

No. _____

In the
Supreme Court of the United States

PEDRO BUSTILLO-FORMOSO
Petitioner,

v.

MILLION AIR SAN JUAN CORPORATION;
THOMAS HILL, individually and as President of
Million Air San Juan Corporation
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Pedro Bustillo-Formoso is a pilot who filed an EEOC charge of discrimination in which he requested, as remedies, “[c]ompensation for damages, sufferings, and mental anguishes for [him] and [his] family.” After filing the charge, Bustillo flew with a supervisor, passed an FAA medical examination, trained and was certified to fly a plane. When the employer received the charge, and noted the request for general emotional damages, it grounded Bustillo (removed his flight status) and referred him to a psychiatrist for evaluation. Later, it fired him because Bustillo requested limitations to the psychiatric examination pursuant to 42 U.S.C. §12112(d)(4). The First Circuit endorsed the employer’s actions – grounding, referral, and termination. The intertwined questions posed in this case, which may apply to any employee in a sensitive position, are:

Whether the First Circuit erred in allowing the grounding, referral and termination of Bustillo? Do claims for general emotional damages constitute “direct” threats of “significant” harm? Does the First Circuit’s decision trump the objective inquiry standard followed by the other circuits when evaluating the “business necessity” prong of 42 U.S.C. §12112(d)(4)(A)? Does the opinion trump the exam limitations and burden of proof imposed by 42 U.S.C. §12112(d)(4)? Ultimately, will employers of pilots be forced to ground a pilot who claims “garden-variety” emotional damages? Will employees in similar sensitive positions, and their employers, be similarly affected?

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PETITION FOR A WRIT OF CERTIORARI

Pedro Bustillo-Formoso respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the First Circuit in this case.

CITATIONS TO OPINIONS BELOW

The Opinion of the Court of Appeals (Appendix A, p. 24) is unpublished and available as *Bustillo-Formoso v. Million Air San Juan Corporation*, 2017 WL 3411809 (1st Cir., 2017). The District Court's Opinion (Appendix B, p. 29) is published and available as *Bustillo-Formoso v. Million Air San Juan Corp.*, __ F.Supp3d __, 2016 WL 4014583, (D. Puerto Rico, 2016).

JURISDICTIONAL STATEMENT

This Honorable Court's jurisdiction lies under 28 U.S.C. § 1254(1), appellate level jurisdiction under 28 U.S.C. § 1291, and district court jurisdiction under 28 U.S.C. § 1331. The opinion of the Court of Appeals is dated August 9, 2017; and the order denying *en banc* reconsideration is dated September 12, 2017.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, of the United States Constitution provides, in relevant part: “The Congress shall have power . . . To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.”

The Americans with Disabilities Act, at 42 U.S.C. §12112(d)(4), provides in its relevant part:

(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 make inquiries into the ability of an employee to perform job related functions.

STATEMENT OF THE CASE¹

A. Factual Scenario

On September 1, 2012, Pedro Bustillo-Formoso's ("Bustillo") salary was decreased from \$68,000 to \$40,000. At the time of the pay cut, Bustillo (55 y.o.) was the senior pilot at defendant Million Air San Juan Corp. ("Million Air"). The company and its president, Thomas Hill ("Hill"), had refused to place him on a plane, alleging there were no positions available.

Bustillo's pay cut was a substantial drop from his last raise on January 2010, when his salary increased from \$52,000 to \$68,000, and he began flying a jet, a GulfStream G200, as "co-pilot" or "second-in-command." The pay cut, the denial of flying opportunities, and the overall development of younger pilots flying jets in captain's positions ("first-in-command"), were the catalysts for him seeking advice at the local EEOC/ Anti-Discrimination Unit ("ADU") regarding actions for age discrimination.

On September 18, 2012, Bustillo filed a charge of age discrimination. As part of the charge, and pursuant to the instructions received at the ADU (similar to those issued by the EEOC regarding compensatory damages found at www.eeoc.gov/employees/remedies.cfm), he alleged general emotional damages for his family and

¹ See: Claudia G. Catalano, *Psychological Testing of Employee or Job Applicant as Violation of Americans with Disabilities Act or Rehabilitation Act*, 24 A.L.R. Fed. 3d, Art. 1, §§19, 23, 24 & 37 (Summarizing the facts and commenting on the decision).

himself. Aside from challenging the pay cut, he charged that during his employment he had been relegated to co-pilot positions in jets while younger pilots were being given positions as “first-in-command”; his development as a pilot was being systematically curtailed by Million Air; and, younger pilots received better positions, trainings, salaries, and opportunities to develop as pilots, all in violation of the ADEA.

