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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

EQUAL EMPLOYMENT  
OPPORTUNITY COMMISSION,

Plaintiff,

v.

BNSF RAILWAY COMPANY,

Defendant.

CASE NO. C14-1488 MJP

ORDER ON CROSS MOTIONS FOR  
SUMMARY JUDGMENT, BNSF’S  
MOTION FOR SANCTIONS,  
BNSF’S MOTION TO EXCLUDE  
TESTIMONY

THIS MATTER comes before the Court on Plaintiff Equal Employment Opportunity Commission’s (“EEOC’s”) Partial Motion for Summary Judgment and Defendant BNSF Railway Company’s (“BNSF’s”) Motion for Summary Judgment (Dkt. No. 91). Having reviewed the Motions, the Responses (Dkt. Nos. 98, 96), the Replies (Dkt. Nos. 99, 100), and all related papers, the Court hereby GRANTS EEOC’s Motion on ADA liability and DENIES BNSF’s Motion. A trial on damages will proceed as scheduled. After reviewing the related briefing, the Court further DENIES BNSF’s Motion for Sanctions (Dkt. No. 114) and finds BNSF’s Motion to Exclude Testimony (Dkt. No. 90) moot.

ORDER ON CROSS MOTIONS FOR SUMMARY  
JUDGMENT, BNSF’S MOTION FOR  
SANCTIONS, BNSF’S MOTION TO EXCLUDE  
TESTIMONY- 1

1 **Background**

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

4 I. Factual Background

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

8 Senior patrol officers with BNSF are certified police officers with responsibilities and  
9 powers similar to those of government police officers. See 49 U.S.C. § 28101. Prior to applying  
10 for the position with BNSF, Mr. Holt had been working as a patrol deputy and criminal  
11 investigator with the Pulaski County Sherriff's Office in Arkansas between 2006 and 2011. (Holt  
12 Decl., Dkt. No. 88 at 1–2; Holt Dep., Dkt. No. 85, Ex. 1 at 57:4–12; Holt Dep., Dkt. No. 91 at  
13 10–20.)

14 In 2007 Mr. Holt suffered a back injury after lifting weights. (Holt Dep., Dkt. No. 91, Ex.  
15 1 at 23:17–22; Heck Dep., Dkt. No. 91, Ex. 5 at 14:14–19.) According to an August 2007  
16 medical record, several months after the injury, a doctor hypothesized the injury could have  
17 occurred during the workout or previously during his work as a police officer. (Heck Dep., Dkt.  
18 No. 91, Ex. 5 at 71:6–14.) A 2007 MRI of Mr. Holt showed a two-level disc extrusion in his  
19 back. (Heck Dep., Dkt. No. 91, Ex. 5 at 27:15–28:21.) Mr. Holt was treated with epidural steroid  
20 injections, chiropractic care, physical therapy and medicines from 2007 to 2009 and continued to  
21 receive chiropractic treatments through 2011. (See Heck Dep., Dkt. No. 91, Ex. 5 at 111–127;  
22 Fender Records, Dkt. No. 91, Ex. 6.) He had an additional MRI in 2009, which showed a new  
23 disc extrusion but improvement in other areas. (Heck Dep., Dkt. No. 91, Ex. 5 at 59:11–60:17.)

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

3 In 2011 Mr. Holt interviewed for a position with BNSF. (Dkt. No. 91, Ex. 1 at 59:9–  
4 61:15.) He received a conditional offer subject to passing a medical examination and criminal  
5 background check. (Holt Dep., Dkt. No. 91, Ex. 1 at 61:18-62:8 & Ex. 2.)

