# APPENDIX

# APPENDIX

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## APPENDIX A

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**No. 15-35410**
**D.C. No. 3:10-cv-05577-RBL**

**[Filed May 11, 2018]**

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| DANNY SNAPP, *Plaintiff-Appellant*, | ) |
| v. | ) |
| UNITED TRANSPORTATION UNION, *Defendant*, | ) |
| and | ) |
| BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY, *Defendant-Appellee.* | ) |

OPINION

Appeal from the United States District Court
for the Western District of Washington
Ronald B. Leighton, District Judge, Presiding

Argued and Submitted November 8, 2017
Portland, Oregon

App. 2

Filed May 11, 2018

Before: Ferdinand F. Fernandez, William A. Fletcher, and Michael J. Melloy,[*] Circuit Judges.

Opinion by Judge Melloy

**SUMMARY**[**]

**Employment Discrimination**

The panel affirmed the district court's judgment, after a jury trial, in favor of Burlington Northern Santa Fe Railway Co., the defendant in an action alleging a failure to accommodate under the Americans with Disabilities Act.

The panel held that the ADA treats the failure to provide a reasonable accommodation for a disability as an act of discrimination if the employee is a "qualified individual," the employer receives adequate notice, and a reasonable accommodation is available that would not place an undue hardship on the operation of the employer's business. Notifying an employer of a need for an accommodation triggers a duty to engage in an "interactive process." If an employer receives notice and fails to engage in the interactive process, the employer will face liability if a reasonable accommodation would have been possible. If an employer fails to engage in good faith in the interactive process, the burden at the

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[*] The Honorable Michael J. Melloy, United States Circuit Judge for the U.S. Court of Appeals for the Eighth Circuit, sitting by designation.

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

summary-judgment phase shifts to the employer to prove the unavailability of a reasonable accommodation.

In an earlier appeal, a prior panel reversed the district court's summary judgment in favor of BNSF and stated: "there is a genuine dispute over whether BNSF engaged in good faith in a required interactive process, and failure to do so would constitute discrimination under the ADA." The panel concluded that this statement was not law of the case, but rather a less-than-complete statement of law.

The panel held that at trial, unlike at the summary judgment phase, the burden of proof does not shift, and the plaintiff bears the burden of proving that the employer could have made a reasonable accommodation that would have enabled the plaintiff to perform the essential functions of the job. The panel rejected the argument that the plaintiff has only a burden of production, rather than a burden of proof. Accordingly, the district court's jury instructions were correct.

Affirming the district court's denial of the plaintiff's motion for judgment as a matter of law, and agreeing with the Tenth Circuit, the panel held that BNSF was not bound by admissions made in a deposition of a corporate designee for BNSF pursuant to Fed. R. Civ. P. 30(b)(6), such that the jury should not have been allowed to consider other evidence.

## COUNSEL

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**OPINION**

MELLOY, Circuit Judge:

Plaintiff Danny Snapp brought this action against the United Transportation Union (the "Union") and his former employer, Burlington Northern Santa Fe Railway Company ("BNSF"), alleging a failure to accommodate under the Americans with Disabilities Act ("ADA"). A jury returned a defense verdict, and Snapp appeals. At trial, the parties disputed whether Snapp had requested an accommodation. In addition, the parties disagreed as to whether and how the jury instructions should address the "interactive process," *i.e.*, the statutorily required collaborative effort for identifying an employee's abilities and an employer's possibly reasonable accommodations. Snapp argues the district court improperly rejected a proposed instruction that would have imposed liability on BNSF merely for failing to engage in the interactive process, regardless of the availability of a reasonable accommodation. Snapp also argues the district court improperly rejected a proposed jury instruction that would have described his overall burden of proof as a mere burden of production rather than as an ultimate burden of persuasion. Finally, Snapp argues the district court erred by refusing to treat statements by BNSF's Federal Rule of Civil Procedure 30(b)(6) corporate representative as binding admissions. We find no error and affirm the judgment of the district court.

## I. Background

Snapp worked for BNSF from 1971 through 1999. He rose through the ranks, becoming a Division Trainmaster in 1986. Due to tiredness and low energy, he went to a doctor in 1994. He was diagnosed with sleep apnea and had surgeries in 1996 and 1998 in unsuccessful attempts to correct his condition.

In 1999, BNSF received a report from Snapp's physician. Snapp's supervisor told Snapp he did not believe Snapp could work in a safe manner. In 1999, Snapp took a "fitness for duty" evaluation, was determined to be totally disabled, and went on short-term disability leave. He applied for long-term disability benefits through CIGNA, the third-party administrator for BNSF's disability plan. In February 2000, BNSF's medical director told Snapp that CIGNA had approved Snapp's claim for disability benefits and that, should CIGNA later find him ineligible, he should contact BNSF's medical director to plan a "return to work." Snapp began a period of long-term disability leave and received payments from CIGNA.

In 2005, CIGNA requested a sleep study to verify Snapp's continuing disability. When Snapp arrived at a clinic for the study, the clinic asked him to sign a release accepting personal financial responsibility for the test. He refused and did not complete the study. In November 2005, CIGNA terminated Snapp's disability benefits citing an absence of evidence of continuing disability.

At that time, Snapp did not request an accommodation or apply to return to work. Rather, he appealed CIGNA's denial of benefits, filed complaints

with governmental entities, and copied BNSF on his appeal letter. CIGNA notified BNSF in November 2007 that it had denied Snapp's appeal and Snapp was no longer eligible for long-term disability.

Also in November 2007, Snapp wrote to BNSF demanding reinstatement of his disability payments, demanding reimbursement for overpayment of life-insurance premiums, and threatening to sue BNSF. He called to follow up on the letter. He did not ask to return to employment in either the letter or the call.

On January 2, 2008, BNSF representative Lori Emery sent Snapp a letter telling him that, in accordance with the BNSF Long-Term Disability Plan, he had sixty days to secure a position with BNSF or he would be dismissed. The letter stated, "BNSF is under no obligation to provide you with a salaried position if you are released to return to work by your physician." Emery invited Snapp to contact her directly and copied Dane Freshour, BNSF's Regional Director of Human Resources.

On January 6, 2008, Snapp wrote back a letter addressing primarily the denial of disability benefits and attaching several documents. Snapp's letter stated, "Your letter does nothing to address my letter dated November 10, 2007! . . . I was in hopes that BNSF Railway would assist me in my endeavor with CIGNA . . . . For several years I have attempted to get BNSF Railway to correct the ongoing malicious administration of the Disability contract(s) . . . ." Snapp also stated he would "more than welcome your offer to return to BNSF employment without discrimination of my situation . . . ." He attached to his letter several pages related to the CIGNA policy regarding CIGNA's

payment for rehabilitation and reasonable accommodation costs. He also attached a doctor's note dated April 2007 in which the doctor stated, "I do not feel . . . it is safe for you to return to work." In the alternative, Snapp asked for "[a] continued and on going Long Term Disability leave of Absence until this is presented in a court of law regarding CIGNA discontinued benefits through malicious administration and breach of the BNSF . . . Welfare Plan."

Emery wrote to Snapp on January 10. She confirmed receipt of his November 2007 and January 2008 letters and reported having resolved the life-insurance-premium overpayment issue, stating a refund check was on its way. Regarding disability benefits, she reiterated that CIGNA was solely responsible for plan administration and he should deal with CIGNA directly. In doing so, she referenced a 2006 communication from BNSF to Snapp's attorney conveying the same information. Emery reported that BNSF was standing by the sixty-day window to secure employment, cited a website for accessing current openings, and identified Freshour as the human resources representative for Snapp's geographic region.

Snapp neither visited the website nor contacted Freshour. Before the end of the sixty-day period, however, Snapp contacted the Union to ask about his seniority for a yardmaster position. The Union told him he lacked the requisite seniority. Notwithstanding this information, he sent a letter dated February 28, 2008, to a BNSF facility in Vancouver, Washington, seeking to displace a senior yardmaster for a position and asking for an immediate ninety-day medical leave beginning March 2 "to finalize medical testing with the

slight possibility of surgery for correction of my long and existing condition." Snapp attached to his February 28 letter a note from a Veterans Affairs neurologist who stated:

> Thank you for your recent correspondence and request for clarification of my recommendations from January 14, 2008. As I stated previously, *light-duty work can be considered after treatment is further optimized* (oral appliance therapy) but the following restrictions would need to apply: daytime work only (no shift work); restriction to 8 hours of duty at the maximum (no mandated overtime)[;] and no working with heavy equipment. An office job that didn't involve any activity during which time if you [fell] asleep you could cause injury to yourself or other[s] is what I would recommend.

