APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Plaintiff-Appellee*, v. BNSF RAILWAY COMPANY, *Defendant-Appellant*.	No. 16-35457 D.C. No. 2:14-cv-01488-MJP ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Western District of Washington
Marsha J. Pechman, Senior District Judge, Presiding

Argued and Submitted February 8, 2018
Seattle, Washington

Filed August 29, 2018
Amended September 12, 2018

Before: Raymond C. Fisher, Ronald M. Gould,
and Richard A. Paez, Circuit Judges.

Order;
Opinion by Judge Gould

SUMMARY*

Americans with Disabilities Act

The panel amended the opinion filed on August 29, 2018, in which the panel affirmed the district court's judgment imposing liability on BNSF Railway Company under the Americans with Disabilities Act ("ADA"); vacated the nationwide injunction that prohibited BNSF from engaging in certain hiring practices; and remanded with instructions for the district court to make further factual findings in order to establish the proper scope of the injunction.

Russell Holt received a conditional job offer from BNSF for the position of Senior Patrol Officer contingent on Holt's satisfactory completion of a post-offer medical review. BNSF demanded that Holt submit an MRI of his back at his own cost, which he could not afford. BNSF revoked Holt's job offer, and the Equal Employment Opportunity Commission sued BNSF for violations of the ADA.

The panel held that the EEOC demonstrated all three elements of a 42 U.S.C. § 12112(a) claim by showing (1) that Holt had a "disability" within the meaning of the ADA because BNSF perceived him to have a back impairment; (2) that Holt was qualified for the job; and (3) that BNSF impermissibly conditioned Holt's job offer on Holt procuring an MRI at his own expense because it assumed that Holt had a back impairment. The panel noted that BNSF offered no

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

affirmative defense on appeal; and affirmed the district court's holding that the EEOC made a *prima facie* case for a violation of ADA, and was entitled to summary judgment.

The district court held that it could grant an injunction to the EEOC by statute, without looking to the four-factor test for injunctive relief. The panel held that it need not, and did not, decide whether the standard four-factor test for injunctive relief was required in the Title VII/ADA context, because even if the four-factor test applied, that test would be satisfied. Namely, the panel held that Holt suffered an irreparable injury, the remedies at law were inadequate, and the balance of equities, and the public interest weighed in favor of an injunction. The panel concluded that the district court properly entered an injunction.

The panel held that the district court must make further factual findings to support the scope of the injunction; and remanded for the district court to establish the proper scope of the injunction.

COUNSEL

Bryan P. Neal (argued) and Stephen F. Fink, Thompson & Knight LLP, Dallas, Texas; Kenneth J. Diamond, Winterbauer & Diamond PLLC, Seattle, Washington; for Defendant-Appellant.

Susan Ruth Oxford (argued), Attorney; Margo Pave, Assistant General Counsel; Jennifer S. Goldstein, Associate General Counsel; James L. Lee, Deputy General Counsel; U.S. Equal Employment Opportunity Commission, Washington, D.C.; for Plaintiff-Appellee.

John R. Annand and Rae T. Vann, NT Lakis LLP, Washington, D.C.; Kathryn Comerford Todd and Warren Postman, U.S. Chamber Litigation Center Inc., Washington, D.C.; for Amici Curiae Equal Employment Advisory Council and Chamber of Commerce of the United States of America.

Jeffrey L. Needle, Law Offices of Jeffrey L. Needle, Seattle, Washington; Jesse Wing, MacDonald Hoague & Bayless, Seattle, Washington; for Amicus Curiae Washington Employment Lawyers Association.

ORDER

The opinion in the above-captioned matter filed on August 29, 2018, is amended as follows:

At slip opinion page 5, line 7, delete <apply> and replace with <make further factual findings in order to establish>.

At slip opinion page 5, lines 7–9, delete <traditional four factor test to determine whether to issue a permanent injunction, and, if so, the> and replace with <proper>.

At slip opinion page 26, line 27, delete <its> and replace with <an>.

An Amended Opinion is filed concurrently with this order.

IT IS SO ORDERED.

OPINION

GOULD, Circuit Judge:

Russell Holt received a conditional job offer from BNSF Railway Company ("BNSF") for the position of Senior Patrol Officer, contingent on Holt's satisfactory

completion of a post-offer medical review. During that medical review, Holt disclosed that he had injured his back four years before, suffering a two-level spinal disc extrusion. Holt's primary care doctor, his chiropractor, and the doctor BNSF's subcontractor hired to examine Holt all determined that Holt had no current limitations due to his back and found no need for follow-up testing. Yet as an effective condition to consider him further for the job, BNSF demanded that Holt submit an MRI of his back—at his own cost—or it would treat Holt as having declined the offer. Holt was in bankruptcy at that time and did not obtain an MRI. As a result, BNSF revoked Holt's job offer.

The district court concluded that BNSF's actions violated the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.*, as amended by the ADA Amendments Act of 2008 ("ADAAA") Pub. L. No. 110-325, 122 Stat. 3553, and issued a nationwide injunction that prohibited BNSF from engaging in certain hiring practices. We affirm the district court's judgment imposing ADA liability, but we vacate the injunction and remand with instructions for the district court to make further factual findings in order to establish the proper scope of the injunction.

I

In June 2011, Holt applied for a job with BNSF as a Senior Patrol Officer. BNSF describes the job duties of a Senior Patrol Officer as "essentially the same" as a city police officer: Patrol Officers protect the safety of people and property, prevent and respond to criminal activities, and arrest suspects, among other duties. At the time he applied to work for BNSF, Holt was working as a criminal investigator in the Pulaski

County Sheriff's Office in Little Rock, Arkansas, where he had worked for five years. After interviewing Holt, BNSF extended him an offer of employment—contingent upon him passing a background check and satisfactorily completing a post-offer medical exam.

BNSF contracts with Comprehensive Health Services ("CHS") to coordinate its medical evaluations nationwide. CHS requires applicants to take a strength test, have a basic physical examination, complete the CHS medical questionnaire, submit to a clinical exam, answer any follow-up questions, and potentially undergo a targeted medical examination. For any cases in which the decision to clear or reject an applicant is not routine, BNSF's medical department, not CHS, decides whether an applicant is medically qualified.

Holt proceeded through CHS's evaluation process. In his health questionnaire, Holt disclosed that he had injured his back in 2007 and suffered back pain as a result. An MRI had shown that he had a two-level disc extrusion, meaning that the nucleus pulposus had escaped from two of his spinal discs. In layman's terms, this was described as the "jellylike material" inside two of Holt's spinal discs having been pushed out of the discs and into the spinal column. A follow-up MRI in 2009 showed that one of Holt's spinal discs had broken off, and a chunk of that spinal disc was then floating in Holt's spinal canal.[1] After his back injury, Holt

[1] BNSF's doctor described this as progression in a "non-positive direction," while Holt's primary care doctor opined that in some areas Holt's back looked better, while in other areas his back looked worse.

had regularly visited a chiropractor for "maintenance."

Holt also suffered from knee pain in March 2011, as well as some associated back pain, which led him to see his primary care doctor, Dr. Richard Heck. Dr. Heck stated that an MRI of Holt's knee might be warranted, but one was never ordered, and Holt's knee and back pain appears to have resolved with medication, chiropractic care, and physical therapy.

On September 21, 2011, the day after Holt submitted his questionnaire disclosing his prior back injury, a CHS nurse called him with more questions about his back. Holt told her that he had kept the same job after his back was injured and that he had no current back issues. The nurse asked him to submit his medical records relating to his back. Within a week, Holt had submitted his medical records; a letter from his chiropractor stating that Holt had responded well to care; the 2007 MRI; and a note from Dr. Heck—who had just reexamined Holt that week—stating that Holt had no current back problems and had functioned normally since 2009.

CHS's subcontractor, Concentra, then assigned Dr. Marcia Hixson to conduct a medical exam of Holt. Dr. Hixson was informed generally of Holt's prior back injury,[2] and she said that she looked at his back a "little more closely" than usual as part of her "very thorough" exam. Dr. Hixson's exam revealed no issues—with Holt's back or otherwise—that would prevent him from performing the duties of the Patrol Officer job, and she saw no need for a follow-up exam; Dr.

[2] Dr. Hixson was not provided with any of Holt's prior medical records.

Hixson relayed these conclusions on the written examination report.

CHS then sent its medical file on Holt to BNSF for additional review. BNSF's Medical Officer, Dr. Michael Jarrard, reviewed Holt's file. Dr. Jarrard decided that he wanted additional information before he made an informed decision about whether Holt could perform the Senior Patrol Officer job. Specifically, on November 11, 2011, Dr. Jarrard requested (1) a current MRI and radiologist's report on Holt's back, (2) Holt's pharmacy records for the past two years for prescriptions related to treatment of Holt's back pain, and (3) any other medical records for Holt from the prior two years, including chiropractic notes. Dr. Jarrard stated that he wanted this information because—although Holt reported no current symptoms and all the reviewing doctors had agreed that he could perform the job—Dr. Jarrard was concerned that there was an underlying pathology that might disqualify Holt from the job. Dr. Jarrard told CHS to tell Holt that the additional information was necessary "due to [the] uncertain prognosis of [Holt's] back condition."