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

15 Here, Mr. Holt answered “yes” to two items in CHS’s medical questionnaire: “Have you  
16 ever had a back injury” and “Do you currently have or have you ever had . . . [b]ack pain?” (Dkt.  
17 No. 91, Ex. 9 at 5–6.) He briefly explained, “Bulging dis[c] in 2007. Treated with chiropractic  
18 care.” (Id. at 5.) CHS conducted a follow-up interview in which records reflect that he reported  
19 he had non-work related back strain, namely a “bulging disc,” in 2007; had an MRI; and was  
20 treated by a chiropractor for only four to six months. (Id. at 10.) CHS requested “back MRs” and  
21 received Mr. Holt’s MRI from 2007. (Id.) Mr. Holt also provided a letter from his treating  
22 doctor, Dr. Heck, and a letter from his chiropractor, Dr. Fender. (Holt Dep., Dkt. No. 91, Ex. 1 at  
23 65:15–22.)

1 Mr. Holt also had a physical examination by a physician named Dr. Hixson, who was  
2 retained by CHS for this purpose. Again Mr. Holt reported a bulging disc and chiropractic  
3 treatment. Dr. Hixson reported to BNSF that she found no abnormalities; no restrictions were  
4 needed; and Holt was not likely to experience any symptoms in the next two years impairing his  
5 performance or presenting a risk to the health and safety of himself or others. (Hixson Dep., Dkt.  
6 No. 91, Ex. 10 at 35:14–37:16 & Ex. 1 at 71–74.) She did not have access to either the 2007 or  
7 2009 MRI, but assumed that he had had one based on his report of a bulging disc. (Hixson Dep.,  
8 Dkt. No. 91, Ex. 10 at 54:14–20.) She testified at her deposition that knowing that Mr. Holt had  
9 an extruded rather than bulging disc would have led her to “look[ ] at the back a little more  
10 closely and look[ ] more for signs of nerve root impingement.” (Id. at 52:13–21.) She agreed that  
11 it was “possible” that knowing that he had two extruded discs could have affected her  
12 assessment. (Id. at 52:22–53:2.)

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

21 Mr. Holt testified that he sought an MRI but the doctor he spoke to would not approve it  
22 because it was for a job application rather than because he was experiencing pain. (Dkt. No. 91,  
23 Ex. 1 at 79:1–13.) Through emails and/or phone calls with BNSF representatives, Mr. Holt

1 explained that because he had been asymptomatic since 2009, his doctor would not approve it,  
2 and therefore he would have to pay for the MRI. (Dkt. No. 30 at 3; Dkt. No. 85, Ex. A at 82:2–  
3 22.) An MRI at Mr. Holt’s doctor’s office in the absence of insurance would have cost  
4 approximately \$2,000. (Dkt. No. 91, Ex. 5 at 23:6–7.) Despite Mr. Holt’s requests, BNSF  
5 refused to waive the requirement. (Dkt. No. 85, Ex. A at 82:23–83:11.) Because Mr. Holt did not  
6 provide the MRI and other information Dr. Jarrard had requested, it treated him as having  
7 declined the position, although he had not. (Dkt. No. 91, Ex. 3 at 170:2–12.)

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

## 12 II. Procedural History and Summary of Argument

13 The Court previously denied BNSF’s renewed motion to dismiss for failure to state a  
14 claim. (Dkt. No. 28.) In the briefing on that motion, BNSF argued that the language of 42 U.S.C.  
15 § 12112(d) explicitly authorized a post-conditional-job-offer, preemployment follow-up request  
16 for an MRI after an initial medical examination required for all applicants if that request was tied  
17 to issues revealed by the initial exam. (Dkt. No. 21 at 4–6.) BNSF also responded to the EEOC’s  
18 argument that BNSF’s actions violated 42 U.S.C. § 12112(b)(6) by arguing that the EEOC’s  
19 theory that the request for an MRI could be a “selection criterion” contradicted EEOC  
20 interpretive guidance on a regulation interpreting that provision. (Id. at 6–7 (citing 29 C.F.R. §  
21 1630.14 App.)) The Court, citing § 12112(b)(6) and 29 C.F.R. § 1630.14(b), did not find either  
22 of these arguments persuasive. (Dkt. No. 28 at 5.)

