No. 19-1514

United States Court of Appeals for the Eighth Circuit

QUINTON HARRIS, et al.,
Plaintiffs-Appellees,

v.

UNION PACIFIC RAILROAD COMPANY,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Nebraska
No. 8:16-CV-00381-JFB-SMB

BRIEF OF PLAINTIFFS-APPELLEES

JAMES H. KASTER
DAVID E. SCHLESINGER
ROBERT L. SCHUG
CHARLES A. DELBRIDGE
NICHOLS KASTER, PLLP
4600 IDS Center
80 South 8th Street
Minneapolis, MN 55402
(612) 256-3200

MATTHEW W.H. WESSLER
JONATHAN E. TAYLOR
GUPTA WESSLER PLLC
1900 L Street NW, Suite 312
Washington, DC 20036
(202) 888-1741
matt@guptawessler.com

June 21, 2019

Counsel for Plaintiffs-Appellees

SUMMARY OF THE CASE AND ORAL ARGUMENT STATEMENT

The plaintiffs are current and former Union Pacific employees who challenge the company's uniform "reportable health events" policy, under which thousands of employees have been removed from their positions. The plaintiffs allege that this corporate policy violates the Americans with Disabilities Act (or ADA) because it discriminates against a "class of individuals with disabilities" and is not justified by "business necessity." 42 U.S.C. § 12112(b)(6).

After nearly two years of discovery, the district court found that the policy is uniformly applied and does not vary by position. As a result, the court certified the ADA claim for class treatment under Rule 23 and ordered a bifurcated trial plan, in keeping with *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). The question in this interlocutory appeal is whether the district court abused its discretion.

For two reasons, it did not. *First*, the court correctly recognized that a class action is appropriate under both Rule 23(b)(2) and (b)(3) because this case turns on the lawfulness of the reportable-health-events policy—a common question. That question will be resolved at stage one of the litigation, while any individual claims (if necessary) may be addressed at stage two. *Second*, Title VII precedent—which the ADA expressly incorporates—firmly supports the district court's order.

If argument is scheduled, the plaintiffs request as much time as Union Pacific.

Appellate Case: 19-1514 Page: 2 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

TABLE OF CONTENTS

Summary of the case and oral argument statement i

Table of authorities iv

Introduction 1

Statement of the issue 4

Statement of the case and of the facts 4

I. Statutory background 4

II. Factual background 9

III. Procedural history 14

Summary of argument 19

Standard of review 21

Argument 22

I. The district court did not abuse its discretion in certifying this case as a class action under Rule 23(b)(2) and (b)(3) 22

A. The ADA claim certified in this case—challenging a facially discriminatory policy against a "class of individuals with disabilities"—is ideally suited for class treatment. 22

1. This case is a classic Rule 23(b)(2) class action. 22

2. The district court did not abuse its discretion in finding that common questions predominate over individual issues and a class action is superior. 27

B. Title VII precedent, which the ADA expressly incorporates, confirms the appropriateness of class certification here 40

II. Union Pacific's remaining arguments for an abuse of discretion contravene the ADA's text and purpose and cannot be reconciled with Supreme Court precedent. 45

A. Most of Union Pacific's arguments are predicated on the mistaken belief that the lawfulness of its policy "require[s] individualized inquiries into disability and qualification." 46

B. The district court's decision does not conflict with *Hohider*...... 47

C. Union Pacific's standing arguments cannot be reconciled with Supreme Court precedent. 48

Conclusion 50

Appellate Case: 19-1514 Page: 4 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

TABLE OF AUTHORITIES

Cases

Amchem Products., Inc. v. Windsor,
521 U.S. 591 (1997) ... 26

Amgen Inc. v. Connecticut Retirement Plans & Trust Funds,
568 U.S. 455 (2013) ... 28

Barfield v. Sho-Me Power Electric Cooperative,
852 F.3d 795 (8th Cir. 2017) ... 30

Bates v. Dura Automotive Systems, Inc.,
625 F.3d 283 (6th Cir. 2010) ... 36

Bates v. United Parcel Services, Inc.,
511 F.3d 974 (9th Cir. 2007) (en banc) ... 31, 34, 40

Branham v. Snow,
392 F.3d 896 (7th Cir. 2004) ... 34

Bridging Communities Inc. v. Top Flite Financial Inc.,
843 F.3d 1119 (6th Cir. 2016) ... 31, 32