(Emphasis added).

BNSF checked with the Union regarding Snapp's seniority and discovered he lacked the requisite seniority. Because the sixty-day window had expired, BNSF terminated his employment. Snapp challenged the Union's determination, and the Union explained he had not been a member since 1982. Snapp continued to communicate with BNSF through at least Spring 2009, seeking to exercise seniority rights for a brakeman position. BNSF directed him to the company website to apply for open positions. Snapp then pursued a claim against BNSF through the Public Law Board concerning his attempted exercise of seniority rights. The Board ruled in favor of BNSF. Snapp did not apply for any positions with BNSF other than the Vancouver

yardmaster job in 2008 and the brakemaster job in 2009 (his post-termination attempt).

Snapp sued BNSF in August 2010 alleging a failure to provide a reasonable accommodation. BNSF moved for and was granted summary judgment. The Ninth Circuit reversed, finding a genuine dispute of material fact as to whether Snapp requested an accommodation so as to trigger BNSF's duty to engage in the interactive process. *Snapp v. United Transp. Union*, 547 F. App'x 824, 826 (9th Cir. 2013) (unpublished memorandum disposition). On remand, BNSF and Snapp each moved for summary judgment. The district court denied the motions. As relevant to the present appeal, Snapp argued that, in a Federal Rule of Civil Procedure Rule 30(b)(6) corporate-designee deposition, Freshour admitted Snapp had requested an accommodation and also admitted BNSF failed to engage in the interactive process in response to the request.

At trial, Snapp repeatedly addressed the issue of BNSF's duty to engage in the interactive process. Snapp requested jury instructions that the district court rejected. In particular, Snapp sought an instruction that would have relieved him entirely of showing the availability of a reasonable accommodation. He sought to impose liability on BNSF simply for failing to engage in the interactive process *unless* BNSF could prove an affirmative defense, which he argued BNSF had waived.[1] In doing so, Snapp

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[1] With his proposed instruction, which referenced "an affirmative defense," Snapp submitted a note to the court, stating:

characterized the unavailability of a reasonable accommodation as an affirmative defense. Further, and regardless of BNSF's participation in an interactive process, Snapp sought an instruction that would have described Snapp's burden of proof as to the availability of a reasonable accommodation in terms equivalent to a slight burden of production. The instructions as actually given to the jury placed the burden of proof on Snapp as to all issues other than the statutory defense of "undue hardship," which the instructions placed on BNSF. The district court did not give the jury an instruction regarding the duty to engage in the interactive process. The instructions the district court gave were based on the Ninth Circuit Model Instructions.

Snapp moved at the end of trial for judgment as a matter of law, reasserting the arguments from his unsuccessful summary judgment motion. The district court denied the motion, and the jury returned a verdict for BNSF.

## II. Analysis

Snapp alleges the district court erred in formulating the jury instructions and in denying the motion for judgment as a matter of law. Snapp also seeks review of the denial of his motion for summary judgment. Post-trial, however, a denial of summary judgment

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> Defendant has raised no affirmative defense that no reasonable accommodation was possible, that reasonable accommodation would pose an undue hardship or that plaintiff's employment posed a direct threat of harm. Plaintiff objects to trying any of these untimely affirmative defenses at this late date.

generally is not separately reviewable. *See Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1243 (9th Cir. 2014). In any event, we address issues raised in that motion to the extent Snapp reasserted his arguments in his later motion for judgment as a matter of law. *See id.*

The parties agree de novo review applies to the denial of the motion for judgment as a matter of law. The parties disagree as to the standard of review we are to apply to the alleged instructional error. "A district court's formulation of the jury instructions is reviewed for 'abuse of discretion.' If, however, 'the instructions are challenged as a misstatement of the law, they are then reviewed de novo.'" *Duran v. City of Maywood*, 221 F.3d 1127, 1130 (9th Cir. 2000) (per curiam) (quoting *Gilbrook v. City of Westminster*, 177 F.3d 839, 860 (9th Cir. 1999) (internal citation omitted)). In this instance, we conclude de novo review applies because an improper allocation of the burden of proof or an improper articulation of the elements of a cause of action necessarily would be errors at law.

A. ADA Interactive Process, Generally

The ADA treats the failure to provide a reasonable accommodation as an act of discrimination if the employee is a "qualified individual," the employer receives adequate notice, and a reasonable accommodation is available that would not place an undue hardship on the operation of the employer's business. 42 U.S.C. § 12112(b)(5)(A) ("[T]he term 'discriminate against a qualified individual on the basis of disability' includes—not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a

disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity[.]"). The statute itself places on the employer the burden to demonstrate an undue hardship. *Id.*

The Ninth Circuit has held that notifying an employer of a need for an accommodation triggers a duty to engage in an "interactive process" through which the employer and employee can come to understand the employee's abilities and limitations, the employer's needs for various positions, and a possible middle ground for accommodating the employee. *See Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1111–16 (9th Cir. 2000) (en banc), *vacated on other grounds sub nom.*, *US Airways, Inc. v. Barnett*, 535 U.S. 391, 406 (2002). In *Barnett*, the Ninth Circuit held that if an employer receives notice and fails to engage in the interactive process in good faith, the employer will face liability "*if a reasonable accommodation would have been possible*." *Barnett*, 228 F.3d at 1116 (emphasis added). In other words, there exists no stand-alone claim for failing to engage in the interactive process. Rather, discrimination results from denying an available and reasonable accommodation.

Recognizing the importance of the interactive process, the Ninth Circuit also held that if an employer fails to engage in good faith in the interactive process, the burden at the summary-judgment phase shifts to the employer to prove the unavailability of a reasonable accommodation. *See Morton v. United Parcel Serv., Inc.*, 272 F.3d 1249, 1256 (9th Cir. 2001), *overruled on other grounds*, *Bates v. United Parcel Serv., Inc.*, 511

F.3d 974, 995 (9th Cir. 2007) (en banc); *Barnett*, 228 F.3d at 1116 ("We hold that employers, who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible. We further hold that an employer cannot prevail at the summary judgment stage if there is a genuine dispute as to whether the employer engaged in good faith in the interactive process."). The rationale for shifting this burden arises from EEOC regulations and the ADA's legislative history that characterize the interactive process as at the heart of the accommodation process. *See Barnett*, 228 F.3d at 1110–16.

*Barnett* and *Morton* were summary-judgment cases. No Ninth Circuit case has actually held that the shifted burden as to the availability of a reasonable accommodation carries over into trial and must be expressed in jury instructions. In *Morton*, however, the court used expansive language that Snapp relies upon to argue that this burden shifting should apply at trial. *See*, 272 F.3d at 1256 ("The question whether this failure should be excused because there would in any event have been no reasonable accommodation available is one as to which the employer, not the employee, should bear the burden of persuasion *throughout the litigation*." (emphasis added)). The main question in the present appeal turns on whether the burden shifting announced in *Barnett* and *Morton* applies also at trial or should be cabined to the summary-judgment context. Snapp also presents an argument concerning the "law of the case" based on the memorandum disposition in the first appeal, a more general challenge to the jury instructions, and an

argument concerning testimony from a corporate-designee deponent. We address these arguments below.

B. Jury Instructions—Interactive Process

i. Law of the Case

Snapp requested an instruction that would have provided, "If plaintiff proves defendant failed to initiate the interactive process or to participate in good faith in the interactive process, your verdict should be for plaintiff [unless defendant proves an affirmative defense.]" Plaintiff's Proposed Inst. No. 27. Snapp then characterized "reasonable accommodation," "undue hardship," and "direct threat of harm" as affirmative defenses and argued BNSF waived all of these defenses. Through this request, including his labeling of "reasonable accommodation" as an affirmative defense that BNSF allegedly had waived, Snapp sought in the alternative (1) direct liability on BNSF for failing to engage in the interactive process, and (2) an instruction that would have applied burden shifting as a remedy for BNSF's alleged failure to engage (*i.e.*, would have imposed on BNSF a burden to prove the unavailability of a reasonable accommodation).

Snapp argues that his exact proposed instruction was proper because, in the memorandum disposition from the first appeal in this case, the Ninth Circuit stated, "Consequently, there is a genuine dispute over whether BNSF engaged in good faith in a required interactive process, and failure to do so would constitute discrimination under the ADA." *Snapp*, 547 F. App'x at 826. According to Snapp, this statement constitutes "the law of the case" such that the district court was bound to use his proposed instruction.