1 BNSF now renews this argument in its motion for summary judgment, pointing out for  
2 the first time that § 12112(b)(6) is intended to function as a disparate impact test and arguing it is  
3 inappropriate to interpret “selection criterion” as an additional requirement imposed only on  
4 individuals whom the employer may perceive as disabled, an interpretation that would transform  
5 the provision into a disparate treatment test. (Dkt. No. 91 at 15.) It also repeats the argument that  
6 the EEOC’s interpretive guidance controls the scope of 29 C.F.R. § 1630.14(b) rather than  
7 explaining one way the regulation might come into play. (Dkt. No. 91 at 15–16 (citing 29 C.F.R.  
8 § 1630.14 App.).)

9 BNSF also argues that it did not decline to hire Holt on the basis of a “record of”  
10 disability because his records did not show a substantially limiting impairment and it did not  
11 decline to hire him on the basis of “regarded-as” disability because it did not know whether  
12 Holt’s prior or latent back condition constituted an actual impairment. (Dkt. No. 91 at 20–21.) In  
13 its motion, EEOC points out that the 2008 amendments to the ADA relaxed the definition of  
14 “regarded as” disability, see 42 U.S.C. § 12102(1)(C) & (3)(A), because Congress was  
15 concerned courts were interpreting the former definition too strictly. (Dkt. No. 84 at 12-13.) See  
16 generally 29 C.F.R. § 1630 App; ADA Amendments Act of 2008 (“ADAAA”), Pub. L. No. 110-  
17 325, 122 Stat. 3553 (2008).

18 The EEOC, meanwhile, argues it merits partial summary judgment on liability under §  
19 12102 of the ADA, but reserves the issue of damages for trial.

## 20 Discussion

### 21 I. Legal Standard

22 Summary judgment is appropriate if the evidence, when viewed in the light most  
23 favorable to the non-moving party, demonstrates that “there is no genuine dispute as to any  
24

1 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a);  
2 See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). If the movant meets this initial burden,  
3 then the burden shifts to the non-moving party to “designate specific facts” showing that there is  
4 a genuine issue of material fact for trial that precludes summary judgment. Celotex Corp., 477  
5 U.S. at 324. An issue of fact is “genuine” if it can reasonably be resolved in favor of either party.  
6 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of fact is “material” if it  
7 “might affect the outcome of the suit under the governing law.” Id.

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

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

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

17 Subsection (b) of § 12112, titled “Construction,” lists specific ways an employer might  
18 discriminate on the basis of disability, including (b)(6),  
19 using qualification standards, employment tests or other selection criteria that screen out  
20 or tend to screen out an individual with a disability or a class of individuals with  
21 disabilities unless the standard, test or other selection criteria, as used by the covered  
22 entity, is shown to be job-related for the position in question and is consistent with  
23 business necessity.  
24

1 § 12112(b)(6). Subsection (b) makes clear that the list is not exhaustive: it states that “the term  
2 ‘discriminate against a qualified individual on the basis of disability’ includes” the following  
3 acts, but does not limit discrimination to those acts. § 12112(b) (emphasis added).

4 The Parties’ dispute over BNSF’s request for an updated MRI from Mr. Holt centers on  
5 subsection (d), titled “Medical examinations and inquiries.” This provision specifies that medical  
6 examinations can constitute discrimination, § 12112(d), but also explicitly permits medical  
7 “employment entrance examination[s]” made after a conditional offer of employment but before  
8 employment duties have commenced so long as the examinations adhere to certain requirements,  
9 including that “the results of such examination are used only in accordance with [the ADA].” §  
10 12112(d)(3)(C). The EEOC regulation interpreting this section elaborates,

11 Medical examinations conducted in accordance with this section do not have to be job-  
12 related and consistent with business necessity. However, if certain criteria are used to  
13 screen out an employee or employees with disabilities as a result of such an examination  
14 or inquiry, the exclusionary criteria must be job-related and consistent with business  
15 necessity, and performance of the essential job functions cannot be accomplished with  
16 reasonable accommodation as required in this part.

17 29 C.F.R. § 1630.14(b)(3).