Brown v. Electrolux Home Products., Inc.,
817 F.3d 1225 (11th Cir. 2016) ... 31

Celestine v. Petroleos de Venezuella SA,
266 F.3d 343 (5th Cir. 2001) ... 40

Chevron USA Inc. v. Echazabal,
536 U.S. 73 (2002) ... 32

Chicago Teachers Union, Local No. 1 v. Board of Education of City of Chicago,
797 F.3d 426 (7th Cir. 2015) ... 26, 28, 37

Cooper v. Federal Reserve Bank of Richmond,
467 U.S. 867 (1984) ... *passim*

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) ... 40

Appellate Case: 19-1514 Page: 5 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

Cossette v. Minnesotta Power & Light,
188 F.3d 964 (8th Cir. 1999) 36

Craik v. Minnesotta State Univerity Board,
731 F.2d 465 (8th Cir. 1984) 42, 45, 47

Day v. Celadon Trucking Services, Inc.,
827 F.3d 817 (8th Cir. 2016) 28

Ebert v. General Mills, Inc.,
823 F.3d 472 (8th Cir. 2016). 25, 28

Equal Employment Opportunity Commission v. McDonnell Douglas Corp.,
960 F. Supp. 203 (E.D. Mo. 1996) 39

Equal Employment Opportunity Commission v. Wal-Mart,
477 F.3d 561 (8th Cir. 2007) 30, 32

Farmers Cooperative Co. v. Senske & Son Transfer Co.,
572 F.3d 492 (8th Cir. 2009) 21

Franks v. Bowman Transporation Co.,
424 U.S. 747 (1976) .... *passim*

Halliburton Co. v. Erica P. John Fund, Inc.,
573 U.S. 258 (2014) 34

Halvorson v. Auto-Owners Ins. Co.,
718 F.3d 773 (8th Cir. 2013) 49

Henson v. Santander Consumer USA Inc.,
137 S. Ct. 1718 (2017) 35

Hohider v. United Parcel Services, Inc.,
574 F.3d 169 (3d Cir. 2009) 47, 48

Hohider v. United Parcel Service, Inc.,
243 F.R.D. 147 (W.D. Pa. 2007) 48

In re Aqua Dots Produdcts Liability Litigation,
654 F.3d 748 (7th Cir. 2011) 37

Appellate Case: 19-1514 Page: 6 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

International Brotherhood of Teamsters v. United States,
431 U.S. 324 (1977) ....*passim*

Krakauer v. Dish Network, LLC,
— F.3d —, 2019 WL 2292196 (4th Cir. May 30, 2019) 22, 23

Martin v. Behr Dayton Thermal Produdcts LLC,
896 F.3d 405 (6th Cir. 2018) 39

PGA Tour, Inc. v. Martin,
532 U.S. 661 (2001) 4, 5

Postawko v. Missouri Department of Corrections,
910 F.3d 1030 (8th Cir. 2018)...24, 25, 36

Rolscreen Co. v. Pella Produdcts of St. Louis, Inc.,
64 F.3d 1202 (8th Cir. 1995)... 21

Ross v. Blake,
136 S. Ct. 1850 (2016) 36

Smilow v. Southwestern Bell Mobile Systems, Inc.,
323 F.3d 32 (1st Cir. 2003).. 31, 32

Stuart v. State Farm Fire & Casualty Co.,
910 F.3d 371, (8th Cir. 2018) ....*passim*

Sutton v. United Air Lines,
527 U.S. 471 (1999),... 33

Torres v. S.G.E. Management, LLC,
838 F.3d 629 (5th Cir. 2016) (en banc)... 30, 32

True Health Chiropractic, Inc. v. McKesson Corp.,
896 F.3d 923 (9th Cir. 2018)... 30

Tyson Foods, Inc. v. Bouaphakeo,
136 S. Ct. 1036 (2016). ....*passim*

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) ....*passim*

Appellate Case: 19-1514 Page: 7 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