"[U]nder [the] 'law of the case' doctrine, one panel of an appellate court will not as a general rule reconsider questions which another panel has decided on a prior appeal in the same case." *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1993) (quoting *Merritt v. Mackey*, 932 F.2d 1317, 1320 (9th Cir. 1991)). But, "[f]or the doctrine to apply, the issue in question must have been 'decided either expressly or by necessary implication in [the] previous disposition.'" *Id.* (quoting *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir. 1990)). Here, we find no indication that the prior panel intended the quoted statement to serve as a full statement of the law or that the quoted statement was necessary for resolution of the appeal. That panel was reviewing a grant of summary judgment and did not purport to articulate instructions for trial. Moreover, as explained below, a denial of summary judgment is appropriate where there has been a failure to engage in the interactive process. *See Morton*, 272 F.3d at 1256; *Barnett*, 228 F.3d at 1116. The prior panel's statement, therefore, is not the law of the case. Rather it is merely a *less-than-complete* statement of law commensurate in scope with the matter actually before that court, namely, a motion for summary judgment that did not actually present the opportunity to expand upon *Morton* and *Barnett* in the context of a trial. We reject Snapp's attempt to invoke the law of the case doctrine based upon this short, conclusory statement from the memorandum disposition.

A party's failure to submit a proper articulation of the law in a proposed jury instruction, however, does not relieve the trial court of the duty to properly set forth the law in the actual instructions. *See Merrick v. Paul Revere Life Ins.*, 500 F.3d 1007, 1017 (9th Cir.

2007). And, the use of model instructions does not preclude reversal. *See Hunter v. County of Sacramento*, 652 F.3d 1225, 1232 (9th Cir. 2011) ("We have also recognized that a district court's 'use of a model jury instruction does not preclude a finding of error.'" (quoting *Dang v. Cross*, 422 F.3d 800, 805 (9th Cir. 2005))). Moreover, other contested instructions in this case involved disputes as to the proper articulation of the burden of proof. As such, notwithstanding our rejection of Snapp's "law of the case" challenge, it remains necessary to address the instructions.

ii. *Barnett* and *Morton* Holdings and Dicta

In *Barnett*, on appeal from a grant of summary judgment, the Ninth Circuit recognized the employer's duty to engage in the interactive process. The court first reviewed the ADA, legislative history, and EEOC guidelines for conducting the interactive process. Recognizing the inherent informational imbalance between employers and employees and the employer's superior knowledge regarding possible alternative positions, the court concluded:

> To put the entire burden for finding a reasonable accommodation on the disabled employee or, effectively, to exempt the employer from the process of identifying reasonable accommodations, conflicts with the goals of the ADA. The interactive process is at the heart of the ADA's process and essential to accomplishing its goals. It is the primary vehicle for identifying and achieving effective adjustments which allow disabled employees to continue working without placing an "undue burden" on employers. Employees do not have at

> their disposal the extensive information concerning possible alternative positions or possible accommodations which employers have. Putting the entire burden on the employee to identify a reasonable accommodation risks shutting out many workers simply because they do not have the superior knowledge of the workplace that the employer has.

*Barnett*, 228 F.3d at 1113. The court then "turn[ed] to the consequences for employers who fail to engage in the interactive process in good faith." *Id.* at 1115. The court noted that the employee typically will have proposed some accommodation, but that "[t]he range of possible reasonable accommodations, for purposes of establishing liability for failure to accommodate, can extend beyond those proposed." *Id.* Based upon this multiplicity of possible accommodations and the need to deter uncooperative employers, the court concluded "an employer cannot prevail at the summary judgment stage if there is a genuine dispute as to whether the employer engaged in good faith in the interactive process." *Id.* at 1116. Nevertheless, the court unequivocally stated that liability does not arise in the absence of an available reasonable accommodation. *Id.* ("We hold that employers, who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible."); *see also id.* at 1115 ("Most circuits have held that liability ensues for failure to engage in the interactive process when a reasonable accommodation would otherwise have been possible.").

The court made no comments purporting to address burdens of proof at trial. Nor did the court suggest it was contemplating the complexities that would arise from such an instructional issue at trial. In fact, these complexities militate strongly against taking *Barnett* out of context and extending its holding to trial. As a practical matter, the jury would need instructions asking if the employer participated in the interactive process in good faith. Then, the jury would need alternative instructions telling them how to allocate the burden of proof if they found an employer had failed to engage in good faith, and as a contingency, how to allocate the burden if the employer did engage in the interactive process. All the while, the court would need to ensure the jury did not impose liability on the employer simply for failing to engage—the risk of prejudicial juror confusion would be high. District judges dealing with motions for summary judgment, with the benefit of briefing, are well-equipped to cut through such thickets. It is less clear such complexity is appropriate for jury instructions. In fact, courts often reject attempts to charge jurors with complicated burden-shifting frameworks, asking jurors, instead, to weigh in on the ultimate question of discrimination. *Cf. Sanghvi v. City of Claremont*, 328 F.3d 532, 539 (9th Cir. 2003) (critiquing in another context "the use of legalistic language and the complexities of burden shifting" and concluding "the only question that should go to the jury is the ultimate question of discrimination").

Moreover, if the burden were shifted at trial, and if the employer failed to meet the burden, the net effect might be liability without identification of an accommodation. This outcome alone would seem to

contradict *Barnett*. And it would place the jury in the difficult situation of assessing damages for a failure-to-accommodate claim with nothing but speculation to guide the analysis of damages. *See Yonemoto v. McDonald*, 114 F. Supp. 3d 1067, 1115–18 (D. Haw. 2015) (refusing to extend burden shifting to trial and identifying damages issue), *aff'd sub nom.*, *Yonemoto v. Shulkin*, Nos. 15-16769 & 16-16076, 2018 WL 896723 (9th Cir. Feb. 15, 2018) (unpublished memorandum disposition). The summary judgment context for *Barnett*, the absence of discussion of trial issues, and the obvious complexities that would arise all strongly suggest that the burden shifting should be limited to summary judgment.

Then, in *Morton*, applying and interpreting *Barnett* to review a summary judgment, the court stated:

> It is the employer's responsibility, through participation in the interactive process, to assist in identifying possible accommodations. Here, UPS does not argue that it *did* engage in good faith in the interactive process. The question whether this failure should be excused because there would in any event have been no reasonable accommodation available is one as to which the employer, not the employee, should bear the burden of persuasion *throughout the litigation*.

272 F.3d at 1256 (first emphasis in original, citation and footnote omitted). This language, seemingly purporting to reach beyond summary judgment, was more expansive than what was said in *Barnett* and was unnecessary for resolution of the appeal in *Morton*.

Regardless, in an accompanying footnote, the court continued its discussion:

> *Barnett* can be read as holding that an employer who has not engaged in the interactive process is not entitled to summary judgment no matter what the evidence on summary judgment shows concerning the actual availability of a reasonable accommodation. It is odd, however, to delay until trial an issue that is fact dependent, if proof of the relevant facts—here, the facts pertinent to proving that a relevant accommodation was available—*will* be necessary at trial. We therefore understand *Barnett* as holding, instead, that the task of proving the negative—that *no* reasonable accommodation was available—rests with an offending employer throughout the litigation, and that, given the difficulty of proving such a negative, it is not likely that an employer will be able to establish on summary judgment the absence of a disputed fact as to this question.

*Id.* at 1256 n.7. In making these comments, however, the court in *Morton* did not acknowledge or address the complexities that might arise at trial.

Most recently, in *Yonemoto*, a district court in our circuit analyzed this issue in the context of a bench trial and concluded the shifted burden does not carry over from summary judgment to trial. *See Yonemoto*, 114 F. Supp. 3d at 1115–18. In doing so, the court in *Yonemoto* identified the expansive language from *Morton* as dicta and found that a consensus of "virtually every other circuit" did not employ such burden shifting. *Id.* at 1117. Moreover, *Yonemoto*

concluded the concerns that justified the summary judgment rule in *Barnett* were lessened at trial. We agree.

*Yonemoto* characterized the *Morton* court's comments about burdens at trial as dicta not only due to the limited summary-judgment context in which they were made, but also because they were "made casually . . . without any discussion, let alone analysis, of the possible alternatives at trial." *Yonemoto*, 114 F. Supp. 3d at 1117. Given the complexities and risk of prejudice, "it appear[ed] very unlikely that the *Morton* panel intended, without a much fuller analysis, to establish a burden-shifting rule at odds with virtually every other circuit." *Id.* (applying the Ninth Circuit's analysis for identifying dicta as set forth in *United States v. Johnson*, 256 F.3d 895, 915–16 (9th Cir. 2001) (en banc) (Kozinski, J. concurring)).