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

20 Under § 12112(d)(3)(C), an employer’s reasons for withdrawing a conditional job offer  
21 must be “job-related and consistent with business necessity.” 29 C.F.R. § 1630.14(b)(3).  
22 Moreover, the employer may only withdraw the conditional job offer if “performance of  
23 the essential job functions cannot be accomplished with reasonable accommodation.” Id.

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



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

5 Holiday v. City of Chattanooga, 206 F.3d 637, 643 (6th Cir. 2000) (emphasis added). The Ninth  
6 Circuit has not yet interpreted the circumstances in which employers are permitted to withdraw  
7 conditional offers in any depth. Cf. Norman-Bloodsaw v. Lawrence Berkeley Lab., 135 F.3d  
8 1260, 1273 (9th Cir. 1998) (holding that neither post-offer examinations themselves nor medical  
9 records selected for retention by the employer that are derived from such examinations need be  
10 job-related or consistent with business necessity), Leonel v. Am. Airlines, Inc., 400 F.3d 702,  
11 709 (9th Cir. 2005) (noting that restricting medical examinations to the post-offer stage requires  
12 employers to "isolate[]" their consideration of medical issues so that "applicants know when they  
13 have been denied employment on medical grounds and can challenge an allegedly unlawful  
14 denial"). However, the Tenth Circuit's approach, where a conditional offer becomes irrevocable  
15 after the medical examination unless the employer can identify a legitimate basis for excluding  
16 the applicant that is job-related and consistent with business necessity, finds support in the  
17 legislative history. See Chai R. Feldblum, Medical Examinations and Inquiries Under the  
18 Americans with Disabilities Act: A View from the Inside, 64 Temp. L. Rev. 521, 537 (1991)  
19 (citing H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3, at 43) ("[R]esults [of medical  
20 examinations] may not be used to withdraw a conditional job offer from an applicant unless they  
21 indicate that the applicant is not qualified to perform the job."); 136 Cong. Rec. 10,872 (1990)  
22 (statement of Representative Weiss) ("The results of the examination can only be used to  
23 withdraw a job offer if the applicant is found not to be qualified for the job based on the results  
24 of the exam.").

1 III. Liability

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

5 A. ADA Liability on the Basis of Selection Criteria

6 In the EEOC’s Amended Complaint, the EEOC argues BNSF’s actions with respect to  
7 Claimant Russell Holt violated Sections 102(a), 102(b)(6), and 102(d)(3) of Title I of the ADA  
8 (Dkt. No. 11 at 3)—i.e., the generic discrimination provision, 42 U.S.C. § 12112(a), the  
9 “selection criteria” subtype of that discrimination provision, 42 U.S.C. § 12112(b)(6), and the  
10 restriction on use of medical records obtained pursuant to an “employment entrance  
11 examination.” 42 U.S.C. § 12112(d). The Court’s order on BNSF’s motion to dismiss referred to  
12 the “selection criteria” subtype in holding that the Amended Complaint stated a claim. (Dkt. No.  
13 28 at 5 (“BNSF’s requirement that Holt procure a follow-up MRI after the post-offer, pre-  
14 employment examination functioned as a screening criterion that screened out an applicant with  
15 a disability by imposing an expensive additional requirement not imposed on other applicants.”)  
16 (emphasis added).)

17 BNSF now argues for the first time that § 12112(b)(6) is a disparate-impact, not a  
18 disparate-treatment provision, citing Raytheon Co. v. Hernandez, 540 U.S. 44, 53 (2003), and  
19 interpretive guidance to the regulations interpreting the section. BNSF is correct that Raytheon  
20 puts § 12112(b)(6) squarely into the disparate-impact category. See 540 U.S. at 53 (explaining  
21 that disparate impact claims are cognizable under the ADA and citing “using qualification  
22 standards, employment tests or other selection criteria that screen out or tend to screen out an  
23 individual with a disability”—language lifted directly from § 12112(b)(6)—as an example); see

1 also Lopez v. Pacific Maritime Assoc., 657 F.3d 762, 766–67 (9th Cir. 2011) (holding that a  
2 plaintiff waived his disparate-impact ADA claim by not citing § 12112(b)(6) in his opening  
3 brief).