Young v. Nationwide Mutual Insurance Co.,
693 F.3d 532 (6th Cir. 2012) 31

Young v. United Parcel Services, Inc.,
135 S. Ct. 1338 (2015) 40

Statutes, Rules, and Regulations

42 U.S.C. § 12101(b)(1) 4

42 U.S.C. § 12101(b)(2) 4

42 U.S.C. § 12102(1) 4, 7

42 U.S.C. § 12102(1)(C) 33

42 U.S.C. § 12102(3) 1, 4, 7

42 U.S.C. § 12102(4) 4

42 U.S.C. § 12102(4)(A) 7

42 U.S.C. § 12111(3) 7

42 U.S.C. § 12112(a) 34

42 U.S.C. § 12112(b)(5) 47

42 U.S.C. § 12112(a) 4, 5

42 U.S.C. § 12112(b) 5, 25

42 U.S.C. § 12112(b)(6) .... *passim*

42 U.S.C. § 12113(a) 6

42 U.S.C. § 12113(b) 7, 25, 29

42 U.S.C. § 12117(a) .... *passim*

42 U.S.C. § 2000e-5(a) 4, 8, 23

42 U.S.C. § 2000e-5(f) 4

42 U.S.C. § 2000e-5(f)(1) 8, 23

42 U.S.C. § 2000e-5(g) 4
42 U.S.C. § 2000e-5(g)(1) 1, 8, 23, 41
42 U.S.C. § 2000e-5(g)(2) 8
42 U.S.C. § 2000e-5(g)(2)(A) 41
42 U.S.C. § 2000e-6(a) 4, 8
29 C.F.R. § 1630.2(g)(iii)(3) 33
29 C.F.R. § 1630.10(a) .... *passim*
Federal Rule of Civil Procedure 23(b)(2) .... *passim*
Federal Rule of Civil Procedure 23(b)(3) .... *passim*

Other Authorities

154 Cong. Rec. S8342-01 (September 11, 2008) 6, 36
H.R. Rep. No. 101-485, pt. 3 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267 8
Pub. L. 110-325, 122 Stat. 3553 (September 25, 2008) 6, 34, 35, 36

Appellate Case: 19-1514 Page: 9 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

INTRODUCTION

This case challenges the lawfulness of a single Union Pacific employment policy that the district court found is uniformly applied. The policy targets workers who are discovered to have at least one specified health condition, automatically places them on leave, and removes them from service unless they satisfy an overly stringent across-the-board standard that Union Pacific asserts is medically necessary. There is no individualized assessment of the worker's particular capabilities or job duties. The policy has been used to remove thousands of workers from their positions, many of whom had worked at the company for years without issue.

The plaintiffs allege that this policy violates the Americans with Disabilities Act (or ADA) because it "screen[s] out" a "class of individuals with disabilities"—a term that includes anyone with even a "perceived" impairment—and cannot be justified by "business necessity." 42 U.S.C. §§ 12102(3), 12112(b)(6). Union Pacific argues the opposite, defending its facially discriminatory policy as permissible.

This dispute is tailor-made for class treatment. The most important question is common: Does the policy target a "class of individuals with disabilities" without good reason? If so, the policy is unlawful and may be enjoined under section 12117(a) of the ADA, which grants the "powers, remedies, and procedures set forth" in Title VII to "any person alleging [unlawful] discrimination on the basis of disability." That includes the power to enjoin the "unlawful employment practice." *Id.* § 2000e-5(g)(1).

Appellate Case: 19-1514 Page: 10 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

Given the text and purpose of the relevant ADA provisions, the district court acted well within its discretion in certifying a class under Rule 23(b)(2) and (b)(3) and bifurcating the proceedings. Rule 23(b)(2) is satisfied because Union Pacific's policy "appl[ies] generally to the class," so enjoining the policy (should it be found unlawful) would be "appropriate respecting the class as a whole." That question will be decided at stage one of the litigation, as authorized by Title VII precedent, which the ADA expressly incorporates. If the policy is found to be lawful, Union Pacific will prevail on the class claim. If the policy is unlawful, however, stage two will then allow class members to seek individualized relief—again in keeping with Title VII precedent.

The certification order also complies with Rule 23(b)(3) because the lawfulness of Union Pacific's policy, including any potential defenses of it, is a common question that predominates over any individual issues, "such as damages or some affirmative defenses peculiar to some individual class members." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016). And a class is superior to requiring "individual lawsuits [that] would duplicate [the] proof over and over again," A252, especially given that individual questions will come into play only if the policy is first declared unlawful.