In this regard, *Yonemoto* correctly noted that several circuits strongly support the view that a failure to engage does not require a shifted burden at trial. In fact, many circuits do not relieve the plaintiff of the burden even at summary judgment. *See, e.g.*, *Stern v. St. Anthony's Health Ctr.*, 788 F.3d 276, 293 (7th Cir. 2015) ("But regardless of the state of the record, an employer's failure 'to engage in the required [interactive] process . . . need not be considered if the employee fails to present evidence sufficient to reach the jury on the question of whether she was able to perform the essential functions of her job with an accommodation.'" (alterations in original) (quoting *Basden v. Prof'l Transp., Inc.*, 714 F.3d 1034, 1039 (7th Cir. 2013))); *EEOC v. Ford Motor Co.*, 782 F.3d 753, 766 (6th Cir. 2015) (noting that if an employee fails to

create a jury question as to a reasonable accommodation, the employer will not be liable "[e]ven if [the employer] did not put sufficient effort into the 'interactive process' of finding an accommodation"); *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 581 (4th Cir. 2015) ("However, an employer will not be liable for failure to engage in the interactive process if the employee ultimately fails to demonstrate the existence of a reasonable accommodation that would allow her to perform the essential functions of the position."); *Jones v. Nationwide Life Ins.*, 696 F.3d 78, 91 (1st Cir. 2012) (addressing an employer's alleged failure to engage in the interactive process and concluding: "It was [the employee's] burden 'to proffer accommodations that were reasonable under the circumstances[.]'" (quoting *Jones v. Walgreen Co.*, 679 F.3d 9, 19 n.6 (1st Cir. 2012))); *Hennagir v. Utah Dep't of Corr.*, 587 F.3d 1255, 1265 (10th Cir. 2009) ("Even if [an employer] fail[s] to fulfill its interactive obligations to help secure a [reasonable accommodation], [the employee] will not be entitled to recovery unless [s]he can also show that a reasonable accommodation was possible . . . ." (alterations in original) (quoting *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1174 (10th Cir. 1999) (en banc))); *McBride v. BIC Consumer Prods. Mfg. Co.*, 583 F.3d 92, 101 (2d Cir. 2009) ("The employer's failure to engage in such an interactive process, however, does not relieve a plaintiff of her burden of demonstrating, following discovery, that some accommodation of her disability was possible."). Further, Snapp cites no cases in which a court has held such a burden shifting should occur at trial.

We believe the general consensus identified in *Yonemoto* is consistent with *Barnett* and with the text

of the ADA itself. *Barnett* recognized that, as a practical matter, an employer's failure to engage in the interactive process limits the employee's access to information about what types of accommodations might have been possible. This informational imbalance, in part, drove the court in *Barnett* to fashion the burden-shifting "consequence" for employers who fail to engage. *Id.* at 1115. This remedial burden shifting, however, is a departure from the generally understood apportionment of burdens of proof to plaintiffs. It also is a departure from the ADA itself which does not place the burden of disproving a reasonable accommodation on the employer, but rather, expressly places the burden on the employer to prove only the affirmative defense of "undue hardship." 42 U.S.C. § 12112(b)(5)(A). Moreover, employees may possess informational advantages in certain respects. *Barnett*, 228 F.3d at 1113 ("While employers have superior knowledge regarding the range of possible positions and can more easily perform analyses regarding the 'essential functions' of each, employees generally know more about their own capabilities and limitations."). As such, even without judicially created consequences, the negative effects of a failure to engage are not entirely one-sided.

Snapp's argument in the present case, in practical terms, asserts that *Barnett*'s burden shifting at summary judgment is an *insufficient* consequence for an employer's failure to engage. Snapp's argument is not unappealing. Still, the informational imbalances that prevail pre-lawsuit (when the interactive process should be taking place) are likely to be greatly diminished after full discovery and after the opportunity to present evidence for resolution of factual

questions. *See Yonemoto*, 114 F. Supp. 3d at 1116 ("Further, the plaintiff is in the best position to know his limitations, and by trial the plaintiff has had the benefit of full discovery such that he should be able to identify a specific reasonable accommodation he was denied."). We therefore conclude it is neither appropriate nor necessary to extend the *Barnett* and *Morton* burden-shifting framework to trial. The "consequence" of the denial of summary judgment is not a meaningless gesture, and when weighed against the confusion and complexity likely to arise at trial, burden shifting is best confined to summary judgment.[2]

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[2] We also note that Snapp only *indirectly* requested a burden-shifting instruction based on *Barnett*; he actually requested an imposition of liability as the direct consequence for BNSF's alleged failure to engage and argued "reasonable accommodation" was an affirmative defense that BNSF had waived. The statute itself is clear, however, that the employer's affirmative defense of "undue hardship" is a concept separate and distinct from the question of whether an otherwise reasonable accommodation exists. *See* 42 U.S.C. § 12112(b)(5)(A) (requiring reasonable accommodation "unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity"). As such, Snapp did not propose instructions that would have addressed the complexities identified in *Yonemoto*. Even on appeal, Snapp fails to address completely how a jury actually should be instructed if the jury also must decide whether an employer failed to engage. In the alternative, Snapp appears to argue that the district court, at a minimum, should have used an instruction proffered by BNSF, or some unidentified instruction, that would have notified the jury of the employer's duty to engage in the interactive process. The instruction BNSF proffered as to this point stated:

> When the employee requests a reasonable accommodation, the employer has an obligation to engage in an interactive process with the employee to identify and

C. Burden of Production or Burden of Persuasion

A separate and more straightforward instructional issue on appeal relates to the district court's general characterization of the burden of proof. Snapp's argument as to this issue stands alone, apart from any proposed burden shifting due to BNSF's alleged failure to engage in the interactive process. With this argument, Snapp asserts that the instructions given by the district court simply misstated as a burden of proof what he believes should have been characterized as a mere burden of production.

The actual instructions submitted to the jury stated: "[T]he plaintiff has the burden of proving the following elements by a preponderance of the evidence," Inst. No. 10; "To establish the defendant's duty to provide a reasonable accommodation, the plaintiff must prove, by a preponderance of the evidence . . . the employer could have made a reasonable accommodation that would have enabled the employee to perform the essential functions of the job," Inst. No. 13; and, "The Defendant asserts the affirmative defense of undue hardship . . . . The defendant has the burden of proving an affirmative

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> implement appropriate reasonable accommodations. An employer is not required to engage in a futile interactive process. If no reasonable accommodation exists that would allow an employee to do his job, an employer cannot be liable for failure to engage in the interactive process.

Def. Prop. Instr. No. 27. At trial, however, Snapp specifically argued *against* the use of this instruction. And, in any event, Snapp does not articulate how a failure to use BNSF's instruction or some unidentified "interactive process" instruction could have caused harm in the absence of a misallocated burden.

defense by a preponderance of the evidence." Inst. No. 14.

Snapp had requested an instruction that stated:

> With respect to a reasonable accommodation, plaintiff has the burden of identifying an accommodation that seems reasonable on its face. A plaintiff meets this burden by identifying a plausible accommodation or a method of accommodation that is reasonable in a typical case. Once a plaintiff makes this showing, defendant bears the burden of proving specific circumstances about this particular case that demonstrates an undue hardship.

Plaintiff's Proposed Instr. No. 23. And in his argument to the district court, Snapp repeatedly characterized the underlying issue of a reasonable accommodation (or the lack thereof) as an affirmative defense.

In general, in the summary-judgment context, a burden-shifting framework applies to the analysis of ADA reasonable-accommodation claims just as it applies to myriad other civil-rights claims. *See US Airways*, 535 U.S. at 401–02. In *US Airways*, the Supreme Court identified a framework adopted by "[m]any of the lower courts" in which the "plaintiff/employee . . . need only show that an 'accommodation' seems reasonable on its face . . . [and then] the defendant/ employer . . . must show special . . . circumstances that demonstrate undue hardship." *Id.* This burden of merely identifying a possible accommodation is a simple burden of production. Importantly, the Court did not purport to speak as to the parties' ultimate burdens at trial. Rather, the

Court specifically identified this framework for use "to defeat a defendant/employer's motion for summary judgment." *Id.* at 401.

The Ninth Circuit has distinguished expressly the summary-judgment burden from the plaintiff's ultimate burden of proof at trial:

> [The plaintiff/employee] has the burden of showing the existence of a reasonable accommodation that would have enabled him to perform the essential functions of an available job. To avoid summary judgment, however, [the plaintiff/employee] "need only show that an 'accommodation' *seems reasonable on its face*, i.e., ordinarily or in the run of cases."