4 EEOC’s theory about selection criteria, in contrast, tries to shoehorn the request for an  
5 MRI into § 12112(b)(6) even though it was not an across-the-board requirement for all  
6 applicants. (Dkt. No. 96 at 10–15.) The EEOC tries to justify its approach by arguing the Ninth  
7 Circuit used § 12112(b)(6) as a disparate treatment standard in Bates v. United Parcel Serv., Inc.,  
8 511 F.3d 974 (9th Cir. 2007) (en banc). This reading of the case is incorrect. See id. at 989  
9 (“Where an across-the-board safety ‘qualification standard’ is invoked, the question then  
10 becomes what proof is required with respect to being a ‘qualified individual,’ that is, one who  
11 can perform the job’s essential functions.”). In fact, no Ninth Circuit case or district court case  
12 within the Ninth Circuit (save this Court’s order on the initial motion) has accepted §  
13 12112(b)(6) as the standard for a claim made on the basis of disparate treatment.

14 EEOC also cites to a district court case in which the court tentatively accepted a disparate  
15 treatment analysis under § 12112(b)(6) of a request for additional medical information similar to  
16 the MRI request here. See EEOC v. Am. Tool & Mold, Inc., 21 F. Supp. 3d 1268, 1284 (M.D.  
17 Fla. 2014) (“To the extent one could argue that obtaining the release/restriction was an  
18 independent ‘exclusionary criteria,’ ATM has not identified any ‘job-related’ criteria consistent  
19 with a ‘business necessity,’ as required by 29 C.F.R. § 1630.14(b)(3), that would justify the  
20 additional obligation.”). However, in that case, the court appeared to rely primarily on the Tenth  
21 Circuit and Sixth Circuit’s interpretation of the statutory scheme in relation to § 12112(d)(3)(C),  
22 emphasizing that “the parties agree[d] that the results of the pre-employment screening may only  
23 be used to withdraw an offer of employment where an individualized determination reveals that

1 the impairment will preclude the putative employee from performing the essential functions of  
2 the position.” Id. at 1283.

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

#### 8 B. Request Versus Requirement for Additional Medical Information

9 The EEOC and BNSF also spend an inordinate number of pages addressing the question  
10 whether BNSF’s Dr. Jarrard was medically justified in seeking an updated MRI on the basis of  
11 the medical record he was reviewing. The EEOC goes so far as to offer expert testimony on the  
12 question whether such a request was medically justified and BNSF moves to exclude it. (See  
13 Dkt. No. 87, Ex. A; Dkt. No. 90.) The EEOC’s enforcement guidance makes clear that the  
14 medical-justification question is irrelevant: Employers may “ask specific individuals for more  
15 medical information,” including “follow-up examinations,” as long as they are “medically  
16 related to the previously obtained medical information.” Enforcement Guidance: Preemployment  
17 Disability-Related Questions and Medical Examinations (1995)  
18 (<http://www.eeoc.gov/policy/docs/preemp.html>) (“Preemployment Guidance”)<sup>1</sup>; see also  
19 Christen v. Harris Cnty., 529 U.S. 576, 587–588 (2000) (noting that opinion letters, “like

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

1 | interpretations contained in . . . enforcement guidelines,” do not warrant Chevron deference but  
2 | are entitled to respect under Skidmore to the extent of their persuasive power or Auer deference  
3 | where the regulation is ambiguous). The guidance does not require a follow-up examination to  
4 | be somehow medically justified, only that it be “medically related,” so there is no material fact,  
5 | disputed or otherwise, with respect to the medical justification for Dr. Jarrard’s request for an  
6 | updated MRI. The Court does not base any aspect of its decision on the EEOC’s expert  
7 | testimony.

