No. 18-1139

IN THE
SUPREME COURT OF THE UNITED STATES

BNSF Railway Co.,

Petitioner,

v.

Equal Employment Opportunity Commission,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

RUSSELL HOLT'S MOTION FOR LEAVE TO INTERVENE AS A RESPONDENT AND TO FILE A BRIEF IN OPPOSITION

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INTRODUCTION

The case arises from a charge Russell Holt filed with the Equal Employment Opportunity Commission (EEOC) alleging that petitioner BNSF Railway had discriminated against him in violation of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.* The EEOC brought suit against BNSF and secured a judgment awarding Mr. Holt nearly $100,000 in make-whole relief, which the Ninth Circuit affirmed in relevant part. But the Solicitor General, representing the EEOC in this Court, has declined to defend that judgment. Instead, the Solicitor General agrees with BNSF on one of the two questions presented and urges the Court to grant BNSF's petition, vacate the judgment below, and remand (GVR) to allow the Ninth Circuit to reconsider that question in light of his views.

Mr. Holt learned of the Government's change in position when the Solicitor General filed his brief. Given that development, Mr. Holt respectfully seeks leave to intervene as a respondent and to file a brief in opposition, which he is submitting along with this motion. The motion should be granted because Mr. Holt has a direct and substantial interest in the case, because he is seeking to intervene promptly upon learning of the Solicitor General's position, and because intervention would neither prejudice the parties nor inconvenience the Court. Just the opposite: It would provide the Court with the benefit of adversarial briefing on the question on which BNSF and the Solicitor General are aligned.

The Solicitor General does not oppose this motion. BNSF has informed us that it has not yet determined its position and will file a response in due course.

STATEMENT

1. In 2011, Mr. Holt applied to be a patrol officer for BNSF. Pet. App. 5a. BNSF offered him the job, subject to a medical evaluation. *Id.* 6a. During the evaluation, Mr. Holt disclosed that he had injured his back in 2007 and provided BNSF with medical records showing that he had suffered a two-level disc extrusion. *Id.* But both Mr. Holt's primary care physician and a doctor working for BNSF determined that his back condition would not "prevent him from performing the duties of the Patrol Officer job." *Id.* 7a.

BNSF's chief medical officer nonetheless refused to approve Mr. Holt without a new MRI, which he deemed necessary "due to the uncertain prognosis of Holt's back condition." Pet. App. 8a (brackets omitted). Mr. Holt attempted to obtain the required MRI, but learned that it would have cost him more than $2,500. *Id.* 9a. He could not afford such a substantial sum, and BNSF refused to arrange the required test for him. Instead, BNSF told him that "he was expected to bear the cost of the MRI himself," and it refused to hire him when he failed to do so. *Id.*

2. Mr. Holt filed a charge with the EEOC alleging that BNSF had violated the ADA, which provides in relevant part that an employer may not "discriminate against a qualified individual on the basis of disability in regard to job application procedures" or "hiring." 42 U.S.C. § 12112(a). An individual is deemed to have a protected disability if he was "subjected to an action prohibited under [the ADA] 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." *Id.* § 12102(3)(A).

The ADA incorporates the enforcement provisions of Title VII, which authorize the EEOC to investigate charges of discrimination and to bring enforcement actions. 42 U.S.C. §§ 2000e-5(f), 12117(a). In bringing such an action, the Commission seeks both to "vindicate a public interest" in eliminating discrimination and to "obtain make-whole relief for the employee" injured by the discriminatory practice. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 296 (2002); *see General Tel. Co. v. EEOC*, 446 U.S. 318, 323-24, 326 (1980).

3. In this case, the EEOC concluded that Mr. Holt's charge had merit and brought suit against BNSF "to correct unlawful employment practices" and "to provide appropriate relief to Russell Holt." C.A. E.R. 1578. The Commission's complaint asked the district court to order BNSF "to make whole Mr. Holt" by awarding him backpay and other compensatory relief. *Id.* 1582.

On cross-motions for summary judgment, the district court agreed with the EEOC that BNSF had perceived Mr. Holt as having a physical impairment. Pet. App. 48a. The court also held that BNSF had violated the ADA by requiring Mr. Holt to pay for an expensive medical test because of that perception. *Id.* 47a. The court entered a judgment awarding Mr. Holt nearly $100,000. C.A. E.R. 4. It also granted the EEOC's motion for injunctive relief. Pet. App. 11a.

4. The Ninth Circuit affirmed the finding of liability and the award to Mr. Holt, but remanded for further proceedings on the injunction. Pet. App. 1a-29a. As relevant here, the Ninth Circuit first held that BNSF had perceived Mr. Holt as having an impairment because it "assumed that Holt had a 'back condition' that

disqualified him from the job unless Holt could disprove that proposition." *Id.* 17a. The Ninth Circuit also held that BNSF had engaged in prohibited discrimination because it had "impos[ed] an additional financial burden on a person with a disability because of that person's disability." *Id.* 21a.

