

[Taylor v. Burlington N. R.R. Holdings](#)

United States Court of Appeals for the Ninth Circuit
January 28, 2020, Resubmitted; January 30, 2020, Filed
No. 16-35205

Reporter

801 Fed. Appx. 477 *; 2020 U.S. App. LEXIS 3192 **; 333 Accom. Disabilities Dec. (CCH) P19-022; 2020 WL 496312

CASEY TAYLOR; ANGELINA TAYLOR, husband and wife and the marital community composed thereof, Plaintiffs-Appellants, v. BURLINGTON NORTHERN RAILROAD HOLDINGS INC., a Delaware Corporation licensed to do business in the State of Washington; BNSF RAILWAY COMPANY, a Delaware Corporation licensed to do business in the State of Washington, Defendants-Appellees.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Subsequent History: Rehearing denied by [Taylor v. Burlington N. R.R. Holdings Inc., 2020 U.S. App. LEXIS 13373 \(9th Cir. Wash., Apr. 24, 2020\)](#)

On remand at, Summary judgment denied by, Motion denied by, As moot [Taylor v. BNSF Ry. Co., 2021 U.S. Dist. LEXIS 162866 \(W.D. Wash., Aug. 27, 2021\)](#)

Prior History: **[**1]** Argued and Submitted February 8, 2018; Submission Withdrawn September 17, 2018.

Appeal from the United States District Court for the Western District of Washington. D.C. No. 2:11-cv-01289-JLR. James L. Robart, District Judge, Presiding.

[Taylor v. Burlington N. R.R. Holdings, Inc., 2016 U.S. Dist. LEXIS 19879, 2016 WL 632077 \(W.D. Wash., Feb. 17, 2016\)](#)

Disposition: AFFIRMED IN PART; VACATED IN PART; REMANDED.

Core Terms

disability, obesity, district court, impairment, reasonable jury, testing, email, disability discrimination, grant

summary judgment, essential function, substantial factor, able to perform, vacate, knees, grant of summary judgment, discrimination claim, decision to deny, proceedings, holdings, records

Case Summary

Overview

HOLDINGS: [1]-A district court properly granted summary judgment to a railroad on a claim of disability discrimination due to the applicant's perceived back and knee impairments as the railroad had not perceived the applicant as having such impairments; [2]-The district court erred in granting summary judgment to the railroad on the disability discrimination claim based on the applicant's perceived obesity where a reasonable jury could have found from the evidence that the applicant was perceived to have a disability (obesity) under the Washington Law Against Discrimination, he was able to perform the essential functions of the electronic technician job, and the perception of his disability was a substantial factor in the railroad's decision to deny him employment.

Outcome

Summary judgment affirmed in part and vacated in part. Case remanded.

LexisNexis® Headnotes

Labor & Employment
Law > ... > Evidence > Burdens of Proof > Employee Burdens of Proof

[HN1](#) **Burdens of Proof, Employee Burdens of Proof** **Conduct**

To establish a disability discrimination claim under the Washington Law Against Discrimination, a plaintiff must show (1) that the plaintiff was perceived to have a disability; (2) that he was able to perform the essential functions of the job; and (3) that the perception of his disability was a substantial factor in the employer's decision to deny him employment.

Labor & Employment Law > ... > Disability
Discrimination > Scope & Definitions > Qualified
Individuals With Disabilities

[HN2](#) **Scope & Definitions, Qualified Individuals With Disabilities**

The Washington Supreme Court has held that obesity always qualifies as an impairment under the Washington Law Against Discrimination.

Business & Corporate Compliance > ... > Disability
Discrimination > Scope &
Definitions > Discriminatory Conduct

[HN3](#) **Scope & Definitions, Discriminatory Conduct**

An employer engages in prohibited discrimination under the federal Americans with Disabilities Act (ADA) when it withdraws a conditional offer of employment based on a prospective employee's failure to pay for medical testing that the employer has required solely because of the prospective employee's perceived disability or impairment. Because the Washington Law Against Discrimination (WLAD), generally speaking, is at least as broad as the ADA, that holding applies to the WLAD as well.

Business & Corporate Compliance > ... > Disability
Discrimination > Scope &
Definitions > Discriminatory Conduct

Labor & Employment
Law > ... > Evidence > Burdens of Proof > Burden
Shifting

[HN4](#) **Scope & Definitions, Discriminatory**

Where it is clear that an action was taken because of an impairment or perception of an impairment, no further inquiry or burden-shifting protocol is necessary to establish causation for purposes of a disability discrimination claim.

Counsel: For Casey Taylor, ANGELINA TAYLOR, husband and wife and the marital community composed thereof, Plaintiffs - Appellants: Shelby R. Frost Lemmel, Esquire, Attorney, Masters Law Group, Bainbridge Island, WA; Rod Stephens, Esquire, The Stephens Law Firm, Puyallup, WA.

For BURLINGTON NORTHERN RAILROAD HOLDINGS INC., a Delaware Corporation licensed to do business in the State of Washington, BNSF RAILWAY COMPANY, a Delaware Corporation licensed to do business in the State of Washington, Defendants - Appellees: Richard Paul Lentini, Attorney, Ryan, Swanson & Cleveland, PLLC, Seattle, WA; Bryan P. Neal, Thompson & Knight, LLP, Dallas, TX; Teruyuki Scott Olsen, Attorney, Oseran Hahn P.S., Bellevue, WA; Britenae M. Pierce, Esquire, Attorney, Ryan, Swanson & Cleveland, Seattle, WA.

For U.S. Equal Employment Opportunity Commission, Amicus Curiae: Paul D. Ramshaw, Attorney, U.S. Equal Employment Opportunity Commission, Washington, [**2] DC.