8 |         However, the question whether BNSF discriminated on the basis of disability does not  
9 | end there. While this enforcement guidance helps BNSF justify its request for an updated MRI, it  
10 | does not shield the employer from liability for its actions upon not receiving the MRI. The  
11 | guidance allows employers to “ask . . . for more medical information” and, by implication, to  
12 | perform a follow-up additional examination; nowhere does it endorse the practice of requiring  
13 | the applicant to pay for costly additional information as a condition of proceeding through the  
14 | hiring process. The guidance also provides the following illustration:

15 |         Example: At the post-offer stage, an employer asks new hires whether they have had back  
16 | injuries, and learns that some of the individuals have had such injuries. The employer may  
17 | give medical examinations designed to diagnose back impairments to persons who stated that  
18 | they had prior back injuries, as long as these examinations are medically related to those  
19 | injuries.

20 | Preemployment Guidance (emphasis added). This illustration clearly suggests that the employer  
21 | or its agent will conduct the medical examination “designed to diagnose back impairments.”  
22 | Here, in contrast, Mr. Holt was required to procure an MRI at his own cost in order to proceed  
23 | with the hiring process. The guidance does not address this additional obligation.  
24 |

1 C. Cooperation Obligation

2 BNSF briefly argues that it cannot be liable for using the “results” of the medical  
3 examination other than in accordance with the ADA because “if an applicant refuses to cooperate  
4 in the examination, the employer never obtains the ‘results’ to use.” (Dkt. No. 91 at 16.) There is  
5 limited ADA case law regarding the obligation of employees (i.e., after the entrance examination  
6 stage) to cooperate with legitimate medical examinations, but these courts emphasize that the  
7 employer offered to pay for or conduct the medical examination at issue. See, e.g., EEOC v.  
8 Prevo’s Family Mkt., Inc., 135 F.3d 1089, 1097 (6th Cir. 1998); Grassel v. Dep’t of Educ. of  
9 City of New York, No. 12 CV 1016 PKC, 2015 WL 5657343, at \*3, \*9 (E.D.N.Y. Sept. 24,  
10 2015). A generic cooperation obligation where the employer has offered to pay is not relevant to  
11 the facts of this case. More to the point, BNSF can hardly argue that it had no examination  
12 “results” to work with: Mr. Holt had undergone an initial medical examination, provided a 2007  
13 MRI that showed a two-level disc extrusion, and answered a questionnaire in which he admitted  
14 to a back injury. Those are the results at issue here.

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

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

1 light of liberalizing amendments to the ADA and in the absence of any alteration in Ninth Circuit  
2 precedent following Nassar, the motivating factor test continues to apply).

3 1. Prima Facie Case of Disparate Treatment

4 The Court addresses the third element—discrimination because of disability—first.  
5 Because employers may withdraw conditional offers based only on the applicant’s failure to  
6 meet standards that are job-related and consistent with business necessity and only where  
7 performance of the essential job functions cannot be accomplished with reasonable  
8 accommodation, see Garrison, 287 F.3d at 960, BSNF’s withdrawal of Mr. Holt’s job offer when  
9 he failed to supply an updated MRI at his own cost constituted facial “discrimination.”  
10 Undisputed facts also establish causation: A reasonable jury could not escape the conclusion that  
11 in the absence of the 2007 MRI and Mr. Holt’s answers to the CHS medical questionnaire—  
12 “results” obtained from the post-offer medical examination, see § 12112(d)(3)(C)—BNSF would  
13 not have demanded an additional MRI and would not have treated Mr. Holt as though he had  
14 declined his offer, although he had not.<sup>2</sup> Meanwhile, nothing prevented BNSF from paying for  
15 an updated MRI when Mr. Holt informed the company he could not obtain an MRI on his own.