*Dark v. Curry County*, 451 F.3d 1078, 1088 (9th Cir. 2006) (quoting *US Airways*, 535 U.S. at 401–02). This distinction is consistent with the generally limited use of the familiar burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Because burden-shifting frameworks like those articulated in *US Airways* and *McDonnell Douglas* are merely analytical tools for focusing arguments, they typically fall away at the end of the analysis and leave the ultimate burden of proof (the burden of persuasion) on the plaintiff. *See, e.g.*, *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 855–56 (9th Cir. 2002) ("Regardless of the method chosen to arrive at trial, it is not normally appropriate to introduce the *McDonnell Douglas* burden-shifting framework to the jury. At that stage, the framework 'unnecessarily evade[s] the ultimate question of discrimination *vel non*.'" (citations and footnote omitted)), *aff'd*, 539 U.S. 90 (2003).

Snapp relies upon *US Airways* to support his argument that the burden-of-production/burden-of-persuasion bifurcation carries over into all ADA trials. *US Airways*, however, does not support this contention for two reasons. First, the Court in *US Airways* was addressing a summary-judgment ruling, not a trial issue. 535 U.S. at 395. And second, the Court was not addressing a general question regarding the allocation of the burden of proof. Rather, in *US Airways*, the Supreme Court addressed how a court should consider the existence of an employer's otherwise non-discriminatory seniority-preference system when assessing a reasonable-accommodation claim. *Id.* at 395–96. Far from concluding a plaintiff carries only some minimal burden at trial, the Court concluded, instead, that a plaintiff at summary judgment must show "special circumstances" to justify an accommodation that would violate a seniority-preference system. *Id.* at 405–06 ("[W]e do mean to say that the plaintiff must bear the burden of showing special circumstances that make an exception from the seniority system reasonable in the particular case."). The Court, therefore, in no manner suggested it was lessening a burden or shifting more general burden of proof at trial *away from* an ADA reasonable-accommodation plaintiff.

We conclude, based upon *Dark*, that the district court properly described Snapp's burden as a burden of proof and properly refused Snapp's requested instruction.

D. Motion for Judgment as a Matter of Law

Finally, as a separate matter, Snapp argues that the district court erroneously denied his motion for

judgment as a matter of law. Specifically, Snapp argues that a corporate designee for BNSF made binding admissions that should have resulted in a determination, as a matter of law, that Snapp requested an accommodation and BNSF failed to engage in the interactive process. We find no error in the denial of the motion for judgment as a matter of law.

During discovery, BNSF designated Human Resources Director Dane Freshour as its Fed. R. Civ. P. 30(b)(6) corporate representative. During Freshour's deposition, counsel for Snapp read isolated sentences from Snapp's letters to BNSF and elicited responses from Freshour. Snapp correctly notes that, in these responses, Freshour appeared to indicate Snapp had requested a reasonable accommodation and BNSF had failed to engage in the interactive process. Snapp argues these statements conclusively bind BNSF.

Apart from Freshour's answers to these questions in the depositions, however, the record contains a full history of communications between the parties showing that Snapp communicated repeatedly with BNSF, sought reinstatement of his long-term disability benefits, and accused BNSF, CIGNA, and his doctors of conspiring against him to deny him benefits. Moreover, two of Snapp's letters included doctor's notes that did not release him to work. Rather, the doctor's notes stated (1) it would not be safe for Snapp to return to work, and (2) he might be able to return to work in the future if treatment is "further optimized." The sentences Snapp's attorney asked Freshour about in the deposition were taken from these same letters—letters that were long and dense and primarily

addressed Snapp's grievances about his terminated disability-insurance payments. At trial, the BNSF employee who had been communicating with Snapp through these letters, Emery, testified that she believed Snapp's letters were an attempt to reinstate his disability-insurance benefits. She also testified that she understood a reference by Snapp to "reasonable accommodation" to be a reference to CIGNA policy provisions that he had attached to his letter and that concerned rehabilitation.

Finally, BNSF's reply letters directed Snapp to review open positions and contact human resources, neither of which he did.

At trial, Freshour was questioned about his deposition responses. Snapp, therefore, was not limited in his ability to use the corporate designee's deposition as evidence. And his letters were admitted into evidence for the jury to consider. Taken in the light most favorable to the verdict, the record amply supports the view that Snapp neither requested an accommodation nor took advantage of resources that could have opened the door for the interactive process or a possible accommodation.

The only issue meriting discussion as to the motion for judgment as a matter of law, then, is whether BNSF was bound by Freshour's deposition responses such that the jury should not have been allowed to consider other evidence. "[A] corporation *generally* cannot present a theory of the facts that differs from that articulated by the designated Rule 30(b)(6) representative." 7 James Wm. Moore et al., *Moore's Federal Practice* § 30.25[3] (3d ed. 2016) (emphasis added). As such, "courts have ruled that because a

Rule 30(b)(6) designee testifies on behalf of the entity, the entity is not allowed to defeat a motion for summary judgment based on an affidavit that conflicts with its Rule 30(b)(6) deposition or contains information that the Rule 30(b)(6) deponent professed not to know." *Id.*

This general proposition should not be overstated, however, because it applies only where the purportedly conflicting evidence truly, and without good reason or explanation, is in conflict, *i.e.*, where it cannot be deemed as clarifying or simply providing full context for the Rule 30(b)(6) deposition. *See, e.g.*, *MKB Constructors v. Am. Zurich Ins.*, 49 F. Supp. 3d 814, 829 n.11 (W.D. Wash. 2014) ("[A] party cannot rebut the testimony of its Rule 30(b)(6) witness when, as here, the opposing party has relied on the Rule 30(b)(6) testimony, and there is no adequate explanation for the rebuttal."); *Hyde v. Stanley Tools*, 107 F. Supp. 2d 992, 993 (E.D. La. 2000) (striking an affidavit that "directly contradict[ed]" the party's Rule 30(b)(6) deposition when the party did not provide a "reasonable explanation" for the inconsistency), *aff'd*, 31 F. App'x 151 (5th Cir. 2001) (per curiam). Moreover, it is important to distinguish between the use of a Rule 30(b)(6) designee's comments as to ultimate legal conclusions as contrasted with statements to establish background facts:

> the testimony of a Rule 30(b)(6) deponent does not absolutely bind the corporation in the sense of a judicial admission, but rather is evidence that, like any other deposition testimony, can be contradicted and used for impeachment purposes. The Rule 30(b)(6) testimony also is not

> binding against the organization in the sense that the testimony can be corrected, explained and supplemented, and the entity is not "irrevocably" bound to what the fairly prepared and candid designated deponent happens to remember during the testimony.

7 James Wm. Moore, et al., *Moore's Federal Practice* § 30.25[3] (3d ed. 2016). "Finally, a Rule 30(b)(6) deponent's own interpretation of the facts or legal conclusions do not bind the entity." *Id.*

The Tenth Circuit recently discussed limitations and challenges to Rule 30(b)(6) testimony, stating, "the 'majority of courts to reach the issue . . . treat the testimony of a Rule 30(b)(6) representative as merely an evidentiary admission, and do not give the testimony conclusive effect.'" *Vehicle Mkt. Research, Inc. v. Mitchell Int'l, Inc.*, 839 F.3d 1251, 1260 (10th Cir. 2016) (citation omitted); *see also Keepers, Inc. v. City of Milford*, 807 F.3d 24, 34 (2d Cir. 2015) ("[The plaintiff] rightly notes that an organization's deposition testimony is binding in the sense that whatever its deponent says can be used against the organization. But Rule 30(b)(6) testimony is not binding in the sense that it precludes the deponent from correcting, explaining, or supplementing its statements." (footnote and quotation marks omitted)); *A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001) ("[T]estimony given at a Rule 30(b)(6) deposition is evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes." (quoting *Indus. Hard Chrome, Ltd. v. Hetran, Inc.*, 92 F. Supp. 2d 786, 791 (N.D. Ill. 2000))); *S. Wine & Spirits of Am., Inc. v. Div. of Alcohol &*

*Tobacco Control*, 731 F.3d 799, 811 (8th Cir. 2013) ("A 30(b)(6) witness's legal conclusions are not binding on the party who designated him, and a designee's testimony likely does not bind [its employer] in the sense of a judicial admission." (citation omitted)).

Snapp essentially seeks to take Freshour's deposition answers to leading questions examining isolated sentences from dense letters and use those answers as legal or judicial admissions as to whether Snapp requested an accommodation and whether BNSF engaged in the interactive process. His proposed limitations cut severely against the jury's truth-seeking function. The jury was entitled to, and did, hear the full evidence, see the full letters, see completely what Snapp communicated to BNSF, and see what BNSF said in response. The district court did not err in letting the jury hear evidence to explore and explain the full communications between the parties. As such, the district court did not err in denying the motion for judgment as a matter of law.

