cost of post-offer medical testing that they require. The ADA was enacted to facilitate the employment of the statutorily protected individuals, not frustrate it.

Contrary to BNSF's assertions, its policy requiring employees such as Mr. Holt to pay for post-offer medical testing that the company required constitutes "facial discrimination." Once "facial discrimination" is established, the issue of "discriminatory animus" becomes irrelevant, and causation is admitted by virtue of the facial classification itself. Accordingly, BNSF's motive for its policy is irrelevant.

WELA takes no position on the permissible scope of injunctive relief.

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IV. ARGUMENT

A. The ADA Requires a Broad Interpretation to Promote Its Purpose of Establishing Full Participation by Disabled Individuals.

It is a "familiar canon of statutory construction that remedial legislation," such as the ADA, "should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). *See also Jefferson County Pharm. Assn. v. Abbott Labs.*, 460 U.S. 150, 159 (1983) ("Because the Act is remedial, it is to be construed broadly to effectuate its purposes"); *Hason v. Medical Bd. of California*, 279 F.3d 1167, 1172 (9th Cir. 2002) (a narrow construction is at odds with the remedial goals underlying the ADA); *Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854, 861 (1st Cir. 1998) ("The ADA is a 'broad remedial statute'"). The United States Congress determined that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." 42 U.S.C. §12101(a)(7). Toward that end, it enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. §12101(b)(1).

Under the ADA, the term "disability" means an individual with "(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." 42 U.S.C. § 12102(1). A 2008 amendment to the ADA provides, "[t]he 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." § 12102(4)(A). *See also Rohr v. Salt River Project Agricultural Imp.*, 555 F.3d 850, 861 (9th Cir. 2009) ("Beginning in January 2009, 'disability was to be broadly construed and coverage will apply to the 'maximum extent' permitted by the ADA and the ADAAA").[1]

The ADA Amendments Act of 2008 ("ADAAA") broadened the protection afforded by the law, making it significantly easier for a plaintiff to bring a regarded-as claim. Subsequent to the ADA amendments, Congress broadened the definition to allow a plaintiff to demonstrate a disability by establishing that he was subjected to adverse action "because of an actual or perceived physical or mental

[1] According to the federal regulations, the term "substantially limits" "is not meant to [impose] a demanding standard" and determining "whether an impairment 'substantially limits' a major life activity should not demand extensive analysis." 29 C.F.R. § 1630.2(j)(1)(I) (iii). The regulations further provide that the "term 'substantially limits' shall be construed broadly in favor of expansive coverage." *Id*. at § 1630.2(j)(1)(I). *See also Weaving v. City of Hillsboro*, 763 F.3d 1106, 1111 (9th Cir. 2014) ("The term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008").

impairment whether or not the impairment limits or is perceived to limit a major life activity." § 12102(3)(A).[2]

B. The Broad Remedial Purpose of the ADA Requires that Employers Pay for the Cost of Medical Testing that They Require of Post-Offer Applicants.

It appears uncontested that an employer can ask a post-offer job applicant for additional medical information, including follow-up examinations, as long as the follow-up requests and examinations are "medically related to the previously obtained medical information." EEOC Brief, at 26, citing EEOC Pre-Employment Guidance.[3] This is an extremely low bar. In effect, an employer can ask each and every job applicant, post-offer, but prior to beginning work, to complete a detailed

[2] Prior to the amendments, a plaintiff had to show that the employer "entertain[ed] misperceptions about the [employee, believing either that the employee] has a substantially limiting impairment that [she] does not have or that [she] has a substantially limiting impairment when, in fact, the impairment is not so limiting." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999).

[3] "At the 'post-offer' stage, an employer may ask about an applicant's workers' compensation history, prior sick leave usage, illnesses/diseases/impairments, and general physical and mental health. Disability-related questions and medical examinations at the post-offer stage do not have to be related to the job." EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations. The ADA authorizes medical inquiries and examinations of *current* employees but limits such inquires and examinations to issues concerning the nature, existence, or severity of a disability unless the examination or inquiry is "job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A). Significantly, the standards applicable for current employees are not applicable to the other stages of the hiring process.

medical questionnaire. And then, based upon the answers to the questionnaire, the employer may require the applicant to produce the results of additional medical examinations and testing. That is exactly what happened to Plaintiff in this case, and could be required of any applicant with any medical history revealed in the questionnaire.

There appears to be no limit to the number of medical examinations, or any cap on the costs of medical examinations that a potential employer can require. Indeed, there appears to be no statutory or regulatory restriction on an employer's use (or misuse) of this requirement at all, except that the *results* of the examinations required can be used only in accordance with the ADA. 42 U.S.C. § 12112(d)(3)(c).[4] If the first medical examination is inconclusive, even more medical testing may be required, and according to BNSF, all of it at the employee's expense but with no promise that the conditional job offer will ever become final.

[4] The EEOC Enforcement Guidance is considerably more permissive than that of the implementing regulation. The latter allows for post-offer medical examinations "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." §1630.14(b). The Guidance allows follow-up medical examinations, as long as the follow-up requests and examinations are "medically related to the previously obtained medical information." It appears undisputed that BNSF did not require all entering employees in the same job category to provide new MRI test results, or any test results.