Upon receiving knowledge that a charge had been filed, Million Air decided to appoint Bustillo as pilot in a Piper Cheyenne (a small twin engine plane). Bustillo flew the Piper Cheyenne along with a Million Air supervisor, and shortly thereafter was sent to SimCom to obtain his certification to fly the Piper Cheyenne. As part of the process, on September 25, 2012, Bustillo obtained his FAA medical certificate. On October 2012 he went to SimCom where he finished the required training, obtained his certification in the Piper Cheyenne, and additionally, obtained Master Pilot and Flight Review Certifications.

On October 9, 2012, upon return from his training, Million Air and Hill refused to let him fly the Piper Cheyenne. Million Air and Hill grounded Bustillo, stating that his claim for general emotional damages in the EEOC charge of discrimination placed his fitness to fly in question. “Upon being notified of Bustillo's charges, Million Air told Bustillo that, because of his allegation of “damages, sufferings, and mental anguishes,” the company was grounding him until he could obtain medical certification showing that he was still “fit to fly.”” *Opinion*, USCA1, Appendix A, p. 25. This

action was taken even though in the weeks prior to the grounding, Bustillo had flown with personnel from Million Air, had received his FAA medical certificate, and had been certified at SimCom to fly the Piper.

Without any objective evidence of emotional instability, Million Air and Hill referred Bustillo to a psychiatrist for evaluation. Miss Campos, Secretary of Million Air, and Mr. Santos, a fellow pilot at Million Air, deposed that Bustillo did not have any emotional nor psychological problems. Million Air and Hill did not allege that Bustillo had mental instability. The only reason for the grounding and referral to a psychiatrist was the request for “compensation for damages, sufferings and mental anguishes his and his family’s” alleged in the EEOC charge.

On October 24, 2012, Bustillo went to the appointment for a psychiatric examination. Bustillo gave the psychiatrist a letter from his attorney in which limitations to the exam were requested per 42 U.S.C. §12112(d). The psychiatrist refused to place any limitations on his examination. “Dr. Llado refused to limit his examination or otherwise abide by the attorney’s instructions ..” *Amended Petition for Rehearing*, Appendix E, p. 60 (*citing: Opinion*, USDC-PR, Appendix B, p. 36. Bustillo did not refuse to be examined, but did oppose a limitless examination in violation of the ADA: “Bustillo refused to be examined because the doctor did not agree to place certain limitations on the examination.” *Opinion*, USCA1, Appendix A, p. 25.

Bustillo supplemented his EEOC / ADU charges. He opposed the referral to the psychiatrist as retaliation for filing the ADEA discrimination charge. Bustillo opposed the exam as not narrowly tailored for fitness for duty in violation of the ADA. Bustillo was terminated because he opposed these practices. “On November 1, 2012, Hill terminated Bustillo’s employment with Million Air, and cited his refusal to submit to the independent medical examination as the reason for his termination.” *Amended Petition for Rehearing*, Appendix E, p. 68 (citing: *Opinion*, USDC-PR, Appendix B, p. 36).

B. Procedural Scenario

After exhausting the administrative remedies at the EEOC, Bustillo filed suit in the District Court for Puerto Rico (“USDC-PR”). The case was decided by way of summary judgment. The Court of Appeals for the First Circuit (“USCA1”) affirmed the District Court, and denied rehearing *en banc*. The First Circuit allows the grounding and referral to a psychiatrist due to requests for garden-variety emotional damages;² allows unlimited examinations;³ and, places the burden to prove an

² “Upon being notified of Bustillo's charges, Million Air told Bustillo that, because of his allegation of [‘]damages, sufferings, and mental anguishes,[‘] the company was grounding him until he could obtain medical certification showing that he was still [‘]fit to fly.[‘]” *Opinion*, USCA1, Appendix A, p. 25.

