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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

EQUAL EMPLOYMENT  
OPPORTUNITY COMMISSION,  
  
Plaintiff,  
  
v.  
  
BNSF RAILWAY CO.,  
  
Defendant.

CASE NO. 2:14-CV-01488-MJP  
  
ORDER DENYING DEFENDANT’S  
RENEWED MOTION TO DISMISS

THIS MATTER comes before the Court on Defendant BNSF Railway Co.’s Renewed Motion to Dismiss Plaintiff Equal Employment Opportunity Commission’s claim under the Americans with Disabilities Act filed on behalf of Russell Holt. Having considered the motion (Dkt. No. 21), the response (Dkt. No. 23), the reply (Dkt. No. 24), and all attached documents, the Court DENIES Defendant’s Renewed Motion to Dismiss.

**Background**

BNSF Railway Co. (“BNSF”) offered Russell Holt (“Holt”) a position as a patrol officer, contingent upon Holt passing a post-offer, pre-employment medical examination. (Dkt. No. 23

1 at 5.) The Equal Employment Opportunity Commission (“EEOC”) alleges that BNSF  
2 discriminated against Holt when, after BNSF’s contract doctor cleared Holt for the position  
3 based on a routine medical examination required of all applicants, it demanded that Holt procure  
4 a follow-up MRI. (Id. at 5.) Because the MRI was deemed not medically necessary by Holt’s  
5 doctor, Holt’s medical insurance would not cover it; Holt would have to pay for the MRI  
6 himself. (Id. at 5.) When Holt refused to procure the MRI because of the cost, BNSF refused to  
7 waive the requirement, and rescinded the offer of employment. (Id. at 5.)

8 EEOC contends the MRI was an improper additional inquiry not required of all entering  
9 employees, and discriminated on the basis of disability in a manner that was not job-related and  
10 not consistent with business necessity, violating sections 42 U.S.C. § 12112(d)(3)(A) and (C) of  
11 the Americans with Disabilities Act (“ADA”). (Dkt. Nos. 11, 23.) Defendant argues that the  
12 ADA allows BNSF to require the MRI because it was a follow-up examination that is medically  
13 related to the initial examination. Defendant now moves to dismiss Plaintiff’s ADA claim.

## 14 Analysis

### 15 **I. Legal Standards**

#### 16 **A. Motion to Dismiss**

17 To survive a Fed. R. Civ. P. 12(b)(6) motion, a complaint must state a claim for relief that  
18 is plausible on its face. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A claim is facially  
19 plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable  
20 inference that the defendant is liable for the misconduct alleged.” Id. Plausibility does not mean  
21 probability, “but it asks for more than a sheer possibility that a defendant has acted unlawfully.”  
22 Id. Merely reciting the elements of a cause of action will not suffice. Bell Atl. Corp. v.  
23 Twombly, 550 U.S. 544, 555 (2007).

1 Courts follow a two-pronged approach when deciding whether a complaint survives a  
2 Fed. R. Civ. P. 12(b)(6) motion. Iqbal, 556 U.S. at 678-79. First, “a court must accept as true all  
3 of the allegations contained in a complaint” unless the allegations are legal conclusions. Id.  
4 Second, the claim for relief must be plausible, which is a context-specific task. Id. Courts can  
5 consider “documents attached to the complaint, documents incorporated by reference in the  
6 complaint, or matters of judicial notice” when making their determination. U.S. v. Ritchie, 342  
7 F.3d 903, 908 (9th Cir. 2003).

### 8 **B. Discrimination in the Hiring Process Under the ADA**

9 No covered employer shall discriminate against a qualified individual on the basis of  
10 disability in the hiring process. 42 U.S.C. § 12112(a). After an offer of employment but before  
11 the start of work, the employer may require a medical examination and may condition the offer  
12 of employment on the results of such examination. 42 U.S.C. § 12112(d)(3). These  
13 examinations are not required to be job-related and consistent with business necessity, 29 C.F.R.  
14 § 1630.14(b)(3), but if the results of the examination screen out or tend to screen out individuals  
15 with disabilities, the screening criteria must be job-related and consistent with business necessity.  
16 42 U.S.C § 12112(b)(6).

17 The examination is subject to three restrictions: all entering employees must receive an  
18 examination regardless of disability, information obtained from the examination must be kept  
19 sufficiently confidential, and the results of the examination must only be used “in accordance  
20 with this subchapter,” i.e., they must not be used to impermissibly discriminate against a  
21 candidate with disabilities. 42 U.S.C. § 12112(d)(3)(A)-(C).