5. BNSF filed a petition for a writ of certiorari. Although the EEOC has independent litigating authority in the lower courts, the Solicitor General represents the Commission before this Court. 42 U.S.C. § 2000e-4(b)(2). On August 8, 2019, the Solicitor General filed a brief arguing that the Ninth Circuit correctly held that BNSF perceived Mr. Holt as having an impairment, but that it erred in holding that BNSF violated the ADA by requiring Mr. Holt to obtain an MRI at his own expense. SG Br. 11-12. The Solicitor General urges the Court to GVR so that the Ninth Circuit can reconsider that issue in light of his views. *Id.* 12, 26-27.

REASONS FOR GRANTING THE MOTION

Mr. Holt has a direct and substantial interest in defending the judgment awarding him nearly $100,000 in compensatory relief. Until now, that interest has been ably represented by the EEOC. But the Solicitor General has declined to defend the EEOC's position in this Court and instead seeks to undo the judgment granting Mr. Holt relief. That change in the Government's position makes this a paradigmatic example of the sort of unusual circumstance in which "the interests of justice" support granting leave to intervene while a case is pending in this Court. Stephen M. Shapiro et al., *Supreme Court Practice* 427 (10th ed. 2013).

1. Although no statute or rule establishes a standard for intervening in a case in a court of appeals or this Court, the Court has indicated that the policies reflected in Federal Rule of Civil Procedure 24 provide helpful guidance. *See Automobile Workers v. Scofield*, 382 U.S. 205, 217 n.10 (1965); *cf. Mullaney v. Anderson*, 342 U.S. 415, 416-17 (1952) (Rule 21). Rule 24(a) authorizes intervention as of right upon a timely motion by a party who either (1) "is given an unconditional right to intervene by a federal statute" or (2) "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Mr. Holt satisfies both of those alternative standards.

As to the first, Congress provided that "[t]he person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission." 42 U.S.C. § 2000e-5(f)(1); *see* 42 U.S.C. § 12117(a) (incorporating Section 2000e-5 into the ADA). That provision reflects congressional recognition that aggrieved persons like Mr. Holt have a direct interest in the suits the EEOC brings on their behalf, and it "unambiguously gives employees an unconditional right to intervene in EEOC enforcement actions." *EEOC v. PJ Utah, LLC*, 822 F.3d 536, 540 (10th Cir. 2016); *see General Tel. Co.*, 446 U.S. at 326.

As to the second, Mr. Holt has an undeniable interest in "the subject of the action," Fed. R. Civ. P. 24(a)(2), because BNSF is seeking to overturn a judgment awarding him monetary relief. A decision setting aside that judgment would "impair

or impede [his] ability to protect [his] interest, *id.*—indeed, it could vitiate that interest altogether. And although the EEOC adequately represented Mr. Holt's interest until this point, the Solicitor General's brief makes clear that the Government will not continue to do so in this Court.

2. Mr. Holt's motion to intervene is timely. Rule 24(a)'s timeliness requirement is not a rigid rule based on "the point to which the suit has progressed," but a flexible standard that must be applied in light of "all the circumstances." *NAACP v. New York*, 413 U.S. 345, 365-66 (1973). Where, as here, the movant seeks to intervene because an existing party has ceased to represent his interests, the critical question is whether he acted "promptly" once it became clear that his interests "would no longer be protected." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977); *see NAACP*, 413 U.S. at 367 (prospective intervenors were required to act once it became "obvious that there was a strong likelihood" that the United States would cease to represent their interests).

Another EEOC case currently before this Court supplies an instructive example. The employee in *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (cert. granted, Apr. 10, 2019), sought to intervene while the case was pending in the Sixth Circuit because she feared the EEOC might change its position. The Sixth Circuit granted leave to intervene, holding that the motion was timely because the employee acted as soon as she had "reason to question whether the EEOC would continue to adequately represent her interests." *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 16-2424, 2017 WL. 10350992, at *1 (Mar. 27, 2017).

So too here. Mr. Holt first learned of the Government's change in position when the Solicitor General filed his brief. He then moved expeditiously to protect his rights, and he is filing this motion and his proposed brief in opposition just two weeks later, before BNSF's petition was even set to be distributed to the Court. *See* S. Ct. R. 15.5.

3. Allowing Mr. Holt to intervene would neither prejudice the parties nor inconvenience the Court. He does not seek to raise new issues or otherwise disrupt the proceedings—only to argue that certiorari should be denied. He is submitting his proposed brief along with this motion to ensure that granting leave to intervene would not materially delay the Court's consideration of the petition. And allowing Mr. Holt to participate would give the Court the benefit of full adversarial presentation, which would otherwise be lacking on the second question presented.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Holt leave to intervene as a respondent and to file a brief in opposition.

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Respectfully submitted,

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