³ “... Bustillo refused to be examined because the doctor did not agree to place certain limitations on the examination. Among the requested limitations was a demand that the doctor not disclose his opinion of Bustillo's psychological condition to Million Air.” *Id.*

exam is overbroad on plaintiffs.⁴ It allows termination of pilots for claiming their ADA rights. This Petition follows.

REASONS FOR GRANTING THE WRIT

A. Introduction

In *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 78–79 (2002) this Honorable Court recognized the “affirmative defense for action under a qualification standard [‘]shown to be job-related for the position in question and ... consistent with business necessity.[’]”⁵ It discussed EEOC’s regulations that allow the screening out of potential workers with a disability not only for risks that he would pose to others in the workplace but for risks on the job to his own health or safety as well. *Id.* Most importantly, and directly related to this case, the opinion noted: “[T]he definitional and defense provisions describing the defense in terms of “direct” threats of “significant” harm, 42 U.S.C. §§ 12113(b), 12111(3), are obviously intended to forbid qualifications that screen out by reference to general categories pretextually applied. ... Recognizing the “indirect” and “insignificant” would simply reopen the door to pretext by way of defense.” *Id.*, at 80. This is such a case.

⁴ “Bustillo did not even [‘]elaborate on the respects in which the requested medical examination was overbroad.[’]” *Id.* at p. 27.

⁵ See also: *Schaffer v. Weast*, 546 U.S. 49, 57 (2005) recognizing that “the burden of persuasion as to certain elements of a plaintiff’s claim may be shifted to defendants, when such elements can fairly be characterized as affirmative defenses or exemptions.”

The First Circuit's decision, allowing the grounding of Bustillo (a pilot with no mental illness, nor indicia of) on the basis of having sought general emotional damages in an EEOC proceeding, goes against the "direct" and "significant" harm standards noted in *Chevron*. The decision is contrary to the objective standard followed by the rest of the circuits. It goes against the wording of the ADA and the EEOC interpretations of it. It obstructs the remedial congressional intention and purpose of the ADA. "The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations ..." 29 CFR §1630.2(j)(1)(iii).

The First Circuit has virtually closed the doors for emotional remedies not only to pilots but also to any other similarly situated individuals. As noted by FAA's Dr. John V. Barson, DO, "The airman is involved in an EEO action for age discrimination with his former employer. Part of the claim was for "emotional pain" from the EEO action. This is not a mental illness ... He did not have a mental condition ..." Appendix F, p. 70. Seeking general emotional damages as part of a charge of discrimination should not trigger a witch hunt. Seeking said remedies should not have a negative impact in the work of employees in sensitive positions.

There is no question that a fitness for duty - or in the case of a pilot "fitness to fly", would be proper if a pilot is suffering from a mental or physical condition that would disqualify him from flying. In this case, the USDC-PR recognized that Bustillo had "attended the training on October 2,

and Bustillo received a certificate to fly the Cheyenne II on October 5.” Appendix B, p. 34. Prior to this training, Bustillo had passed his FAA medical examination, and was not suffering from a mental or physical condition. It is highly significant that Million Air did not articulate any objective reason to question Bustillo’s recent FAA medical examination. Neither did Hill. The FAA examination had cleared him to fly. A seminal case cited by the USDC-PR, *Conroy v. N.Y. State Dept. of Correctional Services*, 333 F.3d 88 (2nd Cir., 2003), requires “legitimate, nondiscriminatory reasons to doubt the employee’s capacity to perform his or her duties (such as frequent absences or a known disability that had previously affected the employee’s work).” *Id.* at 98. The requirement for nondiscriminatory and legitimate reasons should be an objective one; and the burden should be placed on the employer to show valid reasons to seek a medical examination, e.g., “unless such examination or inquiry *is shown to be* job-related and consistent with business necessity.” 42 U.S.C. §12112(d)(4)(A) (*Italics Ours*).

The exam should “be limited to an evaluation of the employee’s condition only to the extent necessary under the circumstances to establish the employee’s fitness for the work at issue” *Conroy*, 333 F.3d at 97. The examinations allowed by the ADA have been constructed by the EEOC to be limited to the “functional limitations” of the employee, his/her “ability to work”, and “perform[ance of] his/her job.” Note:

Any medical examination
conducted by the employer’s health

care professional must be job-related and consistent with business necessity. ...the examination must be limited to determining the existence of an ADA disability and the functional limitations that require reasonable accommodation.