1 EEOC guidance provides that, after the examination, an employer may request more  
2 medical information from an entering employee if the follow-up examinations or questions are  
3 “medically related to the previously obtained medical information.” EEOC, EEOC Notice  
4 No. 915.002, Enforcement Guidance: Preemployment Disability-Related Questions and Medical  
5 Examinations (1995); see also, McDonald v. Webasto Roof Sys., Inc., 570 F. App’x 474, 476  
6 (6th Cir. 2014); Flores v. Am. Airlines, Inc., 184 F. Supp. 2d 1287, 1294 (S.D. Fla. 2002). An  
7 employer may choose to ask only some individuals for follow-up examinations before clearing  
8 them for work; they need not ask all applicants. See McDonald, 570 F. App’x at 476.

## 9 **II. Claim against BNSF under the ADA**

10 EEOC argues that BNSF impermissibly discriminated against a qualified individual on  
11 the basis of disability by requiring Holt to secure an MRI at his own expense after being cleared  
12 by a company doctor. While all applicants were given medical examinations, not all applicants  
13 were required to secure expensive additional examinations at their own expense. (Dkt. No. 23 at  
14 6.) EEOC argues that just because follow-up examinations, such as the MRI here, are  
15 permissible if medically related to initial examinations given to all applicants, it does not  
16 necessarily follow that covered employers can require applicants to bear the costs of those  
17 follow-up procedures. (Dkt. No. 23 at 12.) EEOC argues the MRI requirement, because of its  
18 cost, functioned as a screening criterion which screened out Holt, and that screening out Holt in  
19 this manner was impermissible because the criterion is not job-related or consistent with business  
20 necessity. The criterion also tends to screen out people with disabilities by requiring them to  
21 secure expensive additional examinations that applicants without disabilities are not required to  
22 secure. (Dkt. No. 23 at 12.)

1 BNSF argues that examinations seeking additional information based on the results of the  
2 first examination, such as the MRI required here, are considered part of post-offer, pre-  
3 employment medical examinations and are permitted by EEOC guidance as long as they are  
4 medically related. (Dkt. No. 24 at 4-5.) Defendant contends that post-offer, pre-employment  
5 examinations are not required to be identical for all applicants under either the ADA or EEOC  
6 guidance. (Dkt. No. 21 at 8-9.) Defendant further argues that because Holt did not procure the  
7 MRI, BNSF did not use the MRI or its results to disqualify him from the position; rather, BNSF  
8 used Holt's failure to submit a complete application to disqualify him. (Dkt. No. 21 at 8.)

9 The Court is not persuaded by Defendant's contentions. The statute does not authorize  
10 an employer to require that an entering employee pay for the follow-up examination where only  
11 applicants with disabilities are asked to provide the follow-ups, especially where a company  
12 doctor has already cleared that employee as fit for the position. Defendant is correct that a post-  
13 offer, pre-employment examination need not be job-related and consistent with business  
14 necessity, and that medically-related follow-up examinations of some entering employees are  
15 permitted. But BNSF's requirement that Holt procure a follow-up MRI after the post-offer, pre-  
16 employment examination functioned as a screening criterion that screened out an applicant with  
17 a disability by imposing an expensive additional requirement not imposed on other applicants.  
18 The ADA requires screening criteria that screen out people with disabilities to be job-related and  
19 consistent with business necessity; here, EEOC argues the MRI requirement was not job-related  
20 and consistent with business necessity. A company doctor had already cleared Holt for work,  
21 and at the time of his application, Holt had been performing patrolman duties as a police officer  
22 for eleven years without any accommodation.

1 As BNSF points out, the ADA does not discuss the cost or payment of ADA-permitted  
2 medical examinations. BNSF cites to several cases in support of its interpretation of the statute,  
3 but in none of the cases relied on did the employer require the applicant to pay for a follow-up  
4 examination or require a follow-up after its contract doctor had already cleared the applicant for  
5 work. EEOC has stated a plausible claim upon which relief can be granted.

6 **Conclusion**

7 The Court finds that Plaintiff has stated a claim under the Americans with Disabilities  
8 Act. Defendant's Renewed Motion to Dismiss is DENIED.

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

11 Dated January 29, 2015.

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14 Marsha J. Pechman  
15 Chief United States District Judge  
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