The parties in this case dispute whether the requirement for additional medical testing was appropriate or necessary given the medical information that the Plaintiff provided and the clearance initially given by the BNSF medical contractor. But as the District Court found, this dispute is irrelevant. ECF 122, at 12-13.[5] Whether appropriate or necessary, an employer is free to "require" additional testing regardless of the cost. It is axiomatic that applicants for jobs are often unemployed and therefore, like the Plaintiff in this case, unable to pay for the employer-required medical examinations and testing. If the employee is required to bear the cost of post-offer medical examinations, then the expense of even appropriate medical testing will screen out a substantial number of statutorily protected applicants.

Unless employers are required to pay for medical testing, they have no disincentive to require it. To the contrary, employers may use the cost of medical testing to screen out applicants who have a higher likelihood of potential workers compensation, FMLA, or reasonable accommodation claims. If employers are

[5] BNSF argues that the remedy for using inappropriate medical testing as a way to screen out protected individuals is a discrimination claim for disparate treatment. ECF 7. But amicus has been unable to find any case where a post-offer job applicant successfully alleged that an employer's pre-employment required medical testing violates the ADA on the grounds that it was unnecessary or inappropriate. Such a claim would be unprecedented, and would be unlikely to succeed unless the employer routinely required prohibitively expensive medical testing for *all* potential employees with a prior medical condition.

allowed to use the costs of medical testing to screen out the applicants because of disability-associated costs, virtually all applicants who are "regarded as" disabled, who have a "record of" a disability, or a medical condition which might become a disability will be effectively disqualified from work.[6]

The Defendant's amici argue that "[a]pplicants 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." Dkt 10, at 38. Congress chose, however, to protect individuals with disabilities because of the long history of discrimination against

[6] The EEOC has not raised the issue of whether Plaintiff has a "record of" a disability on appeal. EEOC Brief, at 29 n7. But clearly individuals with a "record of" a disability are protected by the statute, 42 U.S.C. § 12102(1)(B), and those protected individuals would also be required to pay for employer required medical examinations, and also be excluded because of their inability to pay. Although not relied upon by the EEOC, it appears that Plaintiff in this case had a record of a disability. "An individual has a record of a disability if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." 29 C.F.R. § 1630.2(k). A broad construction is required. "Whether an individual has a record of an impairment that substantially limited a major life activity shall be construed broadly to the maximum extent permitted by the ADA and should not demand extensive analysis. An individual will be considered to have a record of a disability if the individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as having had such an impairment." §1630.2(k)(2).

them. The cost of traveling to a job interview is unrelated to having a disabilitiy and does not otherwise invoke a protected classification.

The Defendant's amici, ever mindful of employment related costs, argue that "requiring employers to pay for such examinations would impose enormous cost burdens on employers of all sizes." *Id*. While the costs associated with post-offer medical examinations are entirely speculative, unless employers are required to pay those costs there will be no disincentive for employers to unnecessarily require them. To the contrary, employers will have a strong incentive to require medical testing in the hopes of avoiding the associated costs of employing protected individuals with a medical history—which runs directly contrary to the purpose of the ADA. Congress decided that employers could more easily bear the financial burden than job applicants.

C. BNSF's Subjective Motivation is Irrelevant. The District Court Correctly Ruled that BNSF "Facially Discriminated."

The District Court determined that BNSF's withdrawal of Mr. Holt's job offer when he failed to supply an updated MRI at his own cost constituted "facial discrimination." ECF 122, at 15. The Court determined that BNSF failed to establish a legitimate, non-discriminatory reason for failing to hire Mr. Holt because: 1) its response to not receiving an MRI was illegitimate under the ADA's entrance examination framework; and 2) because the request for an MRI was itself

occasioned by evidence of his disability rather than constituting an independent, non-disability-based rationale. *Id.* The Court's determination of "facial discrimination" is based upon BNSF's undisputed reliance on Plaintiff's impairment in requesting a MRI, and its conclusion that his inability to pay for medical testing is not a legitimate non-discriminatory reason for revoking the conditional job offer.

Ordinarily, when evaluating a claim of disparate treatment on summary judgment under the ADA, the court applies the *McDonnell Douglas* burden-shifting analysis. *Raytheon Co.*, 540 U.S. 44, 49 n.3 (2003); *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1093 (9th Cir. 2001).[7] But the District Court correctly ruled that the Defendant's conduct in this case constituted "facial discrimination." In facial discrimination cases, motive is irrelevant and the *McDonnell Douglas* shifting burden analysis therefore does not apply.