...
Any medical examination, however, must be limited to determining whether the employee can perform his/her job. ...

...
Any inquiries or examination, however, must be limited in scope to what is needed to make an assessment of the employee's ability to work. ...

...
In limited circumstances, periodic medical examinations of employees in positions affecting public safety that are narrowly tailored to address specific job-related concerns are permissible. ...

www.eeoc.gov/policy/docs/guidanceinquiries.html

The factual scenario was clearly presented to the District Court. The Court determined that the psychiatrist was going to conduct a limitless exam: “Dr. Llado refused to limit his examination or otherwise abide by the attorney’s instructions ...” Opinion, USDC-PR, Appendix B, page 36. The District Court allowed an unlimited examination and placed the burden to show illegality on Bustillo: “And while Bustillo also contends that Million Air

‘did not limit the scope of the examination,’ he does not elaborate on the respects in which the requested medical examination was overbroad.” *Id.* at 40.⁶

The Opinion of the First Circuit recognized the factual scenario - Bustillo did go to the required examination, he sought limitations to the exam, the physician refused to limit the exam, and he was fired after opposing the unlimited examination:

... When Bustillo went to meet with the doctor to whom Million Air had referred him, Bustillo refused to be examined because the doctor did not agree to place certain limitations on the examination. Among the requested limitations was a demand that the

⁶ Some circuits have held that §12112(d) provides a separate cause of action irrespective of the plaintiff’s disability status. *See: Martino v. Forward, Air, Inc.*, 609 F.3d 1, 4 (1st Cir., 2010)(citing: *Harrison v. Benchmark Elecs. Huntsville, Inc.*, 593 F.3d 1206, 1213-14 (11th Cir., 2010); *Murdock v. Washington*, 193 F.3d 510, 512 (7th Cir., 1999); *Fredenburg v. Contra Costa County Dep’t of Health Servs.*, 172 F.3d 1176, 1182 (9th Cir., 1999); and, *Griffin v. Steeltek, Inc.*, 160 F.3d 591, 594 (10th Cir., 1998). *See also: Taylor v. City of Shreveport*, 798 F.3d 276, 284 (5th Cir., 2015)(“We now join all our sister circuits who have considered the question and hold that a plaintiff need not assert that he or she has a disability to contest an allegedly improper medical inquiry or medical examination.”); and, *Conroy*, 333 F.3d at 94 (“We agree with our sister circuits that a plaintiff need not prove that he or she has a disability unknown to his or her employer in order to challenge a medical inquiry or examination under 42 U.S.C. § 12112(d)(4)(a).”). This issue is subsumed within Bustillo’s case. While *Chevron, supra*, at 806, stated: “An ADA plaintiff bears the burden of proving that she is a [‘]qualified individual with a disability[’],” *Chevron* did not specifically address ADA claims under §12112(d)(4)(A).

doctor not disclose his opinion of Bustillo's psychological condition to Million Air. Soon thereafter, Million Air fired Bustillo.

Opinion, USCA1, Appendix A, p. 25.

In a nutshell, Million Air cited Bustillo's EEOC claim for general emotional damages as reason for the grounding and referral to the psychiatrist; and, the exam was going to be limitless. The First Circuit permitted such grounding and such limitless examination in violation of the ADA;⁷ allowed respondents to fire Bustillo for having requested compliance with the ADA;⁸ and, shifted the burden of proof on complainants / plaintiffs⁹. These interrelated matters succinctly present the issues at hand.

B. The National Standard and the First Circuit's Divergence: Rule 10(a)

The majority of the circuits, consistent with the statutory language of the ADA at 42 U.S.C.

⁷ Prohibited medical examinations may constitute employment discrimination under the ADA. *Taylor*, 798 F.3d at 282. *Cf. University of Texas S.W. Medical Center v. Nassar*, 133 S.Ct. 2517, 2531 (2013)(re ADA's anti-retaliation provision at § 12203: "because such individual has opposed any act or practice made unlawful by this chapter"); and, *Wehrley v. Amer. Fam. Mut. Ins. Co.*, 513 Fed.Appx. 733, 740, 2013 WL 1092856, at *5 (10th Cir., 2013)("any individual").