What happened next is the subject of some dispute between the parties. But based on the record, this picture emerges: In November, Holt contacted Dr. Heck's office and stated that he needed an MRI for his job application with BNSF. It is not clear whether Holt spoke directly with Dr. Heck about this request, although it appears likely that he did. In any event, it is uncontroverted that Holt at least spoke with Dr. Heck's office about getting an MRI and was told that because he was not currently in pain, the MRI was not medically necessary and so would not be covered by

his insurance. An employee from Dr. Heck's office followed up to tell Holt that the office had checked with Holt's insurance company, and the insurance company had confirmed that it would not cover the MRI.

Holt then investigated paying out-of-pocket for the MRI, and was told it would cost more than $2,500 to obtain an MRI without a doctor's referral. Holt was in bankruptcy at the time of his job application. Holt states that he could not afford to pay for an MRI, an allegation BNSF disputes. We do not rely on Holt's representation about his inability to pay in arriving at our holding here. It is not disputed that Holt told BNSF about the high cost of the MRI and that BNSF responded that he was expected to bear the cost of the MRI himself.

After some back-and-forth communications with BNSF in which Holt asked to have the MRI requirement waived, he was told that without the MRI he would not be hired. Holt did not obtain an MRI,[3] and so on December 15, 2011, BNSF designated Holt as having declined the conditional job offer.[4]

---

[3] Holt also did not provide the other medical records that BNSF requested, but without the MRI, it would not have mattered whether Holt gave them to BNSF—he still would have been treated as having declined the job offer.

[4] It is undisputed that Holt later had serious back issues requiring him to undergo surgery in December 2013. Holt testified that those issues caused him to take a six-week medical leave, but that he worked as a law enforcement officer before and after the surgery. Regardless, that Holt later had back problems is not relevant to whether BNSF's actions were justified on the information it had before it in 2011. *See Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1248 (9th Cir. 1999).

Holt next filed a charge with the Equal Employment Opportunity Commission ("EEOC"). The EEOC then sued BNSF for alleged violations of the ADA. BNSF moved to dismiss the complaint. The district court denied that motion, holding that the EEOC had properly pleaded a claim under the ADA, 42 U.S.C. § 12112(b)(6). The parties proceeded through discovery, and both sides moved for summary judgment—BNSF moving for summary judgment as to the entire case and the EEOC requesting only partial summary judgment on the issue of ADA liability.

The district court granted the EEOC's motion for partial summary judgment, and denied BNSF's motion. Although the district court had held in denying BNSF's motion to dismiss that the EEOC could bring its claim under § 12112(b)(6), the district court reversed course in its summary judgment order. It instead concluded that § 12112(b)(6) was a disparate impact, not a disparate treatment provision, and that the EEOC could not make out a § 12112(b)(6) claim absent a showing that BNSF had applied an across-the-board policy.

The district court held that the EEOC could, however, make out a "generic § 12112(a) claim" against BNSF. It determined that the EEOC had established all three elements of a *prima facie* case for disability discrimination under § 12112(a): The EEOC had shown that (1) BNSF had "regarded" Holt as having a disability due to his 2007 back injury; (2) Holt was qualified for the job; and (3) BNSF discriminated against Holt by requiring an MRI because BNSF regarded Holt as having a disability. Holding that BNSF did not offer evidence sufficient to support any

affirmative defense, the district court granted partial summary judgment to the EEOC.

The parties then reached an agreement on the amount to be awarded for damages, although BNSF did not waive its appellate rights. The district court adopted the damages agreement.

Subsequently, the parties briefed the issue of injunctive relief, and the district court entered a nationwide injunction. The district court concluded that because it found BNSF to have purposefully engaged in an unlawful employment practice and BNSF had expressed no intention of changing its behavior, by statute injunctive relief against BNSF was authorized under 42 U.S.C. § 2000e-5(g)(1). The district court's injunction mandated that "BNSF must bear the cost of procuring any additional information it deems necessary to complete a medical qualification evaluation." It also required that "[i]f BNSF chooses not to procure additional information, it must complete the medical examination process, i.e., it must use the medical information it does have to make a determination about whether the applicant is medically qualified for the job for which the applicant received the conditional offer." BNSF appeals.

II

We review *de novo* the district court's ruling on cross-motions for summary judgment. *Guatay Christian Fellowship v. Cty. of San Diego*, 670 F.3d 957, 970 (9th Cir. 2011). We can consider together the denial of BNSF's motion for summary judgment and the grant of the EEOC's motion for summary judgment. *See Padfield v. AIG Life Ins. Co.*, 290 F.3d 1121, 1124 (9th Cir. 2002). "Summary judgment is appropriate if

there is no genuine dispute of material fact viewing the evidence in the light most favorable to the non-moving party." *Folkens v. Wyland Worldwide, LLC*, 882 F.3d 768, 773 (9th Cir. 2018) (internal quotation marks and citation omitted).

We review for abuse of discretion the district court's decision to grant a permanent injunction, but review *de novo* the district court's legal conclusions underlying the decision. *Ting v. AT&T*, 319 F.3d 1126, 1134–35 (9th Cir. 2003).

III

Under the ADA, employer medical inquiries are divided into three categories, each with different rules: (1) inquiries conducted before employers make offers of employment; (2) inquires conducted "after an offer of employment has been made but prior to the commencement of employment duties ('employment entrance examinations')"; and (3) inquiries conducted at any later point. *Norman-Bloodsaw v. Lawrence Berkeley Lab*., 135 F.3d 1260, 1273 (9th Cir. 1998) (alterations and quotation marks omitted); *see also* § 12112 (d)(2)–(4). This case concerns the second category of rules, which govern employment entrance examinations.

"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. However, these examinations must still be used in accord with the ADA and cannot violate the ADA's generic disability prohibitions set forth in § 12112(a).

42 U.S.C. § 12112(d)(1); *see also* 29 C.F.R. § 1630.14(b)(3).

Under § 12112(a) of the ADA, an employer is generally prohibited from "discriminat[ing] against a qualified individual on the basis of disability in regard to job application procedures [or] hiring . . . and other terms, conditions, and privileges of employment." The EEOC contends that BNSF violated this prohibition. To make out a *prima facie* case for a violation of § 12112(a), the EEOC must show: (1) that Holt had a disability within the meaning of the ADA, (2) that Holt was qualified for the position, and (3) that BNSF discriminated against Holt because of his disability. *See Smith v. Clark Cty. Sch. Dist.*, 727 F.3d 950, 955 (9th Cir. 2013). The parties contend, and we agree, that this case turns on the first and third prongs: whether Holt had a disability and whether BNSF discriminated against Holt because of his disability.

A.

We first consider whether Holt had a disability within the meaning of the ADA. *See Clark Cty. Sch. Dist.*, 727 F.3d at 955. The EEOC contends that BNSF "regarded" Holt as having a disability. Under the ADA, a person with a "disability" is defined to include an individual who is "regarded as having" an impairment. 42 U.S.C. § 12102(1)(C).[5] The ADA currently provides that:

> An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been

[5] On appeal, the EEOC does not advance its prior argument that Holt had a record of disability based on his back injury.

> 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). Notably, the ADAAA discarded the requirement that an impairment had to substantially limit a major life activity for the discrimination to be actionable under the "regarded as" prong. *Compare* 42 U.S.C. § 12102(2) (2008), *with* 42 U.S.C. § 12102(3)(A) (2009); *see also Mercado v. Puerto Rico*, 814 F.3d 581, 588 (1st Cir. 2016). But the ADAAA does require that an impairment not be "transitory" or "minor." *Id.* § 12102(3)(B). In regarded-as cases, thus, a plaintiff must show that the employer knew that the employee had an actual impairment or perceived the employee to have an impairment, and that the impairment was not transitory or minor. *See Adair v. City of Muskogee*, 823 F.3d 1297, 1306 (10th Cir. 2016).[6]

The parties agree that for BNSF to have regarded Holt as having a disability, BNSF must have regarded him as having a *current* impairment. This reading comports both with the statutory text, which prohibits discrimination on the basis of an "actual or perceived impairment" in the present tense, 42 U.S.C. § 12102(3)(A), and with out-of-circuit case law, *see Morriss v. BNSF Ry. Co.*, 817 F.3d 1104, 1113 (8th Cir. 2016) ("The ADA prohibits an employer from discrim-

[6] While the EEOC must also show that Holt was "subjected to an action prohibited under [the ADA]," 42 U.S.C. § 12102(3)(A), we consider that issue in analyzing the third prong of a § 12112(a) claim.

inating against an individual on the basis of a *presently existing* 'physical impairment' as that term is defined under the Act." (emphasis added)). The EEOC bears the burden of establishing that BNSF regarded Holt as having an impairment when BNSF requested the MRI.

By regulation, the EEOC has defined an impairment as "[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems." 29 C.F.R. § 1630.2(h)(1). The definition of "impairment" remained unchanged following the enactment of the ADAAA. 29 C.F.R. § 1630(h), App. The ADAAA, however, added language requiring that "[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." 42 U.S.C. § 12102(4)(A). As a result, we construe "perceived impairment," which forms part of the definition of "disability," broadly.

BNSF argues that it did not perceive Holt to have an impairment; its Medical Officer was simply unsure of the state of Holt's back and so sought more information. BNSF cites *Lanman v. Johnson County*, 393 F.3d 1151 (10th Cir. 2004), for the proposition that merely asking for an exam does not suggest that an employer perceived an employee to have an impairment. The EEOC argues that BNSF actually knew Holt had a current impairment because Holt's disc extrusion was a permanent condition. The EEOC points to Dr. Jarrard's deposition, during which he was asked whether "a disc extrusion, the material within the vertebra, ever regenerate . . . or be restored?" Dr.