Having adopted, implemented, and justified its policy on a classwide basis, Union Pacific now claims that its conduct may be assessed only on an individual basis. In its view, the district court abused its discretion in allowing the "class of individuals" subject to the policy to challenge its lawfulness. 42 U.S.C. § 12112(b)(6).

Appellate Case: 19-1514 Page: 11 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

Broadly speaking, Union Pacific's arguments for an abuse of discretion fall into two categories. Neither is persuasive. The first—which manifests itself in a variety of arguments, from Rule 23 to the Rules Enabling Act—is predicated on the notion that the policy's lawfulness cannot be determined at stage one because it requires an individualized assessment into whether each class member is "qualified." It does not. The text of the relevant ADA provisions—which Union Pacific largely ignores—leaves no doubt on this score. A policy is unlawful if it discriminates against a "class of individuals with disabilities" and the discrimination is unjustified. *Id.* § 12112(b)(6); 29 C.F.R. § 1630.10(a). There is no additional "qualification" requirement. A policy that violates these provisions may be enjoined under section 12117(a).

The second category consists of arguments that contravene Supreme Court precedent. Some of these arguments (like the challenges to the trial plan and the scope of the class) are really just attacks on *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977)—Title VII precedent that the ADA expressly adopts. Others (like arguing that individual issues predominate) run afoul of not only those cases, but *Tyson Foods*.

At the end of the day, this case is much more straightforward and case-specific than Union Pacific lets on. It is not about whether *any* ADA claim may be brought as a class, but whether *this* claim may be. Given the district court's fact findings, the text of the specific ADA provisions, and binding precedent, the answer is clear: yes.

Appellate Case: 19-1514 Page: 12 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

STATEMENT OF THE ISSUE

The plaintiffs allege that Union Pacific's reportable-health-events policy violates the ADA because it discriminates against "a class of individuals with disabilities" and is not justified by "business necessity." 42 U.S.C. § 12112(b)(6). After nearly two years of discovery, the district court found that the policy is companywide and is uniformly applied. Did the court abuse its discretion in allowing this claim to be adjudicated on a classwide basis and ordering a bifurcated trial plan, in accordance with the Supreme Court's decisions in *Franks* and *Teamsters*?

Apposite cases: *Franks,* 424 U.S. 747; *Teamsters*, 431 U.S. 324; *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Tyson Foods*, 136 S. Ct. 1036.

Apposite statutes: 42 U.S.C. § 12102(1), (3), (4); 42 U.S.C. § 12112(a), (b)(6); 42 U.S.C. § 12117(a); 42 U.S.C. § 2000e-5(a), (f), (g); 42 U.S.C. § 2000e-6(a).

STATEMENT OF THE CASE AND OF THE FACTS

I. Statutory background

"Congress enacted the ADA in 1990 to remedy widespread discrimination against [individuals with disabilities]." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 674 (2001). The Act's express purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," and "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1), (2).

Appellate Case: 19-1514 Page: 13 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

"To effectuate its sweeping purpose, the ADA forbids discrimination against [individuals with disabilities] in major areas of public life," including employment. *PGA Tour*, 532 U.S. at 675. It achieves this through various provisions, several of which are relevant here.

Subsection 12112(a): the general antidiscrimination rule. This subsection provides a "[g]eneral rule" that no covered employer, in making employment decisions, "shall discriminate against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a).

Subsection 12112(b)(6): the prohibition on policies that target "a class of individuals with disabilities." The next subsection sets forth a rule of "[c]onstruction." *Id.* § 12112(b). It says: "As used in subsection (a) of this section, the term 'discriminate against a qualified individual on the basis of disability' includes" seven distinct actions. *Id.* Among them is "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." *Id.* § 12112(b)(6).

Until 2008, this rule of construction applied only to the word "discriminate"—not the entire phrase "discriminate against a qualified individual on the basis of disability." But in 2008, Congress amended the statute to ensure "a broad scope of

Appellate Case: 19-1514 Page: 14 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

protection." Pub. L. No. 110-325, § 2(b)(1), 122 Stat. 3553 (Sept. 25, 2008) (codified in 42 U.S.C. § 12101 note). It found that judicial decisions had "too often turned solely on the question of whether the plaintiff is an individual with a disability rather than the merits of discrimination claims, such as whether [the employers'] qualification standards were unlawfully discriminatory." 154 Cong. Rec. S8342-01, S8345 (Sept. 11, 2008). Congress intended to fix this problem. It aimed "to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." Pub. L. No. 110-325, § 2(b)(5), 122 Stat. 3553.