⁸ "[T]here was a causal link between his protected activity and the adverse employment actions." *Scott v. Napolitano*, 717 F.Supp.2d 1071, 1089 (S.D. Cal., 2010).

⁹ "... Bustillo did not even [elaborate on the respects in which the requested medical examination was overbroad.]" Opinion, USCA1, Appendix A, p. 27.

§12112(d)(4)(A) – “unless such examination or inquiry is shown to be job-related and consistent with business necessity,” have held that whether a mental examination is job related and consistent with business necessity requires an objective inquiry. The opinions of these circuits consistently define and/or follow said standard. *Conroy*, 333 F.3d at 98 (medical examination permissible “when the employer can identify legitimate, nondiscriminatory reasons to doubt the employee's capacity to perform his or her duties (such as frequent absences or a known disability that had previously affected the employee's work)”; *Tice v. Centre Area Transportation Authority*, 247 F.3d 506, 518 (3rd Cir., 2001)(“The ADA's requirement that an IME be consistent with business necessity is an objective one.”); *Pence v. Tenneco Auto. Operating Co., Inc.*, 169 Fed.Appx. 808, 812, 2006 WL 547831, at *3 (4th Cir., 2006)(“the ADA does not prevent an employer from psychologically evaluating an employee who has been alleged to have made death threats against other employees.”); *Franklin v. City of Slidell*, 969 F.Supp.2d 644, 657 (E.D.La.,2013)(*cited Crews v. Dow Chemical Co.*, 287 Fed.Appx. 410 (5th Cir., 2008), an unreported decision that allowed testing for “changes in her workplace behavior, including, among other things, hand tremors, slurred speech, decreased engagement at meetings, inability to make arguments concerning topics she was very knowledgeable about, and discussing improper topics during work-related meetings.”); *Kroll v. White Lake Ambulance Authority*, 763 F.3d 619, 623 (6th Cir., 2014)(“[T]he individual who decides to require a medical examination must have a

reasonable belief based on objective evidence that the employee's behavior threatens a vital function of the business.”); *Coffman v. Indianapolis Fire Dept.*, 578 F.3d 559, 565–66 (7th Cir., 2009) (Referral to evaluation held proper where two firefighters had committed suicide in the preceding months; coworkers had expressed concern that Coffman did not seem like herself; had become guarded, withdrawn and uncommunicative with other firefighters; showed signs of depression, more than just having a bad day; and, seemed unable to make decisions or even perform routine tasks on the scene of an incident without being told or prompted.); *Wisbey v. City of Lincoln, Neb.*, 612 F.3d 667, 673 (8th Cir., 2010) (“In *Thomas*, we held that a fitness for duty exam was appropriate where a company [‘]sought to ascertain whether [the employee] was fit to return to a position under the same working conditions that allegedly caused [her] stress and anxiety ... [and] an extended three week absence from work.[’] *Id.*”); *Neravetla v. Virginia Mason Medical Center*, 2017 WL 3327830, at 1 (9th Cir., 2017) (This unreported opinion noted: “In *Brownfield v. City of Yakima*, we held that a mandatory psychological evaluation satisfied this standard when the plaintiff police officer had displayed “highly emotional responses[.]” ... volatile responses are of particular concern when the plaintiff is involved in “dangerous work.” ... The practice of medicine is without a doubt similarly “dangerous work.” Neravetla's emotional and belligerent behavior put patients at risk, and his referral to WPHP was job-related and consistent with business necessity.”); *Lanman v. Johnson County, Kansas*, 393 F.3d 1151, 1157 (10th Cir.,

2004)(“Ms. Lanman was a long-time employee with a good employment history who suddenly became involved in several troubling incidents affecting co-workers.”); and, *OwusuAnsah v. Coca Cola Co.*, 715 F.3d 1306, 1311 (11th Cir., 2013) (Perceptions of a police officer being even mildly paranoid, hostile, or oppositional - as well as for an employee who was hostile, made threats, and was insubordinate - satisfied the objective standard).

Nowhere has the mere filing of a complaint or charge of discrimination where general emotional damages are requested been the source of a referral to a medical examiner. Allowing such practice would have an unwarranted chilling effect on persons who seek justice for discriminatory practices. General emotional damages do not mean a person is unfit for his/ her job. Dr. Barton, the FAA physician who reviewed Bustillo’s FAA Form 8500-8, stated that the claim for emotional damages was not a mental illness or condition. Appendix F, p. 70.