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16  
17 <sup>2</sup> The Ninth Circuit has performed McDonnell Douglas burden-shifting after the ADA prima  
18 facie case, which itself incorporates a causation element. See, e.g., Mayo v. PCC Structural,  
19 Inc., 795 F.3d 941, 944 (9th Cir. 2015). The Court agrees with the Sixth Circuit, see Whitfield v.  
20 Tennessee, 639 F.3d 253 (6th Cir. 2011), which has held that combining McDonnell Douglas  
21 burden-shifting with a prima facie case incorporating causation “makes little sense, as its third  
22 element—whether the employee was, in fact, discharged because of the disability—requires at  
23 the prima facie stage what the McDonnell Douglas burden-shifting framework seeks to uncover  
24 only through two additional burden shifts, thereby rendering that framework wholly  
unnecessary.” Id. at 259. To the extent that burden-shifting is required here, the Court holds that  
BNSF has failed to produce a legitimate, non-discriminatory reason for failing to hire Mr. Holt:  
first, because its actions in response to not receiving an MRI were not legitimate under the  
ADA’s entrance examination framework, as discussed above, and second, because the request  
for an MRI was itself occasioned by evidence of his disability rather than constituting an  
independent, non-disability-based rationale.

1           The question then becomes whether this disparate treatment on the basis of Mr. Holt’s  
2 2007 MRI and answers to the CHS medical questionnaire constitutes disparate treatment because  
3 of Mr. Holt’s “disability” (the first prong of the prima facie case). The primary argument BNSF  
4 makes regarding the EEOC’s prima facie case is that Mr. Holt was neither “regarded-as”  
5 disabled nor had a “record-of” disability. (Dkt. No. 98 at 14–15, Dkt. No. 91 at 20–21.) But as  
6 the EEOC notes, the 2008 amendments to the ADA relaxed the application of the “regarded-as”  
7 definition significantly. “An individual meets the requirement of ‘being regarded as having such  
8 an impairment’ if the individual establishes that he or she has been subjected to an action  
9 prohibited under this chapter because of an actual or perceived physical or mental impairment  
10 whether or not the impairment limits or is perceived to limit a major life activity.” 42 U.S.C. §  
11 12102(3) (emphasis added); see also id. at § 12102(4)(a) (“The definition of disability in this  
12 chapter shall be construed in favor of broad coverage of individuals under this chapter, to the  
13 maximum extent permitted by the terms of this chapter.”). This extremely low bar is met here  
14 because Mr. Holt admitted to BNSF that he had a back injury and provided an MRI showing a  
15 two-level disc extrusion, and BNSF halted the hiring process in response to that information. See  
16 29 C.F.R. § 1630 App. (“To illustrate how straightforward application of the ‘regarded as’ prong  
17 is, if an employer refused to hire an applicant because of skin graft scars, the employer has  
18 regarded the applicant as an individual with a disability.”); 29 C.F.R. § 1630.2 (“[E]valuation of  
19 coverage can be made solely under the ‘regarded as’ prong of the definition of disability, which  
20 does not require a showing of an impairment that substantially limits a major life activity or a  
21 record of such an impairment”). The severity of Mr. Holt’s limitations, if any, is no longer at  
22 issue in a regarded-as claim so long as causation is established, and BSNF’s citation to cases that  
23 precede the ADA is not helpful. BNSF’s argument that it did not perceive Mr. Holt’s



1 reported back injury as an “impairment” of any sort, meanwhile, is not persuasive in the absence  
2 of post-ADAAA case law.

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

## 8 2. Direct Threat

9 BNSF is not relying on the direct threat defense except insofar as it relates to the request  
10 for the MRI. (Dkt. No. 98 at 19–20.) Unfortunately, the mere existence of a direct threat  
11 affirmative defense does not justify its failure to hire Mr. Holt or to identify a legitimate  
12 qualification standard which Mr. Holt could not meet. The direct-threat-to-self affirmative  
13 defense—a requirement that an employee not pose a direct threat to his or her own health—is a  
14 recognized qualification standard under the ADA. See 29 C.F.R. § 1630.15(b)(2). (See also Dkt.  
15 No. 98 at 12–13 (“[Qualification standards or selection criteria] refer to physical requirements,  
16 such as height requirements, requirements related to particular medical conditions, or, more  
17 generally, that an employee not pose a direct threat to the health or safety of the applicant or  
18 others.”).) BNSF bears the burden of establishing that Mr. Holt was a direct threat. Nunes v.  
19 Wal-Mart Stores, Inc., 164 F.3d 1243, 1247 (9th Cir. 1999).