**AFFIRMED.**

## APPENDIX B

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF WASHINGTON**
**AT TACOMA**

**CASE NUMBER: C10-5577RBL**

**[Filed April 28, 2015]**

DANNY SNAPP,
Plaintiff,

v.

BURLINGTON NORTHERN SANTA FE RAILWAY,
Defendant.

**JUDGMENT IN A CIVIL CASE**

XX **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

The Jury found that Defendant did not discriminate against Plaintiff in violation of the Americans with Disabilities Act.

The Jury Found that Defendant did not wrongfully discharge Plaintiff under Washington law.

Dated: April 28, 2015

William M. McCool
Clerk

/s/
Deputy Clerk

## APPENDIX C

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**No. 15-35410**
**D.C. No. 3:10-cv-05577-RBL**
**Western District of Washington, Tacoma**

**[Filed August 1, 2018]**

DANNY SNAPP,
Plaintiff-Appellant,

v.

UNITED TRANSPORTATION UNION,
Defendant,

and

BURLINGTON NORTHERN
SANTA FE RAILWAY COMPANY,
Defendant-Appellee.

ORDER

Before: FERNANDEZ, W. FLETCHER, and MELLOY,[*] Circuit Judges.

[*] The Honorable Michael J. Melloy, United States Circuit Judge for the U.S. Court of Appeals for the Eighth Circuit, sitting by designation.

The panel has voted unanimously to deny the petition for rehearing. Judge W. Fletcher voted to deny the petition for rehearing en banc, and Judges Fernandez and Melloy so recommend.

The full court has been advised of the petition for en banc rehearing, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are **DENIED**.

## APPENDIX D

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**No. 12-35714**
**D.C. No. 3:10-cv-05577-RBL**

**[Filed November 5, 2013]**

DANNY SNAPP,
Plaintiff - Appellant,

v.

UNITED TRANSPORTATION UNION,
Defendant,

And

BURLINGTON NORTHERN &
SANTA FE RAILWAY COMPANY,
Defendant - Appellee.

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Ronald B. Leighton, District Judge, Presiding

Argued and Submitted October 10, 2013
Seattle, Washington

Before: TASHIMA, GRABER, and MURGUIA, Circuit Judges.

Danny Snapp appeals from the district court's grant of summary judgment to Burlington Northern Santa Fe Railway ("BNSF") on his discrimination claim under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112, and related Washington state law claim for wrongful discharge. We reverse and remand for further proceedings.

Once a disabled employee has given an employer "notification of [his] disability and the desire for accommodation," *Vinson v. Thomas*, 288 F.3d 1145, 1154 (9th Cir. 2002) (citing *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1114 (9th Cir. 2000) (en banc), *vacated on other grounds*, 535 U.S. 391 (2002)), "there is a mandatory obligation to engage in an informal interactive process 'to clarify what the individual needs and identify the appropriate accommodation.'" *Id.* (quoting *Barnett*, 228 F.3d at 1112). "[A]n employer cannot prevail at the summary judgment stage if there is a genuine dispute as to whether the employer

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

engaged in good faith in the interactive process." *Barnett*, 228 F.3d at 1116.

Prior to being terminated by BNSF for failure to secure a new position with the company following an extended disability leave, Snapp had sent BNSF a job application letter and a letter from his physician that referred to his ongoing disability and to his need for accommodations to perform certain tasks. While the purpose of the letter may be unclear, it would not be unreasonable for a fact-finder to determine that the letter was a notification of his disability and desire for accommodation, which may have included reassignment to an appropriate position. 42 U.S.C. § 12111(9)(B). Such a request would have obligated BNSF to engage in an interactive process with Snapp. Consequently, there is a genuine dispute over whether BNSF engaged in good faith in a required interactive process, and failure to do so would constitute discrimination under the ADA. 42 U.S.C. § 12112(b)(5); 29 C.F.R. § 1630.2(o)(3). It was not possible to grant summary judgment to BNSF based on the conclusion that "BNSF did not terminate Snapp because of his disability" where there was a dispute over whether Snapp's termination resulted from BNSF's failure to engage in a mandatory interactive process.

Similarly, the district court erred in granting summary judgment to BNSF on Snapp's wrongful discharge claim because BNSF offered a "justification . . . for Snapp's termination [that] is completely divorced from any possible public policy at issue." Terminating an employee because of his disability would "jeopardize the public policy against discrimination." *Becker v. Cashman*, 114 P.3d 1210,

1215 (Wash. Ct. App. 2005) (citing Wash. Rev. Code § 49.60.180). Because there is a genuine dispute over whether Snapp's termination occurred as a result of BNSF's failure to respond appropriately to requested disability accommodations, summary judgment was not available to BNSF on this record.

**REVERSED** and **REMANDED**.

## APPENDIX E

### Regulations and Statutes

**29 C.F.R. § 1630.2 - Definitions.**

**(a)** ***Commission*** means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 ( 42 U.S.C. 2000e-4).

**(b)** ***Covered Entity*** means an employer, employment agency, labor organization, or joint labor management committee.

(**c**) ***Person, labor organization, employment agency, commerce and industry affecting commerce*** shall have the same meaning given those terms in section 701 of the Civil Rights Act of 1964 ( 42 U.S.C. 2000e).

(**d**) ***State*** means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

**(e)** ***Employer*** -

> **(1)** ***In general.*** The term employer means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, from July 26, 1992 through July 25, 1994, an employer means a person engaged

in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year and any agent of such person.

**(2)** ***Exceptions.*** The term employer does not include -

**(i)** The United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

**(ii)** A bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

**(f)** ***Employee*** means an individual employed by an employer.

**(g)** ***Definition of "disability"*** -

**(1)** ***In general. Disability*** means, with respect to an individual -

**(i)** A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

**(ii)** A record of such an impairment; or

**(iii)** Being regarded as having such an impairment as described in paragraph (l) of this section. This means that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both "transitory and minor."

**(2)** An individual may establish coverage under any one or more of these three prongs of the definition of disability, i.e., paragraphs (g)(1)(i) (the "actual disability" prong), (g)(1)(ii) (the "record of" prong), and/or (g)(1)(iii) (the "regarded as" prong) of this section.

**(3)** Where an individual is not challenging a covered entity's failure to make reasonable accommodations and does not require a reasonable accommodation, it is generally unnecessary to proceed under the "actual disability" or "record of" prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation 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. An individual may choose, however, to proceed under the "actual disability" and/or "record of" prong regardless of whether the individual is challenging a covered entity's failure to make reasonable accommodations or requires a reasonable accommodation.

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**NOTE TO PARAGRAPH (G):**
See § 1630.3 for exceptions to this definition.

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**(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.

**(i)** ***Major life activities*** -

**(1)** ***In general.*** Major life activities include, but are not limited to:

**(i)** Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working; and

**(ii)** The operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.

**(2)** In determining other examples of major life activities, the term "major" shall not be interpreted strictly to create a demanding standard for disability. ADAAA section 2(b)(4) (Findings and

Purposes). Whether an activity is a "major life activity" is not determined by reference to whether it is of "central importance to daily life."

**(j)** ***Substantially limits*** -

**(1)** ***Rules of construction.*** The following rules of construction apply when determining whether an impairment substantially limits an individual in a major life activity:

**(i)** The term "substantially limits" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. "Substantially limits" is not meant to be a demanding standard.

**(ii)** An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

**(iii)** The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment "substantially limits" a

major life activity should not demand extensive analysis.

**(iv)** The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term "substantially limits" shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for "substantially limits" applied prior to the ADAAA.

**(v)** The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

**(vi)** The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

**(vii)** An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

**(viii)** An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

**(ix)** The six-month "transitory" part of the "transitory and minor" exception to "regarded as" coverage in § 1630.15(f) does not apply to the definition of "disability" under paragraphs (g)(1)(i) (the "actual disability" prong) or (g)(1)(ii) (the "record of" prong) of this section. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.

**(2)** ***Non-applicability to the "regarded as" prong.*** Whether an individual's impairment "substantially limits" a major life activity is not relevant to coverage under paragraph (g)(1)(iii) (the "regarded as" prong) of this section.

**(3)** ***Predictable assessments*** - (i) The principles set forth in paragraphs (j)(1)(i) through (ix) of this section are intended to provide for more generous coverage and application of the ADA's prohibition on discrimination through a framework that is predictable, consistent, and workable for all individuals and entities with rights and responsibilities under the ADA as amended.