The circuits have also placed the burden of demonstrating business necessity on the employer. *Conroy*, 333 F.3d at 97; and, *Brownfield v. City of Yakima*, 612 F.3d 1140, 1146 (9th Cir., 2010). *See also: Ward v. Merck & Co., Inc.*, 226 Fed.Appx. 131, 141, 2007 WL 760391, at *6 (3rd Cir., 2007) (“Merck had the burden of going forward in support of its claim of a business necessity for the fitness for duty test of Ward.”); *Cripe v. City of San Jose*, 261 F.3d 877, 890 (9th Cir., 2001)(“The City has the burden of proving that its discriminatory “qualification standards” satisfy the “business necessity” defense. *Andrews v. Ohio*, 104 F.3d 803, 807–08 (6th Cir.

1997)"); and, *Wisbey*, 612 F.3d at 673 (*citing Thomas v. Corwin*, 483 F.3d 516, 527 (8th Cir., 2007): "To demonstrate compliance with §12112(d)(4)(A), the employer bears the burden to show the asserted 'business necessity' is vital to the business and the request for a medical examination or inquiry is no broader or more intrusive than necessary.")

These cases reflect not only the statutory language, but some include references to the guidance issued by the EEOC in this area. *See: Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986)("these Guidelines, [']while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,[']"). The First Circuit's opinion is contrary to said case law and the pertinent EEOC guidance. Certiorari should be granted.

C. Bungle in the Jungle: Rule 10(c)

The First Circuit's opinion, and the reasoning behind the grounding and referral to psychiatric evaluation, will have significant negative national impact. It will not be limited to Bustillo's case. The reasoning in support of the grounding would entail the grounding of all pilots who have emotional distress claims such as the ones claimed in *Fry v. Airline Pilots Ass'n, Intern.*, 88 F.3d 831, 833 (10th Cir., 1996)(claims related to, "... food and drink contamination, property loss and property damage, death threats and threats of physical harm, threats of sexual assault of spouses and family members,

and harassing phone calls and knocks on the door during the night on flight layovers, among other acts of harassment and intimidation.” *Id.* at 840). Also the pilots in *Pilkington v. United Airlines*, 112 F.3d 1532, 1536 (11th Cir., 1997)(“... the harassment would continue, that it was part of a pattern, that it was affecting their job performance, and that it was causing mental and emotional suffering.”) would be grounded. Other “sensitive” employees could be subjected to improper adverse actions merely based on similar “garden-variety” emotional claims.

The opinion of the First Circuit forces the grounding of female (or male) pilots who sue due to sexual harassment, and claim emotional distress as part of their damages, as in *Currier v. Entergy Services, Inc.*, 73 F.Supp.3d 673, 678 (E.D. La., 2014). The opinion would ground pilots involved in accidents who may seek emotional damages as in *Carolina Indus. Products, Inc. v. Learjet, Inc.*, 189 F.Supp.2d 1147, 1178, n. 79 (D. Kan., 2001)(claimed emotional distress from traveling at nearly 100 miles per hour toward a retention pond with no brakes).

A claim for general emotional damages, or “garden-variety” emotional damages, should not, *per se*, imply that the claimant has a mental condition. An employer is required to have “objective evidence” of impairment, or posing a threat, due to a medical condition. EEOC Notice 915.002, in its pertinent part to our inquiry, clarifies:

Generally, a disability related inquiry or medical examination of an employee may be “job related and consistent

with business necessity" when an employer "has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition." . . .

Sometimes this standard may be met when an employer knows about a particular employee's medical condition, has observed performance problems, and reasonably can attribute the problems to the medical condition. An employer also may be given reliable information by a credible third party that an employee has a medical condition, or the employer may observe symptoms indicating that an employee may have a medical condition that will impair his/her ability to perform essential job functions or will pose a direct threat. In these situations, it may be job related and consistent with business necessity for an employer to make disability related inquiries or require a medical examination.

www.eeoc.gov/policy/docs/guidanceinquiries.html

In 24 A.L.R. Fed. 3d, Art. 1, *supra*, at p. 64, the commentator noted: "[T]he pilot filed an age discrimination charge with the Puerto Rico Antidiscrimination Unit requesting compensation for damages, suffering, and "mental anguish" suffered by him and his family; three days after it

was notified of the discrimination charge it prohibited the pilot from flying until an independent medical examiner determined that he was fit to fly passengers on a commercial basis.” The commentary adds: “[the court] apparently concluded that the request for the evaluation was job related and consistent with business necessity.” *Id.* at p. 65. The legal community is on notice that in the First Circuit a request for general emotional damages, in the absence of any mental illness, is sufficient to ground any pilot seeking such remedies.