20 Here, the direct threat assessment was never made by BNSF because it halted the hiring  
21 process when Mr. Holt failed to provide an MRI at his own cost. (See Dkt. No. 98 at 3.) But even  
22 assuming that an updated MRI was relevant to a determination whether Mr. Holt’s back  
23 condition posed a direct threat to his own health in the workplace setting, it does not follow that

1 the MRI was strictly necessary to BNSF's direct-threat analysis. The applicable regulations  
2 instruct that a direct-threat determination "shall be based on a reasonable medical judgment that  
3 relies on the most current medical knowledge and/or on the best available objective evidence."  
4 29 C.F.R. § 1630.2(r) (emphasis added); see also Den Hartog v. Wasatch Acad., 129 F.3d 1076,  
5 1090 (10th Cir. 1997) ("29 C.F.R. § 1630.2(r) does not require an independent medical  
6 examination when the available objective evidence is clear. It uses the conjunctive "and/or"  
7 between medical knowledge and objective evidence."). BNSF may not have been able to access  
8 "the most current medical knowledge" about Mr. Holt's back condition unless it was willing to  
9 pay for it, but it could make the assessment based on the "best available" evidence—i.e., the  
10 objective information it could glean from the medical examination its contractor had already  
11 performed and the records Mr. Holt was able to provide.

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

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

#### 19         IV.     Sanctions

20         BNSF brings a separate motion for sanctions against the EEOC for failure to preserve a  
21 voicemail from a witness, Dr. Heck, who had called the EEOC to explain that he was mistaken  
22 when he testified at his deposition that there was a clinical note missing from Mr. Holt's file.  
23 (Dkt. No. 114.) A federal trial court has the inherent discretionary power to make appropriate

1 evidentiary rulings in response to the destruction or spoliation of relevant evidence, including the  
2 power where appropriate to order the exclusion of certain evidence. Glover v. BIC Corp., 6 F.3d  
3 1318, 1329 (9th Cir. 1993).

4 Dr. Heck's voicemail is not evidence. Furthermore, there is neither fault by the EEOC  
5 nor prejudice to BNSF in the factual scenario presented here. The EEOC explains that the  
6 voicemail was unintentionally purged by the voicemail system maintained by the General  
7 Services Administration, and that the EEOC offered to reopen Dr. Heck's deposition so that he  
8 could clarify the matter with BNSF's counsel directly. (Dkt. No. 114 at 13–18.)

9 Sanctions are not warranted on this record.

#### 10 V. Motion to Exclude Testimony of Dr. Guy Earle

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

#### 16 Conclusion

17 Because BNSF withdrew its conditional offer to Mr. Holt on grounds not sanctioned by  
18 the ADA and its accompanying regulations, the EEOC provided sufficient undisputed evidence  
19 to establish a prima facie case for disparate treatment under § 12112(a), and BNSF failed to offer  
20 evidence in support of the affirmative defense of a direct threat, the Court DENIES BNSF's  
21 Motion for Summary Judgment (Dkt. No. 91) and GRANTS the EEOC's Motion for Partial  
22 Summary Judgment on liability (Dkt. No. 84). The Court further DENIES BNSF's Motion for  
23 Sanctions (Dkt. No. 114) because the purged voicemail from a witness to Plaintiff's counsel is

1 not evidence, among other reasons, and finds BNSF's Motion to Exclude Testimony of Dr. Guy  
2 Earle (Dkt. No. 90) MOOT at the summary judgment stage because it was not necessary to  
3 consider the testimony in order to reach a decision on summary judgment.

4  
5 The clerk is ordered to provide copies of this order to all counsel.

6 Dated this 8th day of January, 2016.

7  
8 

9 Marsha J. Pechman  
10 Chief United States District Judge