**(ii)** Applying the principles set forth in paragraphs (j)(1)(i) through (ix) of this section, the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under paragraphs (g)(1)(i) (the "actual disability" prong) or (g)(1)(ii)

(the "record of" prong) of this section. Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

**(iii)** For example, applying the principles set forth in paragraphs (j)(1)(i) through (ix) of this section, it should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated: Deafness substantially limits hearing; blindness substantially limits seeing; an intellectual disability (formerly termed mental retardation) substantially limits brain function; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; multiple sclerosis substantially limits neurological function; muscular dystrophy substantially limits neurological function; and major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia

substantially limit brain function. The types of impairments described in this section may substantially limit additional major life activities not explicitly listed above.

**(4)** ***Condition, manner, or duration*** -

**(i)** At all times taking into account the principles in paragraphs (j)(1)(i) through (ix) of this section, in determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the condition under which the individual performs the major life activity; the manner in which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.

**(ii)** Consideration of facts such as condition, manner, or duration may include, among other things, consideration of the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function. In addition, the non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity.

**(iii)** In determining whether an individual has a disability under the "actual disability" or "record of" prongs of the definition of disability, the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population.

**(iv)** Given the rules of construction set forth in paragraphs (j)(1)(i) through (ix) of this section, it may often be unnecessary to conduct an analysis involving most or all of these types of facts. This is particularly true with respect to impairments such as those described in paragraph (j)(3)(iii) of this section, which by their inherent nature should be easily found to impose a substantial limitation on a major life activity, and for which the individualized assessment should be particularly simple and straightforward.

**(5)** ***Examples of mitigating measures*** - Mitigating measures include, but are not limited to:

**(i)** Medication, medical supplies, equipment, or appliances, low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aid(s) and cochlear implant(s) or other

implantable hearing devices, mobility devices, and oxygen therapy equipment and supplies;

**(ii)** Use of assistive technology;

**(iii)** Reasonable accommodations or "auxiliary aids or services" (as defined by 42 U.S.C. 12103(1));

**(iv)** Learned behavioral or adaptive neurological modifications; or

**(v)** Psychotherapy, behavioral therapy, or physical therapy.

**(6)** ***Ordinary eyeglasses or contact lenses*** - defined. Ordinary eyeglasses or contact lenses are lenses that are intended to fully correct visual acuity or to eliminate refractive error.

**(k)** ***Has a record of such an impairment*** -

**(1)** ***In general.*** An individual has a record of a disability if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

**(2)** ***Broad construction.*** Whether an individual has a record of an impairment that substantially limited a major life activity shall be construed broadly to the maximum extent permitted by the ADA and should not demand extensive analysis. An individual will be considered to have a record of a disability if the individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as

having had such an impairment. In determining whether an impairment substantially limited a major life activity, the principles articulated in paragraph (j) of this section apply.

**(3)** ***Reasonable accommodation.*** An individual with a record of a substantially limiting impairment may be entitled, absent undue hardship, to a reasonable accommodation if needed and related to the past disability. For example, an employee with an impairment that previously limited, but no longer substantially limits, a major life activity may need leave or a schedule change to permit him or her to attend follow-up or "monitoring" appointments with a health care provider.

**(l)** ***"Is regarded as having such an impairment."*** The following principles apply under the "regarded as" prong of the definition of disability ( paragraph (g)(1)(iii) of this section) above:

**(1)** Except as provided in § 1630.15(f), an individual is "regarded as having such an impairment" if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity. Prohibited actions include but are not limited to refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment

**(2)** Except as provided in § 1630.15(f), an individual is "regarded as having such an impairment" any

time a covered entity takes a prohibited action against the individual because of an actual or perceived impairment, even if the entity asserts, or may or does ultimately establish, a defense to such action.

**(3)** Establishing that an individual is "regarded as having such an impairment" does not, by itself, establish liability. Liability is established under title I of the ADA only when an individual proves that a covered entity discriminated on the basis of disability within the meaning of section 102 of the ADA, 42 U.S.C. 12112.

**(m)** The term "***qualified,"*** with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position. See § 1630.3 for exceptions to this definition.

**(n)** ***Essential functions*** -

**(1*) In general*.** The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.

**(2)** A job function may be considered essential for any of several reasons, including but not limited to the following:

**(i)** The function may be essential because the reason the position exists is to perform that function;

**(ii)** The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

**(iii)** The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

**(3)** Evidence of whether a particular function is essential includes, but is not limited to:

**(i)** The employer's judgment as to which functions are essential;

**(ii)** Written job descriptions prepared before advertising or interviewing applicants for the job;

**(iii)** The amount of time spent on the job performing the function;

**(iv)** The consequences of not requiring the incumbent to perform the function;

**(v)** The terms of a collective bargaining agreement;

**(vi)** The work experience of past incumbents in the job; and/or

**(vii)** The current work experience of incumbents in similar jobs.

**(o)** ***Reasonable accommodation.***

**(1)** The term ***reasonable accommodation*** means:

**(i)** Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

**(ii)** Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or

**(iii)** Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

**(2)** ***Reasonable accommodation*** may include but is not limited to:

**(i)** Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

**(ii)** Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified

readers or interpreters; and other similar accommodations for individuals with disabilities.

**(3)** To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

**(4)** A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of disability under the "actual disability" prong ( paragraph (g)(1)(i) of this section), or "record of" prong ( paragraph (g)(1)(ii) of this section), but is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the "regarded as" prong ( paragraph (g)(1)(iii) of this section).

**(p)** ***Undue hardship*** -

**(1)** ***In general. Undue hardship*** means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth in paragraph (p)(2) of this section.

**(2)** ***Factors to be considered.*** In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

**(i)** The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;

**(ii)** The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

**(iii)** The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

**(iv)** The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

**(v)** The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

**(q)** ***Qualification standards*** means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.

**(r)** ***Direct Threat*** means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

**(1)** The duration of the risk;

**(2)** The nature and severity of the potential harm;

**(3)** The likelihood that the potential harm will occur; and

**(4)** The imminence of the potential harm.

**29 C.F.R. § 1630.9 - Not making reasonable accommodation.**

**(a)** It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

**(b)** It is unlawful for a covered entity to deny employment opportunities to an otherwise qualified job applicant or employee with a disability based on the

need of such covered entity to make reasonable accommodation to such individual's physical or mental impairments.

**(c)** A covered entity shall not be excused from the requirements of this part because of any failure to receive technical assistance authorized by section 507 of the ADA, including any failure in the development or dissemination of any technical assistance manual authorized by that Act.

**(d)** An individual with a disability is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered qualified.

**(e)** A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of disability under the "actual disability" prong ( § 1630.2(g)(1)(i)), or "record of" prong ( § 1630.2(g)(1)(ii)), but is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the "regarded as" prong ( § 1630.2(g)(1)(iii)).

## 42 U.S.C. § 1981a - Damages in cases of intentional discrimination in employment

### (a) RIGHT OF RECOVERY

#### (1) CIVIL RIGHTS

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e–5, 2000e–16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e–2, 2000e–3, 2000e–16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

#### (2) DISABILITY

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e–5, 2000e–16] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of title 29 and the regulations implementing section 791 of title 29, or who violated the requirements of section 791 of title 29 or the regulations implementing section 791 of title 29 concerning the provision of a

reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

**(3) REASONABLE ACCOMMODATION AND GOOD FAITH EFFORT**

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C. 12112(b)(5)] or regulations implementing section 791 of title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

**(b) COMPENSATORY AND PUNITIVE DAMAGES**

**(1) DETERMINATION OF PUNITIVE DAMAGES**

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or

with reckless indifference to the federally protected rights of an aggrieved individual.

**(2) EXCLUSIONS FROM COMPENSATORY DAMAGES**
Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. 2000e–5(g)].

**(3) LIMITATIONS**
The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more

calendar weeks in the current or preceding calendar year, $300,000.

**(4) CONSTRUCTION**
Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

**(c) JURY TRIAL**
If a complaining party seeks compensatory or punitive damages under this section—

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3).

**(d) DEFINITIONS**
As used in this section:

**(1) COMPLAINING PARTY**
The term "complaining party" means—

(A) in the case of a person seeking to bring an action under subsection (a)(1), the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2), the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 794a(a)(1) of title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 [42 U.S.C. 12111 et seq.].

**(2) DISCRIMINATORY PRACTICE**
The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a).

## 42 U.S.C. § 12111 - Definitions

As used in this subchapter:

**(1) COMMISSION**
The term "Commission" means the Equal Employment Opportunity Commission established by section 2000e–4 of this title.