Jarrard answered, "No." The EEOC argues that because the nucleus pulposus would never be restored, Holt had an ongoing impairment, of which BNSF was aware.

First, BNSF's citation to *Lanman* is not persuasive. There, Lanman was a county sheriff's deputy. *Id.* at 1153. After receiving several reports that Lanman had behaved in a troubling manner, the county placed her on leave pending the outcome of a psychiatric evaluation. *Id.* at 1153–54. Lanman argued that she had been discriminated against in violation of the ADA. *Id.* at 1154. The Tenth Circuit disagreed. *Id.* at 1157. The court questioned whether Lanman had shown that the county perceived her as having an impairment, and cited the ADA for the proposition that an employer may "order a medical exam when it is 'shown to be job-related and consistent with business necessity.'" *Id.* (quoting 42 U.S.C. § 12112(d)(4)(A)). Critically, however, the court held that even if Lanman *had* been able to demonstrate the county regarded her as impaired, she was not able to show the county believed the impairment "substantially limited her in at least one major life activity." *Id.* Thus, Lanman was not "disabled" within the meaning of the ADA. *Id.* at 1158.

Lanman is not helpful here, because the principal basis of its holding has been superseded by statute. The ADA no longer requires a showing of a substantially limiting impairment, following the 2008 enactment of the ADAAA. *Compare* 42 U.S.C. § 12102(2) (2008), *with* 42 U.S.C. § 12102(3)(A) (2009). Thus, the EEOC need show only that BNSF considered Holt to have an impairment—not a substantially limiting impairment. *See* § 12102(3)(A); *Mercado*, 814 F.3d at

588. The other cases BNSF cites are similarly unhelpful.

Second, we decline to parse the nature of Holt's medical condition. Whether or not Holt's disc extrusion was a permanent condition is irrelevant here. In requesting an MRI because of Holt's prior back issues and conditioning his job offer on the completion of the MRI at his own cost, BNSF assumed that Holt had a "back condition" that disqualified him from the job unless Holt could disprove that proposition. And in rejecting Holt's application because it lacked a recent MRI, BNSF treated him as it would an applicant whose medical exam had turned up a back impairment or disability. BNSF chose to perceive Holt as having an impairment at the time it asked for the MRI and at the time it revoked his job offer.

BNSF cannot hide behind its argument that there was some uncertainty as to the actual state of Holt's back when it assumed that Holt had a back condition that disqualified him from the Senior Patrol Officer job. Construing the definition of "perceived impairment" to encompass situations where an employer assumes an employee has an impairment or disability is consistent with the ADAAA's mandate that "the definition of disability . . . be construed in favor of broad coverage of individuals under [the ADA], to the maximum extent permitted by the terms of [the ADA]." *See* 42 U.S.C. § 12102(4)(A). We conclude that BNSF perceived Holt to have an impairment for the purposes of the ADA.

B

We next address whether BNSF discriminated against Holt because of his perceived impairment. *See*

Clark Cty. Sch. Dist., 727 F.3d at 955. Specifically, we consider whether it was permissible for BNSF to condition Holt's job offer on Holt obtaining an MRI at his own expense. This is not how the EEOC frames the discriminatory act—it instead refers to the "rescission of [Holt's] job offer" and focuses on the argument that Holt was unable to complete the testing process. But the key question, as we see it, is whether BNSF was entitled to condition Holt's continuation through the hiring process on Holt providing an MRI at his own cost. If BNSF was entitled to do this, then disqualifying Holt because he failed to cooperate in the completion of the medical screening process, whatever the reason he could not complete the process, was likely permissible. *Cf. Roberts v. City of Chicago*, 817 F.3d 561, 565–66 (7th Cir. 2016) (finding no ADA violation where plaintiffs were not hired because the first eleven applicants to complete medical testing were hired, and plaintiffs were delayed in completing the medical testing because they were required to go through additional screening because of their disabilities); *Leonel v. Am. Airlines, Inc.*, 400 F.3d 702, 709 n.13 (9th Cir. 2005) ("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 an employer is foreclosed from refusing to hire an applicant who does."); *Garrison v. Baker Hughes Oilfield Operations, Inc.*, 287 F.3d 955, 961 n.5 (10th Cir. 2002) (suggesting that it is permissible to fire an applicant for lying on a medical questionnaire); *EEOC v. Prevo's Family Mkt., Inc.*, 135 F.3d 1089, 1097 (6th Cir. 1998).

The ADA prohibits discrimination "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). Requiring that an applicant pay for an MRI—or else lose his or her job offer—because the applicant has a perceived back impairment is a condition of employment imposed discriminatorily on a person with a perceived impairment. Moreover, given the indisputably high cost of MRIs, requiring an MRI as a condition of employment will for many individuals mean a disqualification from participating in the process.

BNSF, however, argues that § 12112(d)(3) authorizes exactly this type of action. BNSF highlights the following text of § 12112(d)(3):

> 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.

§ 12112(d)(3). BNSF fails to mention, however, that the statute qualifies this by stating that these medical exams can only be given if "all entering employees are subjected to such an examination regardless of disability." § 12112(d)(3)(A).

BNSF further points out that the EEOC's 1995 Enforcement Guidance states that follow-up exams are permissible so long as they are "medically related to previously obtained medical information." This would appear to be a necessary implication of allowing employers to conduct medical examinations—it would be an odd and incomplete medical exam that could not include follow-up inquiries or testing based on red

flags raised in the initial exam. But this does not support BNSF's position that the prospective employee may be forced to shoulder the cost of such follow-up exams.

It is true that follow-up exams will frequently be required of people with disabilities or impairments because they have disabilities or impairments. But this additional burden is implicitly authorized by § 12112(d)(3)'s authorization of medical exams. *See Roberts*, 817 F.3d at 566. Indeed, the EEOC concedes that BNSF could have required Holt to get an MRI if BNSF had offered to pay for the MRI. The dispute is over cost allocation. Although it authorizes testing that may disproportionately affect persons with disabilities, § 12112(d)(3) does not, by extension, authorize an employer to further burden a prospective employee with the cost of the testing, however necessary the testing may be. The statute is silent as to who must bear the costs of testing.

BNSF argues that because the ADA allows an employer to "require a medical examination" and not to merely "give" or "request" one, the ADA empowers employers to force applicants to pay for the costs any of testing. BNSF reads too much into the word "require." Here, "require" is properly understood to mean that an employer can compel a medical exam, and that a conditionally hired person's participation in the medical exam is not optional. *See Requirement*, Black's Law Dictionary (10th ed. 2014) ("[s]omething that must be done"). But the word "require" indicates nothing about who must bear the costs of any medical testing. Accordingly, we hold that the standard anti-discrimination provision of the ADA and the ADA's

policy purposes should control on the issue of who must bear the costs of testing.

An employer would not run afoul of § 12112(a) if it required that everyone to whom it conditionally extended an employment offer obtain an MRI at their own expense. [7] That employer would be imposing a cost on its prospective employees across-the-board, with no regard for their actual or perceived disability or impairment status. Where, however, an employer requests an MRI at the applicant's cost only from persons with a perceived or actual impairment or disability, the employer is imposing an additional financial burden on a person with a disability because of that person's disability.[8] In the case of an expensive test like an MRI,[9] making an applicant bear the cost will effectively preclude many applicants, which is at odds with the ADA's aim to increase opportunities for persons with disabilities.

In short, requiring an applicant to pay for follow-up testing is distinct from merely requiring an additional exam for a person with a disability if an addi-

---

[7] This is not to say that such an action would necessarily be legal; we merely note that § 12112(a) would not prohibit it.

[8] For these reasons, *O'Neal v. City of New Albany*, 293 F.3d 998 (7th Cir. 2002), which BNSF cites extensively, is not relevant here, because there the plaintiff conceded that he did not have a disability and did not argue that the burden of paying for testing was imposed on him on account of his disability. *See id.* at 1010.

[9] This is not to imply that an employer may require a prospective employee with a perceived or actual impairment to pay for an inexpensive medical test. On the contrary, our holding here applies regardless of the cost of the medical test at is-sue, as well as the employee's ability to pay.

tional exam is necessary to complete the medical examination contemplated in § 12112(d)(3). But it is not at all necessary that a person with an impairment pay for an exam for a thorough exam to be completed. To construe the statute otherwise would be to constrain and limit the general protections of the ADA beyond the necessary implications of the medical testing provision.

Further, elsewhere the ADA puts the financial burden on employers. The ADA requires *employers* to pay for reasonable accommodations unless it is an undue hardship—it does not require employees to procure reasonable accommodations at their own expense. 42 U.S.C. § 12112(a), (b)(5)(A); *see also* 29 C.F.R. § 1630.2(o)(4).[10] Allowing employers to place the burden on people with perceived impairments to pay for follow-up tests would subvert the goal of the ADA to ensure that those with disabilities have "equality of opportunity," § 12101(a)(7), and would

[10] While the Fourth Circuit has found no ADA violation where an employer required an employee to obtain, at his own cost, a functional capacity evaluation before returning to work, the court did not explain why it was permissible to require the employee to pay for testing. *See Porter v. U.S. Alumoweld Co.*, 125 F.3d 243, 245 (4th Cir. 1997). The court instead focused on the fact that the requested test was "job-related and consistent with business necessity" under § 12112(d)(4). *Id.* at 246. The court also noted that in the absence of any testing, the plaintiff there could not make out a prima facie case of discrimination, as he could not demonstrate that he had a disability or that he was capable of doing his job with or without a reasonable accommodation. *Id.* at 246–47. That case also predated the ADAAA. Given the different factual context and that the court did not discuss why it was appropriate to require an employee to pay for testing, we are not persuaded that we should follow the *Porter* court here.

force people with disabilities to face costly barriers to employment.