[7] The *McDonnell Douglas* analysis requires first that the plaintiff demonstrate a prima facie case of discrimination under the ADA. *See Snead*, 237 F.3d at 1093. If the plaintiff establishes the prima facie case, the burden shifts to the employer to provide a legitimate, nondiscriminatory reason for the adverse employment action. *Id.* If the employer successfully demonstrates that the employment action was not based on the employee's disability, the burden shifts back to the plaintiff to show that the employer's proffered reason is mere pretext for discrimination. *Id.* To establish a prima facie case of discrimination under the ADA, Mr. Holt must show that (1) he is "disabled" within the meaning of the Act; (2) he is a "qualified individual" within the meaning of the Act; and (3) that he suffered an adverse employment action because of his disability. *Kaplan v. City of N. Las Vegas,* 323 F.3d 1226, 1229 (9th Cir. 2003).

The *McDonnell Douglas* shifting evidentiary framework is designed to assist the Court in determining the existence of an illegal motive. But the *McDonnell Douglas* shifting burden framework does not apply to facial discrimination cases because once a determination of "facial discrimination" is made, the issue of proving "discriminatory animus" becomes unnecessary, and causation is admitted by virtue of the facial classification itself. *See United Auto Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) ("[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination"); *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 277-78 (1979) ("Thus, plaintiffs challenging policies that facially discriminate on the basis of race need not separately show either 'intent' or 'purpose' to discriminate"); *Latta v. Otter*, 771 F.3d 456, 468 (9th Cir. 2014) ("Whether facial discrimination exists 'does not depend on why' a policy discriminates, 'but rather on the explicit terms of the discrimination'"); *Enlow v. Salem-Keizer Yellow Cab Co., Inc.*, 389 F.3d 802, 817 (9th Cir. 2004) ("But precedent is clear that in a case of facial discrimination, the explicit use of a protected trait as a criterion for the employer's action establishes

discriminatory intent, regardless of the employer's subjective motivations"); *Frank v. United Airlines, Inc.*, 216 F.3d 845, 854 (9th Cir. 2000) ("[w]here a claim of discriminatory treatment is based upon a policy which on its face applies less favorably to one gender . . . a plaintiff need not otherwise establish the presence of discriminatory intent").

The *McDonnell Douglas* shifting burden analysis is inapplicable to cases of "facial discrimination." *See Bates v. UPS*, 522 F.3d 973, 987 (9th Cir. 2007) ("A burden-shifting protocol is, however, unnecessary in this circumstance. The fact to be uncovered by such a protocol - whether the employer made an employment decision on a proscribed basis . . . - is not in dispute"); *Community House, Inc. v. City of Boise,* 468 F.3d 1118, 1124 (9th Cir. 2006) ("We hold . . . that the plaintiffs' gender and familial discrimination claims are properly characterized as claims of facial discrimination and should be analyzed in that framework. The *McDonnell Douglas* test is inapplicable . . . ."); *Reidt v. County of Trempealeau*, 975 F.2d 1336, 1341 (7th Cir. 1992) ("The *McDonnell Douglas* procedure is inapt in a situation involving a facially discriminatory policy, . . . "); *Piercy v. Maketa,* 480 F.3d 1192, 1204 (10th Cir. 2007) ("where an employer's policy is discriminatory on its face, we need not worry about eliminating nondiscriminatory reasons for an employer's action. In cases of facial discrimination, '[t]here is no need to probe for

a potentially discriminatory motive circumstantially, or to apply the burden-shifting approach outlined in *McDonnell Douglas Corp. v. Green*'").

In this case, BNSF insists that it is not liable because the EEOC offered no evidence "showing that discriminatory animus toward the protected characteristic caused the challenged decision." Dkt 8, at 29. This argument runs counter to the well-established law, cited above, and none of the cases cited by BNSF in support of this argument involve "facial discrimination." *Id.* at 51-52 n.11.

BNSF argues that its decision to revoke the conditional offer of employment was caused by Mr. Holt's failure to provide the additional medical testing that BNSF required, and that there is no evidence of pretext. *Id*. at 52. But BNSF maintained a policy of requiring additional medical testing from only those individuals who it regarded as disabled; those individuals who have an "impairment," which is defined as "[a]ny physiological disorder or condition … affecting one or more body systems" including "musculoskeletal." 29 C.F.R. § 1630.2(h)(1). It is undisputed that BNSF knew that Mr. Holt had an impairment and required him to undergo additional medical testing for that reason. "But for" Mr. Holt's impairment he would have been offered the job.

Mr. Holt didn't fail to cooperate. He was unable to unable to afford the required medical testing, which he explained to BNSF. BNSF was indifferent to

Mr. Holt's explanation and withdrew its offer of employment. This constitutes "facial discrimination." BNSF's subjective motive is irrelevant, causation is established as a matter of law without further analysis, and *a fortiori* proof of pretext is unnecessary.

Mr. Holt offered medical evidence that at the time of his application he could perform the essential functions of the job, without reasonable accommodation. BNSF has offered no evidence to the contrary. The District Court correctly granted summary judgment in favor of the EEOC.

V. CONCLUSION

The ADA requires that the cost of post-offer medical examinations required by the employer be borne by the employer. The judgment of the District Court should be AFFIRMED.

Dated this 19th day of December, 2016.

WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

By,_____/s/ Jeffrey Needle_____
Jeffrey Needle, WSBA #6346
Jesse Wing, WSBA #27751

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