**(2) COVERED ENTITY**
The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

**(3) DIRECT THREAT**
The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

**(4) EMPLOYEE**
The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

**(5) EMPLOYER**

**(A) In general**
The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or

more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

**(B) Exceptions** The term "employer" does not include—

**(i)** the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

**(ii)** a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26.

**(6) ILLEGAL USE OF DRUGS**

**(A) In general**
The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C. 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

**(B) Drugs**
The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C. 812].

**(7) PERSON, ETC.**
The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

**(8) QUALIFIED INDIVIDUAL**
The term "qualified individual" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

**(9) REASONABLE ACCOMMODATION** The term "reasonable accommodation" may include—

**(A)** making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

**(B)** job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

**(10) UNDUE HARDSHIP**

**(A) In general**
The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

**(B) Factors to be considered** In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

**(i)** the nature and cost of the accommodation needed under this chapter;

**(ii)** the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

**(iii)** the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

**(iv)** the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

## 42 U.S.C. § 12112 - Discrimination

**(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), the term "discriminate against a qualified individual on the basis of disability" includes—

> **(1)** limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;
>
> **(2)** participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);
>
> **(3)** utilizing standards, criteria, or methods of administration—
>
> > **(A)** that have the effect of discrimination on the basis of disability; or

**(B)** that perpetuate the discrimination of others who are subject to common administrative control;

**(4)** excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

**(5)**

**(A)** not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

**(B)** denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

**(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; and

**(7)** failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

**(C) COVERED ENTITIES IN FOREIGN COUNTRIES**

**(1) IN GENERAL**

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

**(2) CONTROL OF CORPORATION**

**(A) Presumption**

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

**(B) Exception**

This section shall not apply with respect to the foreign operations of an employer that is a

foreign person not controlled by an American employer.

**(C) Determination** For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on—

**(i)** the interrelation of operations;

**(ii)** the common management;

**(iii)** the centralized control of labor relations; and

**(iv)** the common ownership or financial control,

of the employer and the corporation.

**(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).

## APPENDIX F

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF WASHINGTON**
**AT TACOMA**

**NO. 3:10-cv-05577 RBL**
**THE HONORABLE RONALD B. LEIGHTON**

**[Filed March 18, 2015]**

| | |
|---|---|
| DANNY SNAPP, | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| BURLINGTON NORTHERN SANTA FE RAILWAY, | ) |
| | ) |
| Defendant. | ) |

**JOINT STATEMENT OF DISPUTED INSTRUCTIONS**

* * *

**PLAINTIFF'S REQUESTED JURY INSTRUCTION No. 23**

**ADA—QUALIFIED INDIVIDUAL**

The second element of the ADA claim that the plaintiff must prove is that the plaintiff is a qualified individual under the ADA.

The term qualified individual means an individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. The individual must satisfy the requisite skill, experience, education, and other job-related requirements of the employment position.

With respect to a reasonable accommodation, plaintiff has the burden of identifying an accommodation that seems reasonable on its face. A plaintiff meets this burden by identifying a plausible accommodation or a method of accommodation that is reasonable in a typical case. Once plaintiff makes this showing, defendant bears the burden of proving specific circumstances about this particular case that demonstrates undue hardship.

*US Airways, Inc. v Barnett*, 535 US 391, 402 (2002)

Ninth Circuit Model Instruction 12.6

*Morton v United Parcel Service*, 272 F3d 1249, 1256 n. 7 (9th Cir 2001)

*Barnett v US Air, Inc.*, 228 F3d 1105, 1116 (9th Cir 2000)

TO THE COURT: Defendant has not pleaded an affirmative defense of undue hardship or that no accommodation was possible. Plaintiff objects to trying these untimely raised affirmative defenses. The court should not permit evidence or arguments on these defenses. The matter in brackets is only offered in the event that the court overrules plaintiff's objections and permits the untimely defenses.

* * *

**PLAINTIFF'S REQUESTED JURY INSTRUCTION No. 27**

**ADA – INTERACTIVE PROCESS**

When the employee or someone on his behalf requests accommodation, the employer has a mandatory duty to initiate an interactive process to clarify what the individual needs and to identify the appropriate accommodation.

The interactive process is a process to identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations, including but not limited to the following steps:

(A) An analysis of the subject job and its essential functions;

(B) Ascertainment of job-related limitations imposed by the disability;

(C) Identification of potential accommodations and the effectiveness of each; and

(D) Consideration of the preference of the employee.

If plaintiff proves defendant failed to initiate the interactive process or to participate in good faith in the interactive process, your verdict should be for plaintiff [unless defendant proves an affirmative defense.]

*Barnett v US Air*, 228 F3d 1105, 1112-1116 (9th Cir 2000).

EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the ADA at 6.

TO THE COURT: Defendant has raised no affirmative defense that no reasonable accommodation was possible, that reasonable accommodation would pose an undue hardship or that plaintiff's employment posed a direct threat of harm. Plaintiff objects to trying any of these untimely affirmative defenses at this late date. The bracketed matter is submitted only if the court overrules plaintiff's objections (which it should not.)

* * *

**DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 27**

**ADA—INTERACTIVE PROCESS**

When the employee requests a reasonable accommodation, the employer has an obligation to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations.

An employer is not required to engage in a futile interactive process. If no reasonable accommodation exists that would allow an employee to do his job, an employer cannot be liable for failure to engage in the interactive process.

Source: *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128 (2001); *Valdez v. McGill*, 462 Fed. Appx. 814, 2012 U.S. App. LEXIS 2783 (10th Cir. 2012).

**PLAINTIFF'S REQUESTED JURY INSTRUCTION No. 28**

**AFFIRMATIVE DEFENSE – REASONABLE ACCOMMODATION**

Defendant is not liable for a breach of the duty to provide reasonable accommodation if defendant proves that no reasonable accommodation of plaintiff's disability was possible.

TO THE COURT: Defendant has not pleaded an affirmative defense alleging that no reasonable accommodation of plaintiff's disability was possible. Plaintiff objects to trying this untimely raised affirmative defense. Plaintiff's Requested Jury Instruction No. 28 is only submitted in the event that the court overrules plaintiff's objection, (which the court should not).

**Defendant's Objection to Plaintiff's Proposed Instruction No. 28**

This instruction improperly puts the burden of proof on the defendant regarding whether a reasonable accommodation exists and characterizes this factor as an affirmative defense. The plaintiff bears the initial burden of identifying an accommodation that is reasonable on its face. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401-02 (2002). This instruction is inaccurate and unnecessary. Moreover, it is contrary to this Court's order on plaintiff's motions in limine.

Defendant has consistently argued that no reasonable accommodation existed. Plaintiff has known BNSF's position for as long as plaintiff focused on the

reasonable accommodation claim, and will suffer no prejudice as a result of BNSF asserting it at trial.

* * *

## APPENDIX G

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF WASHINGTON**
**AT TACOMA**

**CASE NO. C10-5577 RBL**
**THE HONORABLE RONALD B. LEIGHTON**

**[Filed April 27, 2015]**

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|---|---|
| DANNY SNAPP, | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| BURLINGTON NORTHERN SANTA FE RAILWAY, | ) |
| | ) |
| Defendant. | ) |
| | ) |

JURY INSTRUCTIONS

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INSTRUCTION NO. 13

One form of discrimination is a failure to reasonably accommodate an employee's disability. To establish the defendant's duty to provide a reasonable accommodation, the plaintiff must prove, by a preponderance of the evidence, both of the following elements:

1. the employee requested an accommodation due to a disability; and

2. the employer could have made a reasonable accommodation that would have enabled the employee to perform the essential functions of the job.

Under the ADA, accommodations by the defendant may include, out are not limited to:

1. making existing facilities used by employees readily accessible to and usable by individuals with disabilities;

2. job restructuring;

3. part-time or modified work schedule;

4. reassignment to a vacant position;

5. a short leave of absence with a definite end date; or

6. other similar accommodations for individuals with sleep apnea.

It is for you to determine whether an accommodation is reasonable.

An accommodation is not reasonable if it includes changing or eliminating any essential function of employment, shifting any of the essential functions of the subject employment to others, or creating a new position for the disabled employee.

An accommodation is generally not reasonable when it consists of a request to be reassigned to another job position that would be in violation of an employer's

seniority system. This general rule, however, does not apply if the plaintiff has proved, by a preponderance of the evidence, special circumstances such as the seniority system provides for exceptions, or the employer has exercised changes to the seniority system.

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