Consistent with this purpose, subsection (b)(6) now makes clear that a covered employer who adopts a policy screening out "an individual with a disability or a class of individuals with disabilities" has violated the statute unless it can show that the policy was (1) job-related and (2) consistent with business necessity. *See also* 29 C.F.R. § 1630.10(a) ("It is unlawful for a covered entity to use [such a policy].").

Section 12113: defenses. A separate section provides defenses to liability. The general defense matches the one built into the text of subsection 12112(b)(6). It allows employers to avoid liability if a discriminatory policy "has been shown to be job-related and consistent with business necessity." 42 U.S.C. § 12113(a). Employers

are also permitted to "include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." *Id.* § 12113(b). "The term 'direct threat' means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *Id.* § 12111(3).

Section 12102: the definition of "disability." Because subsection 12112(b)(6) refers to policies targeting an "individual with a disability or a class of individuals with disabilities," this raises the question of what it means to have a "disability." Section 12102 supplies the answer. It defines the term to mean not only "a physical or mental impairment that substantially limits one or more major life activities," but also "being regarded as having such an impairment." *Id.* § 12102(1). For someone to show that they have a "disability," therefore, it is enough for them to show that they have "been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." *Id.* § 12102(3). And any benefit of the doubt goes to the employee: In another "[r]ule[] of construction" added in 2008, the Act commands that "[t]he definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter." *Id.* § 12102(4)(A).

Section 12117: the incorporation of Title VII "[p]owers, remedies, and procedures." Finally, the ADA expressly adopts all powers, remedies,

procedures conferred by Title VII, reflecting the fact that the ADA was designed "to provide civil rights protections for persons with disabilities that are parallel to those available to minorities and women." H.R. Rep. No. 101-485, pt. 3, at 48 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 471. Specifically, section 12117 says that "[t]he powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides . . . to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations . . . , concerning employment." 42 U.S.C. § 12117(a).

Section 2000e-5, in turn, grants the power to sue "to prevent any person from engaging in any unlawful employment practice [under Title VII]." *Id.* § 2000e-5(a), (f)(1). It also empowers courts to enjoin any "such unlawful employment practice" and issue "any other equitable relief as the court deems appropriate," *id.* § 2000e-5(g)(1), and to issue individualized relief if the individual suffered harm because of the unlawful employment practice, *id.* § 2000e-5(g)(2). In addition, section 2000e-6 authorizes suits when an employer is "engaged in a pattern or practice of resistance" to Title VII's provisions. *Id.* § 2000e-6(a).

As a result of its incorporation of Title VII's remedial provisions, the ADA grants these same powers "to any person alleging discrimination on the basis of disability in violation" of the ADA or its implementing regulations. *Id.* § 12117(a).

Appellate Case: 19-1514 Page: 17 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

II. Factual background

Union Pacific's uniform policy. In 2010, when Union Pacific appointed Dr. John Holland as its Chief Medical Officer, it signaled a "new paradigm" for determining whether workers were fit for their jobs and imposed "more stringent" requirements. SA257-58; SA305-07; SA439; SA89. The result was the "1% Rule"—an ultra-conservative policy that flags any employee deemed to have more than a 1% per-year probability of "sudden incapacitation" and considers them to be an unacceptable safety risk. SA299; SA301-02; SA433; SA295.

To implement the policy, Union Pacific has a set of "Medical Rules" and "common understanding[s] and standard processes" that govern how the 1% Rule works. SA160-173; SA666. Under these rules, the company requires employees in so-called "safety sensitive" positions to disclose what it terms "reportable health events"—any new diagnoses, events, or changes in certain conditions. SA172-73; SA355-56; SA726-28; SA730-31; *see also* SA417-18; SA425-26. Any employee who is identified as having such a condition is then required to undergo a fitness-for-duty evaluation, which automatically forces the employee to be put on leave and to turn over years of medical records. SA726; SA172-73; SA286-87; SA674-80; SA179-90; *see also* SA268-70; SA288; SA296. Well over three-fourths of Union Pacific's 40,000+ employees are subject to the policy. SA177; SA272-74.