Additionally, requiring employers to bear the costs of this testing would discourage unnecessary and burdensome testing of persons with disabilities or impairments, and prevent employers from abusing their ability to require tests. As *amicus curiae* Washington Employment Lawyers Association points out, if employers are not required to pay for the additional medical tests that they require of people with disabilities, then employers might use the cost of medical testing to screen out disabled applicants.[11] Putting the burden to pay on employers helps to ensure that employers do not abuse their power to require testing at the post-offer, pre-employment stage.

BNSF also argues that the EEOC did not show that BNSF acted with a discriminatory motive, or that BNSF's justifications for its behavior were pretextual. But as we have held *en banc*, where it is clear that an action was taken because of an impairment or perception of an impairment, no further inquiry or burden-shifting protocol is necessary to establish causation. *See Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 988 (9th Cir. 2007). Here, there is no question that BNSF conditioned Holt's job offer on Holt obtaining

---

[11] BNSF argues that this concern should not have any bearing here because requesting medical information for the purpose of deterring or screening out disabled applicants would be impermissible under the ADA. BNSF's argument ignores both the difficulty an applicant would face in proving discriminatory intent and that while an employer may not intentionally seek to screen out disabled applicants, a cavalier attitude toward applicant-paid testing may effectively screen out persons with disabilities in a way that violates the ADA.

an up-to-date MRI of his back because of BNSF's assumption that Holt had a back impairment. No further causation inquiry is necessary.

C

The final element that we must consider on the § 12112(a) claim is whether Holt was a "qualified individual with a disability." This term means an "individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." § 12111(8). BNSF makes no attempt to argue that Holt was not an otherwise qualified individual. Nor could it credibly do so: Holt received a conditional offer of employment, at the time of his application he was working as a law enforcement officer, and he was cleared by all three doctors who physically examined him.

That BNSF does not contest this element is telling. Effectively, BNSF has conceded that the medical information it had on Holt at the time it rejected him demonstrated that Holt could perform the Senior Patrol Officer job—yet BNSF still demanded that Holt procure an MRI at his own expense. This is not a case where the medical information previously adduced had been disqualifying and BNSF had provided Holt one last chance to show his ability to perform the job. In such a case, § 12112(a) would not prevent BNSF from choosing not to hire Holt because Holt would be unable to show he was "otherwise qualified for the job." BNSF had ample evidence that Holt could do the job. Yet in the face of all that evidence, BNSF nonetheless decided to impose the burden of procuring an

expensive medical test on Holt because of its perception that Holt had an underlying back problem.

We conclude that the EEOC has demonstrated all three elements of a § 12112(a) claim by showing (1) that Holt had a "disability" within the meaning of the ADA because BNSF perceived him to have a back impairment; (2) that Holt was qualified for the job; and (3) that BNSF impermissibly conditioned Holt's job offer on Holt procuring an MRI at his own expense because it assumed that Holt had a back impairment. BNSF offers no affirmative defense on appeal. We affirm the district court's holding on ADA liability.[12]

IV

BNSF argues that the district court erred in issuing its injunction, both because it applied the wrong legal standard and because it could not issue a nationwide injunction. BNSF argues that controlling Supreme Court authority required the district court to use the standard four-factor test—which considers (1) whether a plaintiff has suffered an irreparable injury, (2) whether remedies available at law are inadequate to compensate for that inquiry, (3) the balance of hardships, and (4) the public interest—before issuing a permanent injunction. *See eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). In recent years, the four-factor test has commonly been applied

[12] Because we hold that the district court correctly concluded that the EEOC was entitled to summary judgment on its § 12112(a) claim, we do not reach the EEOC's alternative argument that BNSF violated § 12112(b)(6).

by the Supreme Court to assess the propriety of injunctive relief. *See id.*; *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010).

The district court held that it could grant an injunction to the EEOC by statute, without looking to the four-factor test. It reached this conclusion because the ADA authorizes any person who proves an ADA violation to seek the remedies provided for in Title VII of the Civil Rights Act of 1964. *See* 42 U.S.C. § 12117(a). The district court reasoned that under Title VII, when a court finds that a defendant has intentionally engaged in an unlawful employment practice, "the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate." *Id.* § 2000e-5(g)(1). Indeed, both our court and the Supreme Court have granted permanent injunctions in the Title VII context without analyzing the four-factor test. *See, e.g.*, *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1092 (1983) (Marshall, J., concurring); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 361 (1977); *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1544 (9th Cir. 1987). Because the district court had already held that BNSF had violated the ADA and because it found that BNSF had no intention of ceasing its unlawful practice, the district court determined that an injunction was authorized by statute.

We need not and do not decide today whether *eBay* and *Monsanto* require the application of the four-factor test in the Title VII/ADA context because we determine that even if the four-factor test is applied, that test would be satisfied here. *See Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1044 (9th

Cir. 2012). First, if BNSF continued its practice, Holt and others like him would suffer the dignitary harm of being falsely told that their disability or perceived impairment rendered them unfit for certain work. *See Nelson v. Nat'l Aeronautics & Space Admin.*, 530 F.3d 865, 882 (9th Cir. 2008), *rev'd on other grounds*, 562 U.S. 134 (2011) ("[T]he loss of one's job does not carry merely monetary consequences; it carries emotional damages and stress, which cannot be compensated by mere back payment of wages."). The harms a person suffers when denied a job on the basis of a disability are "emotional and psychological—and immediate." *Chalk v. U.S. Dist. Court Cent. Dist. of Cal.*, 840 F.2d 701, 710 (9th Cir. 1988). And we are satisfied that these harms constitute irreparable injury. *See id.* Relatedly, while Holt can receive back pay and reinstatement at law, no legal remedy can fully right the wrong of such a dignitary affront. *See id.* We thus conclude that the second factor—insufficient remedies at law—is satisfied here too.

Further, preventing BNSF from continuing to discriminate in its hiring practices does not result in any hardship to BNSF; BNSF is merely being forced to stop doing what it is not entitled to do. By contrast, absent an injunction, those with disabilities or perceived disabilities who receive conditional offers from BNSF will face serious hardship: they will either be deprived of a job on the basis of their disability, or else forced to pay large sums out of their own pocket for additional testing. The third factor is therefore satisfied. Finally, the public interest—the fourth factor—is served by preventing employment discrimination. *See Gen. Tel. Co. of the Nw. v. Equal Emp't Opportunity Comm'n*, 446 U.S. 318, 326 (1980) ("When the

EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination."). We agree with the district court and hold that an injunction was appropriately entered here.

However, we agree with BNSF that the district court must make adequate factual findings to support the scope of the injunction. *See City & Cty. of S.F. v. Trump*, No. 17-17478, 2018 WL 3637911, at *12–13 (9th Cir. Aug. 1, 2018). We observe preliminarily that there are some reasons to support an injunction like that previously entered here. Although BNSF operates in dozens of states, its medical screening decisions are made out of a central medical office in Texas. Holt's own case demonstrates the difficulty of imposing a geographic constraint of the sort BNSF advocates: Holt lived in Arkansas at the time of his application, applied for a position in Washington, and was rejected at the direction of employees in BNSF's Texas office.[13] But the district court did not make factual findings or articulate its reasoning, and so we cannot yet properly review the scope of the injunction. Whether an injunction should be entered in exactly the form and scope of the injunction previously en-

[13] BNSF argues that we should cabin the scope of any injunction to the Ninth Circuit because other circuits have authorized the conduct at issue. We need not decide this issue, which will be considered in the first instance by the district court. However, we observe that no other circuit court has yet ruled on the permissibility of requiring persons who have disabilities or perceived disabilities to pay for their own follow-up testing during the hiring process.

tered by the district court depends on the further review and findings to be made by the district court on remand.

We therefore vacate the injunction and remand for the district court to make further factual findings in order to establish the proper scope of the injunction.

Each party shall bear its own costs on appeal.

AFFIRMED in part; VACATED in part and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON AT SEATTLE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. BNSF RAILWAY COMPANY, Defendant.	CASE NO. C14-1488 MJP **ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT, BNSF'S MOTION FOR SANCTIONS, BNSF'S MOTION TO EXCLUDE TESTIMONY** [Dated: January 8, 2016]

THIS MATTER comes before the Court on Plaintiff Equal Employment Opportunity Commission's ("EEOC's) Partial Motion for Summary Judgment and Defendant BNSF Railway Company's ("BNSF's") Motion for Summary Judgment (Dkt. No. 91). Having reviewed the Motions, the Responses (Dkt. Nos. 98, 96), the Replies (Dkt. Nos. 99, 100), and all related papers, the Court hereby GRANTS EEOC's Motion on ADA liability and DENIES BNSF's Motion. A trial on damages will proceed as scheduled. After reviewing the related briefing, the Court further DENIES BNSF's Motion for Sanctions (Dkt. No. 114) and finds

BNSF's Motion to Exclude Testimony (Dkt. No. 90) moot.