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

Opinion

[*478] MEMORANDUM *

Casey and Angelina Taylor appeal the judgment of the district court on their claims of disability discrimination under the Washington Law Against Discrimination (WLAD) against the Burlington Northern Santa Fe Railway Company (BNSF). We have jurisdiction under [28 U.S.C. § 1291](#), and we affirm in part, vacate in part and remand.

[HN1](#)  To establish a disability discrimination claim

* This disposition is not appropriate for publication and is not precedent except as provided by [Ninth Circuit Rule 36-3](#).

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under the WLAD, the Taylors must show (1) that Mr. Taylor was perceived to have a disability; (2) that he was able to perform the essential functions of the job; and (3) that the perception of his disability was a substantial factor in BNSF's decision to deny him employment. See Washington Pattern Jury Instruction (WPI) 330.32.

[*479] 1. We hold that the district court properly granted summary judgment to BNSF on the Taylors' claim of disability discrimination on account of Mr. Taylor's perceived back and knee impairments. The district court correctly concluded that BNSF did not perceive Mr. Taylor as having such impairments. See [Wash. Rev. Code § 49.60.040\(7\)\(a\)](#).

2. We hold, however, that the district court erred in granting summary judgment to BNSF on the Taylors' claim of disability discrimination on account **[**3]** of Mr. Taylor's perceived obesity.

First, a reasonable jury could find that BNSF perceived Mr. Taylor as obese. The medical vendor who conducted Taylor's initial medical exam referred Taylor's results to BNSF's internal medical department, citing his body mass index (BMI) over 40. Dr. Jarrard, BNSF's Medical Officer, explained at deposition that Taylor's BMI was a "trigger" for the referral. Dr. Jarrard drafted an internal email to BNSF Human Resources that said he was "unable to determine medical qualification for [the] Electronic Technician position due to significant health and safety risks associated with extreme obesity (Body Mass Index near or above 40) and uncertain status of knees and back." That language was included in an email sent to Taylor the next day. The email also advised Taylor that if he wished to pursue a reevaluation, he was free to provide BNSF with further information, including a sleep study, exercise tolerance test, medical report documenting his blood pressure and sugar levels, hip and waist measurements and a VA disability determination report. The email added that if Taylor chose not to obtain the tests (at his own expense), his case could be reconsidered **[**4]** if he lost at least 10 percent of his weight and maintained that weight for at least six months. BNSF's internal records say that Taylor's application was declined because he was "not medically qualified." Elsewhere in BNSF's records — in a "physician's written opinion" form — Taylor was described as "Not Qualified — does not meet standards." The only other marking on that form is "41.3" - Taylor's BMI.

HN2[↑] Second, in answering a question we certified,

the Washington Supreme Court has held that "obesity always qualifies as an impairment" under the WLAD. [Taylor v. Burlington N. R.R. Holdings, Inc., 193 Wn.2d 611, 444 P.3d 606, 608 \(Wash. 2019\)](#). Thus, a reasonable jury could find that BNSF perceived Mr. Taylor as disabled.

Third, BNSF does not dispute in these proceedings that Mr. Taylor was able to perform the essential functions of the job.

HN3[↑] Fourth, our decision in [EEOC v. BNSF Railway Co., 902 F.3d 916, 924-27 \(9th Cir. 2018\)](#) (as amended), *cert. denied*, 140 S. Ct. 494, 205 L. Ed. 2d 316, 2019 WL 5875127 (U.S. Nov. 12, 2019) (No. 18-1139), holds that an employer engages in prohibited discrimination under the federal [Americans with Disabilities Act](#) (ADA) when it withdraws a conditional offer of employment based on a prospective employee's failure to pay for medical testing that the employer has required solely because of the prospective employee's perceived disability or impairment. Because the WLAD, generally **[**5]** speaking, is at least as broad as the ADA, see [Kumar v. Gate Gourmet Inc., 180 Wn.2d 481, 325 P.3d 193, 197-98 \(Wash. 2014\)](#), we conclude that the holdings of [EEOC v. BNSF](#) apply to the WLAD as well. The Taylors' claim of discrimination, therefore, asserts a valid legal theory.

Fifth, a reasonable jury could find that BNSF conditioned Mr. Taylor's job offer on his obtaining additional testing *because* it perceived him as obese. Thus, a reasonable jury could find that Taylor's perceived **[*480]** disability was a substantial factor in BNSF's hiring decision.

In sum, a reasonable jury could find (1) that Mr. Taylor was perceived to have a disability (obesity); (2) that he was able to perform the essential functions of the job; and (3) that the perception of his disability was a substantial factor in BNSF's decision to deny him employment. The district court therefore erred in granting summary judgment to BNSF.

In its appellate briefing, BNSF argued that summary judgment should be affirmed under the *McDonnell Douglas* burden shifting framework. There is, however, no dispute that BNSF required further medical testing *because of* Mr. Taylor's weight. **HN4**[↑] In [EEOC v. BNSF, 902 F.3d at 927](#), we held that, "where it is clear that an action was taken because of an impairment or perception of an impairment, no further **[**6]** inquiry or burden-shifting protocol is necessary to establish causation." Hence, to the extent BNSF continues to

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raise this contention, we conclude that it fails.

3. We express no opinion as to the relevance, if any, of [Washington Revised Code § 81.40.130](#) to the issues presented in this litigation. Because the Taylors raised [§ 81.40.130](#) for the first time in a September 2019 motion, the provision has not factored into our analysis.

We affirm the grant of summary judgment on the Taylors' back and knees claim, vacate the grant of summary judgment on the Taylors' obesity claim and remand to the district court for further proceedings consistent with this disposition. Each party shall bear its own costs on appeal.

**AFFIRMED IN PART; VACATED IN PART;
REMANDED.**

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