Each evaluation is performed by a single group of common decisionmakers. Led by Dr. Holland, this group includes three "Associate Medical Directors"—doctors with their own dedicated areas of responsibility—and a handful of "Fitness-for-Duty Nurses." SA259-63. Although the nurses and doctors assist in the evaluations, they all report to Dr. Holland, and their decisions are subject to his ultimate approval. SA300; SA330; *see also* SA343; SA348-50; SA336.

Standardization is a critical component of the fitness-for-duty policy. SA284. Detailed workflow documents specifically tell the medical group how to conduct evaluations. SA93-159; SA674-96; SA707-22. As Dr. Holland put it: "Almost everything . . . relies on common understanding[s] and standard processes." SA666.

The evaluations therefore do not take into account the employee's specific job duties, whether they work alone or with a team, or the amount of time they have worked with the condition without incident. *See* SA319; SA366-67; SA736. Indeed, Dr. Holland has explicitly criticized any approach that would "require the employer to develop separate medical standards for each individual safety critical job" as "needlessly complex." SA738. "[I]t is neither practical nor necessary," in his view, "for [Union Pacific] physicians to be familiar with the detailed physical demands and safety risks for all safety critical positions within the company." SA736.

Nor do the evaluations constitute an individualized analysis of an employee's individual medical circumstances. Instead, the medical group relies on broad,

population-based risk assessments to determine whether a certain health condition qualifies as a "safety risk" as defined by the company's Medical Rules. *See* SA306-07; SA368-369; SA373-374; SA439. To make this determination, the group simply looks at the employee's medical records, references materials for their suspected condition or diagnosis, and determines whether the employee poses a greater than 1% risk of sudden incapacitation within the next year. *See* SA310-26. For instance, workers who report cardiovascular conditions, seizure or loss of consciousness, significant hearing or vision changes, diabetes, or sleep apnea may be deemed a safety risk, regardless of their particular capabilities or limitations. *See* SA172-73; SA417-26; SA726-31.

Union Pacific has conceded that it uses a uniform, companywide standard for evaluating whether employees are fit for duty, and has the defended its policy as a whole. *See, e.g.*, SA737 (explaining that "[t]he reason that [Union Pacific] can apply its fitness-for-duty program broadly to cover all . . . workers in safety critical positions is because once an unacceptable risk for sudden incapacitation or impairment is identified, the worker is given functional work restrictions"); SA748 ("[Union Pacific] considers this use of a uniform threshold of unacceptable risk for sudden incapacitation (for UPRR workers in safety critical positions) to be both appropriate and necessary[.]"); SA738 ("[Developing] separate medical standards for each job is unnecessary, since the approach used by [Union Pacific] allows a single set of medical standards to be used for all workers in safety critical jobs within an industry

Appellate Case: 19-1514 Page: 20 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

(e.g., all railroad workers).”); A258; SA439; SA734-38; SA741-43; SA748; SA800; SA806-10; *see generally* A257-60; SA795-828.

But, as it turns out, no acceptable scientific rationale supports Union Pacific's policy. *See* SA830-1182. The standards that Union Pacific applies are not mandated by or based on any requirements of the National Transportation Safety Board—the agency charged with regulating rail safety. Instead, the policy imports guidelines from an entirely inapposite context: commercial trucking, where drivers typically work alone. *See* SA275-83; SA442-44; SA812-13; SA837-38; *see also* SA275-76 (describing effort to incorporate guidelines for commercial truckers); SA1112 (noting that these standards “are exclusive to a driver of a [commercial motor vehicle] and not established to govern the physical requirements of non-CMV employees”).

Union Pacific's approach has led industry members to refuse to be associated with the policy. *See* SA1337-41. Instead of finding support in prevailing standards, SA830-1182, Union Pacific's policy is predicated on “unfounded assumptions about specific illnesses and risk, which [has] led to unnecessary exclusion, restrictions and termination of qualified workers.” SA831; *see also* SA838.

In short, the 1% Rule is arbitrary: individuals with certain conditions are treated “uniformly as if belonging to groups and not in an individual manner.” SA834. Yet the policy continues to this day, even though there is no evidence that it has led to fewer events of sudden incapacitation. *See* SA331-32.