Background

The EEOC brings this case on behalf of Russell Holt, who applied for a position as a senior patrol officer with BNSF in 2011.

I. Factual Background

The facts material to liability are undisputed; because the Court is granting the EEOC's motion on liability, the summary that follows places the evidence in the light most favorable to BNSF.

Senior patrol officers with BNSF are certified police officers with responsibilities and powers similar to those of government police officers. See 49 U.S.C. § 28101. Prior to applying for the position with BNSF, Mr. Holt had been working as a patrol deputy and criminal investigator with the Pulaski County Sheriff's Office in Arkansas between 2006 and 2011. (Holt Decl., Dkt. No. 88 at 1–2; Holt Dep., Dkt. No. 85, Ex. 1 at 57:4–12; Holt Dep., Dkt. No. 91 at 10–20.)

In 2007 Mr. Holt suffered a back injury after lifting weights. (Holt Dep., Dkt. No. 91, Ex. 1 at 23:17–22; Heck Dep., Dkt. No. 91, Ex. 5 at 14:14–19.) According to an August 2007 medical record, several months after the injury, a doctor hypothesized the injury could have occurred during the workout or previously during his work as a police officer. (Heck Dep., Dkt. No. 91, Ex. 5 at 71:6–14.) A 2007 MRI of Mr. Holt showed a two-level disc extrusion in his back. (Heck Dep., Dkt. No. 91, Ex. 5 at 27:15–28:21.) Mr. Holt was treated with epidural steroid injections, chiropractic care, physical therapy and medicines from 2007 to

2009 and continued to receive chiropractic treatments through 2011. (See Heck Dep., Dkt. No. 91, Ex. 5 at 111–127; Fender Records, Dkt. No. 91, Ex. 6.) He had an additional MRI in 2009, which showed a new disc extrusion but improvement in other areas. (Heck Dep., Dkt. No. 91, Ex. 5 at 59:11–6017.)

During this period Mr. Holt did not miss any work as a police officer as a result of back pain. (Holt Decl., Dkt. No. 88 at 1–2.)

In 2011 Mr. Holt interviewed for a position with BNSF. (Dkt. No. 91, Ex. 1 at 59:9–61:15.) He received a conditional offer subject to passing a medical examination and criminal background check. (Holt Dep., Dkt. No. 91, Ex. 1 at 61:18-62:8 & Ex. 2.)

BNSF uses a medical contractor, Comprehensive Health Service ("CHS"), to coordinate its multi-step post-offer medical evaluation process. (Jarrard Dep., Dkt. No. 91, Ex. 7 at 46:12–49:2.) Candidates are required to take a shoulder and knee physical capabilities test and a hair-sample drug test, undergo a basic physical examination and psychological evaluation, and complete a CHS medical questionnaire. (Id., Kowalkowski Dep., Dkt. No. 91, Ex. 8 at 49:9–547.) CHS nurses review the questionnaire and may conduct follow-up interviews based on any "yes" answers. (Dkt. No. 91, Ex. 7 at 46:20–48:8.) CHS was entitled to "clear" candidates after the initial medical examination, but it could also send the applicant's information to BNSF's medical department for review and a final decision. (Dkt. No. 91, Ex. 8 at 44:20–45:15.)

Here, Mr. Holt answered "yes" to two items in CHS's medical questionnaire: "Have you ever had a back injury" and "Do you currently have or have you

ever had . . . [b]ack pain?" (Dkt. No. 91, Ex. 9 at 5–6.) He briefly explained, "Bulging dis[c] in 2007. Treated with chiropractic care." (Id. at 5.) CHS conducted a follow-up interview in which records reflect that he reported he had non-work related back strain, namely a "bulging disc," in 2007; had an MRI; and was treated by a chiropractor for only four to six months. (Id. at 10.) CHS requested "back MRs" and received Mr. Holt's MRI from 2007. (Id.) Mr. Holt also provided a letter from his treating doctor, Dr. Heck, and a letter from his chiropractor, Dr. Fender. (Holt Dep., Dkt. No. 91, Ex. 1 at 65:15–22.)

Mr. Holt also had a physical examination by a physician named Dr. Hixson, who was retained by CHS for this purpose. Again Mr. Holt reported a bulging disc and chiropractic treatment. Dr. Hixson reported to BNSF 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. (Hixson Dep., Dkt. No. 91, Ex. 10 at 35:14–37:16 & Ex. 1 at 71–74.) She did not have access to either the 2007 or 2009 MRI, but assumed that he had had one based on his report of a bulging disc. (Hixson Dep., Dkt. No. 91, Ex. 10 at 54:14–20.) She testified at her deposition that knowing that Mr. Holt had an extruded rather than bulging disc would have led her to "look[ ] at the back a little more closely and look[ ] more for signs of nerve root impingement." (Id. at 52:13–21.) She agreed that it was "possible" that knowing that he had two extruded discs could have affected her assessment. (Id. at 52:22–53:2.)

CHS then forwarded Mr. Holt's records—including the 2007 MRI, doctors' notes, and Mr. Holt's completed questionnaire—to BNSF medical officer Dr. Jarrard for a review and a final decision. (Dkt. No. 91, Ex. 7 at 118:5–121:3.) Dr. Jarrard reviewed the records but made no decision about whether Mr. Holt could perform the senior patrol officer job safely because he concluded that he lacked sufficient information. (Dkt. No. 91, Ex. 3 at 101:6–14.) Instead, he composed a request to be sent to Mr. Holt by CHS which requested a radiologist's report of a current MRI, with comparison to the 2007 MRI; pharmacy records for the past two years; and all additional medical records for the past two years. (See Dkt. No. 91, Ex. 9 at 11.)

Mr. Holt testified that he sought an MRI but the doctor he spoke to would not approve it because it was for a job application rather than because he was experiencing pain. (Dkt. No. 91, Ex. 1 at 79:1–13.) Through emails and/or phone calls with BNSF representatives, Mr. Holt explained that because he had been asymptomatic since 2009, his doctor would not approve it, and therefore he would have to pay for the MRI. (Dkt. No. 30 at 3; Dkt. No. 85, Ex. A at 82:2–22.) An MRI at Mr. Holt's doctor's office in the absence of insurance would have cost approximately $2,000. (Dkt. No. 91, Ex. 5 at 23:6–7.) Despite Mr. Holt's requests, BNSF refused to waive the requirement. (Dkt. No. 85, Ex. A at 82:23–83:11.) Because Mr. Holt did not provide the MRI and other information Dr. Jarrard had requested, it treated him as having declined the position, although he had not. (Dkt. No. 91, Ex. 3 at 170:2–12.)

BNSF also cites later medical evidence showing that Mr. Holt experienced additional symptoms from his back condition, but because the Court does not base its holding on the propriety of the request for an MRI from a medical perspective, it is not necessary to discuss those facts in detail here.

II. Procedural History and Summary of Argument

The Court previously denied BNSF's renewed motion to dismiss for failure to state a claim. (Dkt. No. 28.) In the briefing on that motion, BNSF argued that the language of 42 U.S.C. § 12112(d) explicitly authorized a post-conditional-job-offer, preemployment follow-up request for an MRI after an initial medical examination required for all applicants if that request was tied to issues revealed by the initial exam. (Dkt. No. 21 at 4–6.) BNSF also responded to the EEOC's argument that BNSF's actions violated 42 U.S.C. § 12112(b)(6) by arguing that the EEOC's theory that the request for an MRI could be a "selection criterion" contradicted EEOC interpretive guidance on a regulation interpreting that provision. (Id. at 6–7 (citing 29 C.F.R. § 1630.14 App.).) The Court, citing § 12112(b)(6) and 29 C.F.R. § 1630.14(b), did not find either of these arguments persuasive. (Dkt. No. 28 at 5.)

BNSF now renews this argument in its motion for summary judgment, pointing out for the first time that § 12112(b)(6) is intended to function as a disparate impact test and arguing it is inappropriate to interpret "selection criterion" as an additional requirement imposed only on individuals whom the employer may perceive as disabled, an interpretation that

would transform the provision into a disparate treatment test. (Dkt. No. 91 at 15.) It also repeats the argument that the EEOC's interpretive guidance controls the scope of 29 C.F.R. § 1630.14(b) rather than explaining one way the regulation might come into play. (Dkt. No. 91 at 15–16 (citing 29 C.F.R. § 1630.14 App.).)

BNSF also argues that it did not decline to hire Holt on the basis of a "record of" disability because his records did not show a substantially limiting impairment and it did not decline to hire him on the basis of "regarded-as" disability because it did not know whether Holt's prior or latent back condition constituted an actual impairment. (Dkt. No. 91 at 20–21.) In its motion, EEOC points out that the 2008 amendments to the ADA relaxed the definition of "regarded as" disability, see 42 U.S.C. § 12102(1)(C) & (3)(A), because Congress was concerned courts were interpreting the former definition too strictly. (Dkt. No. 84 at 12-13.) See generally 29 C.F.R. § 1630 App; ADA Amendments Act of 2008 ("ADAAA"), Pub. L. No. 110-325, 122 Stat. 3553 (2008).