This “new” standard will force employers of pilots to ground them should the pilot request general emotional damages in any legal proceeding, irrespective of their actual fitness to fly. Employers would risk being sued should they not ground said pilots. The opinion would place a tremendous burden on employers, who would face the tough decision of removing a pilot from duty, and having to find an alternate pilot who is not, or has not been involved in litigation where he/she has sought similar remedies.

The First Circuit’s opinion would force pilots not to seek emotional damages in administrative proceedings, nor in any legal proceedings, because they would risk being grounded, and not being allowed to fly. Family cases, such as contentious divorces, general tort cases, such as slip and falls, and a plethora of others, could be the basis for grounding a pilot.

It is not difficult to foresee how this First Circuit opinion will become the new national standard, forcing employers to stop employees in

sensitive positions from working and requiring that they be psychologically analyzed before being allowed to return to work. Employers would not be allowed much leeway, failing to do so could result in liability should said employees make a mistake that causes damages to a third party.

CONCLUSION

The answers should be clear. Seeking garden-variety emotional damages should not trigger a psychiatric examination. Seeking such legal remedy does not indicate that a person is unfit to work. An airline, or similarly situated employer, should not be able to ground a pilot for having alleged general emotional damages in an EEOC charge of discrimination. If there is a question about an employee's condition, said question should be based on objective findings; the exam limited to fitness for duty; and, the employer should bear the burden of proof to show compliance with the ADA. Plaintiffs should not be terminated for opposing practices made illegal by Congress.

The facts of this case, where Million Air and Hill failed to show any evidence that would place Bustillo's fitness to fly in question, present a proper scenario for deciding the issues presented. The uncontroverted facts – Bustillo's flying with a supervisor, Bustillo's FAA medical examination, and Bustillo's trainings at SimCom – are contrary to the assumption that general emotional damage claims are indicative of mental illness. Allowing such assumption to be the law of the land could have very negative effects. The assumption curtails

the exercise of Congressional power under the commerce clause to protect claimants under the ADEA, ADA, and other civil rights statutes.

The national standard, as expressed by the rest of the circuits cited above, should apply. Employers are required to have objective evidence of a psychiatric illness, before removing workers from their duties, and requesting they undergo limited psychiatric evaluations. Employers bear the burden of proof to show compliance with the ADA.

The First Circuit's opinion creates a Damocles dilemma, or *Catch 22*, by forcing a pilot to make a choice: whether to claim emotional damages and be subject to grounding and psychiatric referral, or not claim emotional damages at all. Grounding and referral to a psychiatrist are about the worst things that could happen to a pilot; it marks him/her for life. Any other employee in a sensitive position would equally be affected.

The stigma associated with emotional issues does carry on. Future potential employers could be too cautious and fail to employ such persons by the mere mention of a grounding and psychiatric referral. "[S]ociety's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." *School Bd. of Nassau County, Fla. v. Arline*, 107 S.Ct. 1123, 1129, 480 U.S. 273, 284 (1987). Specifically, should this become the national standard, employers will be forced to ground and refer to psychiatric evaluation any pilot (and any other employee whose work is of a sensitive nature) who requests general emotional

damages in administrative or court proceedings.

Access to courts and legal remedies should not be limited by the incorrect assumption that seeking general emotional damages implies unfitness to work. Bustillo “does not claim that the treatment he received from defendants has resulted in ongoing pain and suffering requiring psychiatric treatment.” *Hodges v. Keane*, 145 F.R.D. 332, 334 S.D.N.Y., 1993). A pilot should not be required to undergo mental examination for a simple garden-variety claim of emotional distress. Just as in Rule 35(a) exams, the employer should be required to make: “an affirmative showing that ... [the] condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering [the] particular examination.” *Id.*, at 334.

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted, this December 5th, 2017.

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