Appellate Case: 19-1514 Page: 21 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

The policy's systematic removal of individuals with disabilities. Union Pacific's policy is designed to target employees with disabilities. As the company's own internal documents reveal, Union Pacific has taken proactive steps to identify and remove workers with reportable health conditions from its workforce. *See* SA271-72; SA359-64; SA377; SA380-81; SA1211; SA1233-52; SA1278; SA1285-89.

Longtime employees who have never experienced an on-the-job health or medical incident are determined to violate the policy. Named plaintiff Norman Mount, for instance—a 30-year veteran at Union Pacific—was suddenly disqualified from work solely because he had a pacemaker (which Union Pacific had long known about), even though his doctor had cleared him for work with no restrictions. SA21-28. And named plaintiff Quinton Harris was disqualified because he has medication-controlled epilepsy, even though he (1) disclosed the condition when hired, (2) was medically cleared to work, and (3) has not had a seizure in over ten years. SA8-13. Other employees' experiences were similar. *See* SA1-7; SA14-20; SA29-42; *see also* A123-210 (declarations of example class members); SA838-978; SA1351-57; SA1369-75.

For any employee deemed a "safety risk," the consequences are severe. Union Pacific immediately issues these workers what it calls "standard work restrictions." SA293-94; *see* SA87-89; SA755; SA352; SA214-19; SA756-762. These restrictions are, as their name implies, standard. They do not take into account the employee's unique medical circumstances or their specific job duties. SA306-07 (explaining the

approach of applying "functional" work restrictions, by health condition, to a "broad variety of jobs"); SA736 ("[I]t is neither practical nor necessary for [Union Pacific] physicians to be familiar with the detailed physical demands and safety risks for all safety critical positions within the company, because HMS applies functional work restrictions to safety critical workers with health-related safety risks."); *see also* SA439; SA737-38. And they effectively make it impossible for an employee to continue working. *See, e.g.*, SA2; SA9; SA15; SA22; SA30; *see also* A123-210 (declarations of example class members issued work restrictions).

Over the past five years, Union Pacific's policy has affected thousands of its employees. According to the company's own records, more than 7,000 workers were forced to undergo fitness-for-duty examinations based on a "reportable health event" during the relevant time period. SA52-54; SA220-29; SA244-45. And thousands of these workers have been removed from service. SA245-46; SA52-54; *see also* A123-210 (detailing the experiences of 44 class members removed from service because of the policy). The number of workers subject to Union Pacific's policy continues to rise dramatically. *See* SA1208; SA1230; SA1237; SA1265; *see also* SA431-34.

III. Procedural history

In 2016, several current and former employees brought this class action against Union Pacific, alleging that the company's uniform 1% Rule discriminates against individuals with disabilities in violation of the ADA. *See* ECF No. 20. The amended

complaint asserts three ADA class claims: a disparate-treatment claim under subsections 12112(a) and 12112(b)(6); a disparate-impact claim under section 12112; and an unlawful-medical-inquiry claim under subsection 12112(d)(4). A79-82. The plaintiffs sought class certification of only the disparate-treatment claim, so only that claim is at issue in this appeal.

Before the plaintiffs filed a motion for class certification, Union Pacific moved to dismiss the class allegations. It argued that certification is improper because "it will be necessary to assess whether each class member is 'qualified' before Union Pacific can be adjudged liable for violating the ADA," and because damages will be individualized. ECF No. 88, at 12. Union Pacific did not suggest that any other issue—including any defenses it might have—would be too individualized.

The district court denied the motion and allowed the case to "proceed down the normal path," with discovery and class-certification briefing. ECF No. 111, at 9. In doing so, the court remarked that "[t]here appear to be issues capable of class-wide resolution presented in the Amended Complaint." *Id.* at 8. It explained why:

> The allegations, taken as true, show that one or more of the central issues are common to the class and can fairly be said to predominate over individual issues. Class-action treatment is not prohibited just because there may be some matters that will have to be tried separately. The plaintiffs challenge a single cohesive policy and a single injunction under Fed. R. Civ. P. 23(b)(2) could arguably provide relief to each member of the class. Also, the court has tools at its disposal for management of class actions and it may turn out that a class action is the "superior" method of adjudicating the controversy.