The EEOC, meanwhile, argues it merits partial summary judgment on liability under § 12102 of the ADA, but reserves the issue of damages for trial.

Discussion

I. Legal Standard

Summary judgment is appropriate if the evidence, when viewed in the light most favorable to the nonmoving party, demonstrates that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); See Celotex Corp. v. Catrett, 477 U.S. 317, 322

(1986). If the movant meets this initial burden, then the burden shifts to the non-moving party to "designate specific facts" showing that there is a genuine issue of material fact for trial that precludes summary judgment. Celotex Corp., 477 U.S. at 324. An issue of fact is "genuine" if it can reasonably be resolved in favor of either party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of fact is "material" if it "might affect the outcome of the suit under the governing law." Id.

"As long as a district court has jurisdiction over the case, then it possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient." City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper, 254 F.3d 882 (9th Cir. 2001).

II. Structure and Relevant Provisions of Title I of the ADA

Subsection (a) of § 12112, the generic discrimination provision for Title I of the ADA, holds employers liable for discrimination "on the basis of disability." 42 U.S.C. § 12112(a). (This phrasing is a change from "because of" disability made by the 2008 amendments to the ADA.)

Subsection (b) of § 12112, titled "Construction," lists specific ways an employer might discriminate on the basis of disability, including (b)(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.

§ 12112(b)(6). Subsection (b) makes clear that the list is not exhaustive: it states that "the term 'discriminate against a qualified individual on the basis of disability' includes" the following acts, but does not limit discrimination to those acts. § 12112(b) (emphasis added).

The Parties' dispute over BNSF's request for an updated MRI from Mr. Holt centers on subsection (d), titled "Medical examinations and inquiries." This provision specifies that medical examinations can constitute discrimination, § 12112(d), but also explicitly permits medical "employment entrance examination[s]" made after a conditional offer of employment but before employment duties have commenced so long as the examinations adhere to certain requirements, including that "the results of such examination are used only in accordance with [the ADA]." § 12112(d)(3)(C). The EEOC regulation interpreting this section elaborates,

> 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.

29 C.F.R. § 1630.14(b)(3).

The leading court of appeals case interpreting these provisions and the related regulation holds:

> 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). Moreover, the employer may only withdraw the conditional job offer if "performance of the essential job functions cannot be accomplished with reasonable accommodation." Id.

Garrison v. Baker Hughes Oilfield Operations, Inc., 287 F.3d 955, 960 (10th Cir. 2002). Another court of appeals describes the central mandate of this section as "an individualized inquiry in determining whether an employee's disability or other condition disqualifies him from a particular position," and notes,

> In order to properly evaluate a job applicant on the basis of his personal characteristics, the employer must conduct an individualized inquiry into the individual's actual medical condition, and the impact, if any, the condition might have on that individual's ability to perform the job in question.

Holiday v. City of Chattanooga, 206 F.3d 637, 643 (6th Cir. 2000) (emphasis added). The Ninth Circuit has not yet interpreted the circumstances in which employers are permitted to withdraw conditional offers in any depth. Cf. Norman-Bloodsaw v. Lawrence Berkeley Lab., 135 F.3d 1260, 1273 (9th Cir. 1998) (holding that neither post-offer examinations themselves nor medical records selected for retention by the employer that are derived from such examinations

need be job-related or consistent with business necessity), Leonel v. Am. Airlines, Inc., 400 F.3d 702, 709 (9th Cir. 2005) (noting that restricting medical examinations to the post-offer stage requires employers to "isolate[]" their consideration of medical issues so that "applicants know when they have been denied employment on medical grounds and can challenge an allegedly unlawful denial"). However, the Tenth Circuit's approach, where 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, finds support in the legislative history. See Chai R. Feldblum, Medical Examinations and Inquiries Under the Americans with Disabilities Act: A View from the Inside, 64 Temp. L. Rev. 521, 537 (1991) (citing H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3, at 43) ("[R]esults [of medical examinations] may not be used to withdraw a conditional job offer from an applicant unless they indicate that the applicant is not qualified to perform the job."); 136 Cong. Rec. 10,872 (1990) (statement of Representative Weiss) ("The results of the examination can only be used to withdraw a job offer if the applicant is found not to be qualified for the job based on the results of the exam.").

III. Liability

Rather than recognizing the structure of these provisions and the basic individualized-inquiry mandate of the ADA, however, the Parties engage in skirmishes over more marginal issues. The Court addresses those arguments and then moves on to the basic liability question.

A. ADA Liability on the Basis of Selection Criteria

In the EEOC's Amended Complaint, the EEOC argues BNSF's actions with respect to Claimant Russell Holt violated Sections 102(a), 102(b)(6), and 102(d)(3) of Title I of the ADA (Dkt. No. 11 at 3)—i.e., the generic discrimination provision, 42 U.S.C. § 12112(a), the "selection criteria" subtype of that discrimination provision, 42 U.S.C. § 12112(b)(6), and the restriction on use of medical records obtained pursuant to an "employment entrance examination." 42 U.S.C. § 12112(d). The Court's order on BNSF's motion to dismiss referred to the "selection criteria" subtype in holding that the Amended Complaint stated a claim. (Dkt. No. 28 at 5 ("BNSF's requirement that Holt procure a follow-up MRI after the post-offer, pre-employment examination functioned as a screening criterion that screened out an applicant with a disability by imposing an expensive additional requirement not imposed on other applicants.") (emphasis added).)

BNSF now argues for the first time that § 12112(b)(6) is a disparate-impact, not a disparate-treatment provision, citing Raytheon Co. v. Hernandez, 540 U.S. 44, 53 (2003), and interpretive guidance to the regulations interpreting the section. BNSF is correct that Raytheon puts § 12112(b)(6) squarely into the disparate-impact category. See 540 U.S. at 53 (explaining that disparate impact claims are cognizable under the ADA and citing "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability"—language lifted directly from § 12112(b)(6)—as an example); see also Lopez v. Pacific Maritime Assoc., 657 F.3d 762, 766–67 (9th Cir. 2011) (holding that a plaintiff waived his disparate-impact

ADA claim by not citing § 12112(b)(6) in his opening brief).

EEOC's theory about selection criteria, in contrast, tries to shoehorn the request for an MRI into § 12112(b)(6) even though it was not an across-the-board requirement for all applicants. (Dkt. No. 96 at 10–15.) The EEOC tries to justify its approach by arguing the Ninth Circuit used § 12112(b)(6) as a disparate treatment standard in Bates v. United Parcel Serv., Inc., 511 F.3d 974 (9th Cir. 2007) (en banc). This reading of the case is incorrect. See id. at 989 ("Where an across-the-board safety 'qualification standard' is invoked, the question then becomes what proof is required with respect to being a 'qualified individual,' that is, one who can perform the job's essential functions."). In fact, no Ninth Circuit case or district court case within the Ninth Circuit (save this Court's order on the initial motion) has accepted § 12112(b)(6) as the standard for a claim made on the basis of disparate treatment.

EEOC also cites to a district court case in which the court tentatively accepted a disparate treatment analysis under § 12112(b)(6) of a request for additional medical information similar to the MRI request here. See EEOC v. Am. Tool & Mold, Inc., 21 F. Supp. 3d 1268, 1284 (M.D. Fla. 2014) ("To the extent one could argue that obtaining the release/restriction was an independent 'exclusionary criteria,' ATM has not identified any 'job-related' criteria consistent with a 'business necessity,' as required by 29 C.F.R. § 1630.14(b)(3), that would justify the additional obligation."). However, in that case, the court appeared to rely primarily on the Tenth Circuit and Sixth Circuit's interpretation of the statutory scheme in relation to

§ 12112(d)(3)(C), emphasizing that "the parties agree[d] that the results of the pre-employment screening may only be used to withdraw an offer of employment where an individualized determination reveals that the impairment will preclude the putative employee from performing the essential functions of the position." Id. at 1283.

While the Court agrees with BNSF that the EEOC has not demonstrated that actual "qualification standards, employment tests or other selection criteria" were employed by BNSF to disqualify Mr. Holt, the fact that "discrimination" under § 12112(a) is not limited to the categories listed in § 12112(b) means that BNSF has not necessarily escaped liability on the EEOC's generic § 12112(a) claim.

B. Request Versus Requirement for Additional Medical Information

The EEOC and BNSF also spend an inordinate number of pages addressing the question whether BNSF's Dr. Jarrard was medically justified in seeking an updated MRI on the basis of the medical record he was reviewing. The EEOC goes so far as to offer expert testimony on the question whether such a request was medically justified and BNSF moves to exclude it. (See Dkt. No. 87, Ex. A; Dkt. No. 90.) The EEOC's enforcement guidance makes clear that the medical-justification question is irrelevant: Employers may "ask specific individuals for more medical information," including "follow-up examinations," as long as they are "medically related to the previously obtained medical information." Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examina-

tions (1995) (http://www.eeoc.gov/policy/docs/preemp.html) ("Preemployment Guidance")[1]; see also Christen v. Harris Cnty., 529 U.S. 576, 587–588 (2000) (noting that opinion letters, "like interpretations contained in . . . enforcement guidelines," do not warrant Chevron deference but are entitled to respect under Skidmore to the extent of their persuasive power or Auer deference where the regulation is ambiguous). The guidance does not require a follow-up examination to be somehow medically justified, only that it be "medically related," so there is no material fact, disputed or otherwise, with respect to the medical justification for Dr. Jarrard's request for an updated MRI. The Court does not base any aspect of its decision on the EEOC's expert testimony.

However, the question whether BNSF discriminated on the basis of disability does not end there. While this enforcement guidance helps BNSF justify its request for an updated MRI, it does not shield the employer from liability for its actions upon not receiving the MRI. The guidance allows employers to "ask . . . for more medical information" and, by implication, to perform a follow-up additional examination; no-

[1] The EEOC does not attempt to explain this enforcement guidance, falling back instead on the Court's order on BNSF's motion to dismiss. The allegations which the Court relied on for the purposes of that order, however, were that Mr. Holt had been "cleared" in an initial medical examination. (See Dkt. No. 28 at 2.) In fact, while BNSF's contractor was entitled to "clear" candidates after the initial medical examination, it could also send the applicant's information to BNSF's medical department for review and a decision, which is what happened here. (Dkt. No. 91 at 5 (citing Kowalkowski Dep., Dkt. No. 91, Ex. 9 at 44:20–45:15).)

where does it endorse the practice of requiring the applicant to pay for costly additional information as a condition of proceeding through the hiring process. The guidance also provides the following illustration:

> Example: 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.

Preemployment Guidance (emphasis added). This illustration clearly suggests that the employer or its agent will conduct the medical examination "designed to diagnose back impairments." Here, in contrast, Mr. Holt was required to procure an MRI at his own cost in order to proceed with the hiring process. The guidance does not address this additional obligation.

C. Cooperation Obligation

BNSF briefly argues that it cannot be liable for using the "results" of the medical examination other than in accordance with the ADA because "if an applicant refuses to cooperate in the examination, the employer never obtains the 'results' to use." (Dkt. No. 91 at 16.) There is limited ADA case law regarding the obligation of employees (i.e., after the entrance examination stage) to cooperate with legitimate medical examinations, but these courts emphasize that the employer offered to pay for or conduct the medical examination at issue. See, e.g., EEOC v. Prevo's Family Mkt., Inc., 135 F.3d 1089, 1097 (6th Cir. 1998);

Grassel v. Dep't of Educ. of City of New York, No. 12 CV 1016 PKC, 2015 WL 5657343, at *3, *9 (E.D.N.Y. Sept. 24, 2015). A generic cooperation obligation where the employer has offered to pay is not relevant to the facts of this case. More to the point, BNSF can hardly argue that it had no examination "results" to work with: 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. Those are the results at issue here.

D. ADA Liability on the Basis of § 12112(a)

To state a prima facie case for disability discrimination, the EEOC must show (1) that Mr. Holt is disabled within the meaning of the ADA; (2) that he is a qualified individual with a disability; and (3) that he was discriminated against because of his disability. Smith v. Clark Cty. Sch. Dist., 727 F.3d 950, 955 (9th Cir. 2013). The Ninth Circuit has held that the causation standard applicable to § 12112(a) disparate treatment claims is the "motivating factor" test. Head v. Glacier Nw., Inc., 413 F.3d 1053, 1065 (9th Cir. 2005), abrogated on other grounds in Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2533 (2013); see also Siring v. Or. State Bd. of Higher Educ. ex rel. E. Or. Univ., 977 F. Supp. 2d 1058, 1063 (D. Ore. 2013) (holding that in light of liberalizing amendments to the ADA and in the absence of any alteration in Ninth Circuit precedent following Nassar, the motivating factor test continues to apply).

1. Prima Facie Case of Disparate Treatment

The Court addresses the third element—discrimination because of disability—first. Because 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, see Garrison, 287 F.3d at 960, BSNF's withdrawal of Mr. Holt's job offer when he failed to supply an updated MRI at his own cost constituted facial "discrimination." Undisputed facts also establish causation: A reasonable jury could not escape the conclusion that in the absence of the 2007 MRI and Mr. Holt's answers to the CHS medical questionnaire—"results" obtained from the post-offer medical examination, see § 12112(d)(3)(C)—BNSF would not have demanded an additional MRI and would not have treated Mr. Holt as though he had declined his offer, although he had not.[2] Meanwhile, nothing prevented BNSF from paying for an updated MRI when Mr. Holt informed the company he could not obtain an MRI on his own.

---

[2] The Ninth Circuit has performed McDonnell Douglas burden-shifting after the ADA prima facie case, which itself incorporates a causation element. See, e.g., Mayo v. PCC Structurals, Inc., 795 F.3d 941, 944 (9th Cir. 2015). The Court agrees with the Sixth Circuit, see Whitfield v. Tennessee, 639 F.3d 253 (6th Cir. 2011), which has held that combining McDonnell Douglas burden-shifting with a prima facie case incorporating causation "makes little sense, as its third element—whether the employee was, in fact, discharged because of the disability—requires at the prima facie stage what the McDonnell Douglas burden-shifting framework seeks to uncover only through two additional burden shifts, thereby rendering that framework wholly unnecessary."

The question then becomes whether this disparate treatment on the basis of Mr. Holt's 2007 MRI and answers to the CHS medical questionnaire constitutes disparate treatment because of Mr. Holt's "disability" (the first prong of the prima facie case). The primary argument BNSF makes regarding the EEOC's prima facie case is that Mr. Holt was neither "regarded-as" disabled nor had a "record-of" disability. (Dkt. No. 98 at 14–15, Dkt. No. 91 at 20–21.) But as the EEOC notes, the 2008 amendments to the ADA relaxed the application of the "regarded-as" definition significantly. "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." 42 U.S.C. § 12102(3) (emphasis added); see also id. at § 12102(4)(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."). This extremely low bar is met here because Mr. Holt admitted to BNSF that he had a back injury and provided an MRI showing a two-level disc extrusion, and BNSF halted the hiring process in response to that information. See 29 C.F.R. §

Id. at 259. To the extent that burden-shifting is required here, the Court holds that BNSF has failed to produce a legitimate, non-discriminatory reason for failing to hire Mr. Holt: first, because its actions in response to not receiving an MRI were not legitimate under the ADA's entrance examination framework, as discussed above, and second, because the request for an MRI was itself occasioned by evidence of his disability rather than constituting an independent, non-disability-based rationale.

1630 App. ("To illustrate how straightforward application of the 'regarded as' prong is, if an employer refused to hire an applicant because of skin graft scars, the employer has regarded the applicant as an individual with a disability."); 29 C.F.R. § 1630.2 ("[E]valuation of coverage can be made solely under the 'regarded as' prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment"). The severity of Mr. Holt's limitations, if any, is no longer at issue in a regarded-as claim so long as causation is established, and BSNF's citation to cases that precede the ADAAA is not helpful. BNSF's argument that it did not perceive Mr. Holt's reported back injury as an "impairment" of any sort, meanwhile, is not persuasive in the absence of post-ADAAA case law.

On the second prong of the prima facie case, BNSF makes no attempt to argue that Mr. Holt was not otherwise a "qualified individual," and indeed, he had already received a conditional offer and was performing similar work as a police officer at the time of his application. EEOC has established a prima facie case for disparate treatment on the basis of disability.

2. Direct Threat

BNSF is not relying on the direct threat defense except insofar as it relates to the request for the MRI. (Dkt. No. 98 at 19–20.) Unfortunately, the mere existence of a direct threat affirmative defense does not justify its failure to hire Mr. Holt or to identify a legitimate qualification standard which Mr. Holt could not meet. The direct-threat-to-self affirmative defense—a requirement that an employee not pose a direct

threat to his or her own health—is a recognized qualification standard under the ADA. See 29 C.F.R. § 1630.15(b)(2). (See also Dkt. No. 98 at 12–13 ("[Qualification standards or selection criteria] refer to physical requirements, such as height requirements, requirements related to particular medical conditions, or, more generally, that an employee not pose a direct threat to the health or safety of the applicant or others.").) BNSF bears the burden of establishing that Mr. Holt was a direct threat. Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1247 (9th Cir. 1999).

Here, the direct threat assessment was never made by BNSF because it halted the hiring process when Mr. Holt failed to provide an MRI at his own cost. (See Dkt. No. 98 at 3.) But even assuming that an updated MRI was relevant to a determination whether Mr. Holt's back condition posed a direct threat to his own health in the workplace setting, it does not follow that the MRI was strictly necessary to BNSF's direct-threat analysis. The applicable regulations instruct that a direct-threat determination "shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence." 29 C.F.R. § 1630.2(r) (emphasis added); see also Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1090 (10th Cir. 1997) ("29 C.F.R. § 1630.2(r) does not require an independent medical examination when the available objective evidence is clear. It uses the conjunctive "and/or" between medical knowledge and objective evidence."). BNSF may not have been able to access "the most current medical knowledge" about Mr. Holt's back condition unless it was willing to pay for it, but it could

make the assessment based on the "best available" evidence—i.e., the objective information it could glean from the medical examination its contractor had already performed and the records Mr. Holt was able to provide.

Conversely, if BSNF nonetheless believed the MRI was necessary to a reliable direct-threat analysis, BNSF could have paid for the test. One would expect BNSF to pay for proof of a direct threat, given the liability to which a prima-facie disability-based decision exposes a company.

Because BNSF has failed to present evidence that Mr. Holt posed a direct threat to his own health, it has failed to point to disputed material facts that preclude partial summary judgment in favor of the EEOC.

IV. Sanctions

BNSF brings a separate motion for sanctions against the EEOC for failure to preserve a voicemail from a witness, Dr. Heck, who had called the EEOC to explain that he was mistaken when he testified at his deposition that there was a clinical note missing from Mr. Holt's file. (Dkt. No. 114.) A federal trial court has the inherent discretionary power to make appropriate evidentiary rulings in response to the destruction or spoliation of relevant evidence, including the power where appropriate to order the exclusion of certain evidence. Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993).

Dr. Heck's voicemail is not evidence. Furthermore, there is neither fault by the EEOC nor prejudice to BNSF in the factual scenario presented here. The EEOC explains that the voicemail was unintentionally purged by the voicemail system maintained by

the General Services Administration, and that the EEOC offered to reopen Dr. Heck's deposition so that he could clarify the matter with BNSF's counsel directly. (Dkt. No. 114 at 13–18.)

Sanctions are not warranted on this record.

V. Motion to Exclude Testimony of Dr. Guy Earle

In connection with its summary judgment motion, BNSF moves to exclude the testimony of Dr. Guy Earle. (Dkt. No. 90.) Because the Court does not find it necessary to rely on Dr. Earle's testimony in order to decide the motions for summary judgment, the Court finds the motion moot. To the extent the EEOC seeks to reintroduce the testimony at the trial on damages—the only issue remaining in this case—BNSF may renew its motion.

Conclusion

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, the Court DENIES BNSF's Motion for Summary Judgment (Dkt. No. 91) and GRANTS the EEOC's Motion for Partial Summary Judgment on liability (Dkt. No. 84). The Court further DENIES BNSF's Motion for Sanctions (Dkt. No. 114) because the purged voicemail from a witness to Plaintiff's counsel is not evidence, among other reasons, and finds BNSF's Motion to Exclude Testimony of Dr. Guy Earle (Dkt. No. 90) MOOT at the summary

judgment stage because it was not necessary to consider the testimony in order to reach a decision on summary judgment.

The clerk is ordered to provide copies of this order to all counsel.

Dated this 8th day of January, 2016.

/s/ Marsha J. Pechman
Marsha J. Pechman
Chief United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON AT SEATTLE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. BNSF RAILWAY COMPANY, Defendant.	CASE NO. C14-1488 MJP ORDER ON INJUNCTIVE RELIEF [Dated: March 14, 2016]

THIS MATTER comes before the Court on the Parties' Joint Submission Regarding Injunctive Relief. (Dkt. No. 157.) Having considered the Parties' briefing and the related record, the Court GRANTS Plaintiff's request for injunctive relief, but issues a narrower injunction than the one requested.

Discussion

I. Legal Standard

Once a district court finds that an employer has "intentionally engaged in ... an unlawful employment practice," the court "may enjoin [the employer] from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include ... equitable relief as the court deems appropriate." 42 U.S.C. § 2000e–5(g)(1); see

also 42 U.S.C. § 12117(a) (making § 2000e–5(g) applicable to the ADA). "To grant an injunction, a court must consider whether the employer's discriminatory conduct could possibly persist in the future. Because the determinative judgment is about the employer's potential future actions, the EEOC need not prove that the employer previously engaged in widespread discrimination, and injunctive relief is appropriate even where the [EEOC] has produced no evidence of discrimination going beyond the particular claimant's case." E.E.O.C. v. AutoZone, Inc., 707 F.3d 824, 840-41 (7th Cir. 2013) (internal quotation marks and citations omitted); see also E.E.O.C. v. Creative Networks, L.L.C., 912 F. Supp. 2d 828, 846 (D. Ariz. 2012).

An employer may avoid an injunction by showing that "there is no reasonable expectation that the wrong will be repeated," that is, that the issue or claim is moot. United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953); see also E.E.O.C. v. Hacienda Hotel, 881 F.2d 1504, 1518-19 (9th Cir. 1989); E.E.O.C. v. Goodyear Aerospace Corp., 813 F.2d 1539, 1544 (9th Cir. 1987). Generally, however, victims of employment discrimination are entitled to an injunction against future discrimination unless the employer proves it is unlikely to repeat the practice. See Hacienda Hotel, 881 F.2d at 1519; Goodyear Aerospace, 813 F.2d at 1544. "Permanent injunctive relief is warranted where ... defendant's past and present misconduct indicates a strong likelihood of future violations." Orantes–Hernandez v. Thornburgh, 919 F.2d 549, 564 (9th Cir. 1990).

II. Permanent Injunction

The Court finds that issuance of a permanent injunction is warranted in this instance. BNSF has failed to demonstrate a likelihood that its discriminatory conduct will not continue in the future. Indeed, BNSF's briefing in response to the EEOC's request for an injunction includes not a single affirmative assurance that BNSF will not repeat the conduct the Court found unlawful in this case, or that BNSF has made any changes whatsoever to any of its policies or practices. (See Dkt. No. 157 at 6-11.) BNSF has indicated that its policy is to treat all applicants as not medically qualified until a medical examination is completed and can demonstrate otherwise. (Dkt. No. 143 at 3-4, 143-3, 157 at 9.) BNSF has admitted that its policies and practices result in "most" follow-up inquiries "inevitably" being directed to "applicants with conditions that do or may fit the definition of an ADA 'impairment.'" (Dkt. No. 124 at 6-7.) BNSF has admitted that when applicants are required to provide additional information based on their initial examination but those applicants cannot or do not submit the additional information, BNSF will not determine whether the applicant is medically qualified based on the information it does have and instead will treat the applicant as having declined the job offer, regardless of the reason why the applicant cannot or did not submit the additional information. (See Dkt. No. 143 at 6.) These policies result in conduct the Court found unlawful in this case. Without even a single assurance that BNSF's policies or practices have changed or will change, the Court cannot conclude that "there is no reasonable expectation that the wrong will be repeated." Grant, 345 U.S. at 633. Instead, the Court

finds that BNSF's "past and present misconduct indicates a strong likelihood of future violations." Orantes–Hernandez, 919 F.2d at 564.

While the Court finds that issuance of an injunction is warranted, the Court agrees with BNSF that the EEOC's proposed injunction is overly broad and is not tailored towards the violation found here. (See Dkt. No. 157 at 5.) Accordingly, the Court enters a narrower injunction than the one requested by the EEOC. **The Court ORDERS:**

1. BNSF is hereby permanently enjoined from engaging in the unlawful employment practice found in this case to constitute intentional disparate treatment discrimination. 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.

If BNSF chooses not to procure additional information, it must complete the medical examination process, i.e., it must use the medical information it does have to make a determination about whether the applicant is medically qualified for the job for which the applicant received the conditional offer. That determination must be that the applicant is or is not medically qualified; it may not state that the applicant's medical qualification is undetermined or incomplete. If BNSF determines that it will not hire an applicant who received a conditional job offer because the applicant is not medically qualified for that position, BNSF shall present to that applicant a written

explanation about why the applicant was determined to be medically unqualified. The written explanation shall be provided on the same date as the date on which an applicant is notified that he or she will not be hired.

2. 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.

3. BNSF shall ensure that decision makers—whether they be BNSF employees or contractors—who conduct medical evaluations and/or determine whether additional medical information about an applicant is needed, know (1) that BNSF must bear the cost of securing the additional information if additional information is sought, and (2) that BNSF must complete the medical examination process with existing information if no additional information is sought.

4. BNSF shall revise its nondiscrimination policies and medical screening procedures to incorporate the above.

Conclusion

The Court finds that the above injunction is required to prevent the harm that occurred in this case from reoccurring. Without this injunction, BNSF remains free to utilize the expense of securing additional medical information, such as the additional

MRI demanded here, potentially without limit, to prevent applicants regarded as disabled from being hired without having to formally conclude that those applicants are medically unqualified for the job. The ADA was enacted to prevent capable individuals from being excluded based on bias, assumption, speculation, or stereotypes; this injunction requires that BNSF actually determine a job applicant is unqualified before excluding them.

The clerk is ordered to provide copies of this order to all counsel.

Dated this 14th day of March, 2016.

/s/ Marsha J. Pechman
Marsha J. Pechman
Chief United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellee, v. BNSF RAILWAY COMPANY, Defendant-Appellant.	No. 16-35457 D.C. No. 2:14-cv-01488-MJP Western District of Washington, Seattle ORDER

Before: FISHER, GOULD, and PAEZ, Circuit Judges.

Appellant BNSF Railway Company's Petition for Rehearing is DENIED.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35. Appellant's Petitioner for Rehearing En Banc is also DENIED.

IT IS SO ORDERED.

[Dated: November 30, 2018]

APPENDIX E

STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. § 12102

(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.

42 U.S.C. § 12112:

(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—

…

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) 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).

The following are the relevant provisions of the regulations issued by the Equal Employment Opportunity Commission:

29 C.F.R. § 1630.2 — Definitions.

(h) Physical or mental impairment means –

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as an intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EEOC, Plaintiff-Appellee, v. BNSF RAILWAY COMPANY, Defendant-Appellant.	No. 16-35457 D.C. No. 2:14-cv-01488-MJP Western District of Washington, Seattle ORDER

Before: FISHER, GOULD, and PAEZ, Circuit Judges.

Appellant's motion to stay the mandate in the above-referenced matter so that petitioner may file a petition for a writ of certiorari is **GRANTED**.

[Dated: December 7, 2018]