Appellate Case: 19-1514 Page: 24 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

Id. at 8-9.

When Union Pacific answered the complaint, it admitted that the plaintiffs were challenging "company-wide changes [it had made] to its Medical Rules," and that "it will raise some common defenses" to the class ADA claims. ECF No. 113, at 2, 20. Among its asserted defenses, Union Pacific maintained that its company-wide "qualification standards" are job related and consistent with business necessity, and are "necessary to eliminate a significant [health or safety] risk." *Id.* at 32.

After over a year and a half of discovery, the plaintiffs moved for class certification of their ADA disparate-treatment claim. ECF No. 241, at 22. They emphasized their common theory of liability for this claim: "that Union Pacific, through its reportable health events policy, engaged in a pattern or practice of discrimination, including the implementation of qualification standards and other criteria that screen out individuals with disabilities." *Id.* at 23-24 (citing subsections 12112(a) and (b)(6)). The plaintiffs explained that "[t]he common questions driving these claims include: (1) whether, under the reportable health events policy, Union Pacific has engaged in a pattern or practice of disability discrimination; (2) whether Union Pacific can carry its burden of proof on its 'direct threat' defense; and (3) whether Union Pacific's removal of employees based on alleged safety risks is job-related and consistent with business necessity." *Id.* at 24.

Appellate Case: 19-1514 Page: 25 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

In opposing certification, Union Pacific's primary argument was that the class failed the requirements of Rule 23(a). *See* ECF No. 259. Union Pacific again took the position that the "Plaintiffs' claims 'require inquiry into whether class members are 'qualified' . . . before a classwide determination of unlawful discrimination, as contemplated at the first *Teamsters* stage, can be reached." *Id.* at 57. Nearly all of Union Pacific's 92-page brief was predicated on this argument, including the handful of pages it devoted to Rule 23(b). *Id.* at 82-89. Apart from this argument, Union Pacific did not meaningfully dispute the predominant common issues identified by the plaintiffs. It could not credibly deny that its policies are standard and uniform. Nor did it make any developed argument that its affirmative defenses would raise individualized issues, much less explain what those hypothetical issues might be or cite any evidence of how they would differ in significant respects across the class.

The district court certified the class. A238-56. It found that the case "involves a single, uniform reportable events policy" with "work restrictions [that] do not vary by position." A252, A254. Specifically, the court found that "Union Pacific has a company-wide Fitness-for-Duty" program, A238; that "the 1% Rule is applied across-the-board to all decisions to remove a worker from service based on a reportable health event," A239 n.2; that "the fitness-for duty policies and reportable health events are uniformly carried out nationwide by the same group of decision-makers," A245; and that class members "are all being affected by the same policy," A246.

Appellate Case: 19-1514 Page: 26 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

Based on these fact findings, the court held that the requirements of Rule 23 were met. It explained that "[t]he proof will be the same regarding the systemic disability discrimination, operating procedures and policies[,] and the affirmative defenses (direct threat and business necessity)." A245. It further explained that "there are common questions regarding the putative class, including a pattern and practice of discrimination" and the "affirmative defenses." A252. The court found that these common questions predominate over individual issues, A250-51 & n.4; that the class is "sufficiently cohesive" to warrant certification, A250; and that a class is superior to "individual lawsuits [that] would duplicate this proof over and over again," A252.

The court then turned to the question of how to manage the litigation going forward. "[A]fter thoroughly reviewing the alleged facts and law," the court found that a bifurcated trial plan "will best meet the needs of this case." A253-54. "The parties will litigate liability and injunctive relief in Phase One of the Trial. Then, in Phase Two, the parties will litigate damages and other remaining issues through individual hearings, or group hearings as appropriate, or by stipulations of the parties." A254. The court explained that "[t]his model is consistent with litigating class discrimination cases as set forth under *Teamsters*," in which the Supreme Court held that, at phase one, "the plaintiff 'is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy.'" A253-54 (quoting 431 U.S. at 360). "Instead, the focus will be

Appellate Case: 19-1514 Page: 27 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

on 'a pattern of discriminatory decision making.'" A254. The court therefore certified a hybrid class, with the injunctive-relief claims certified under Rule 23(b)(2) and the backpay and damages claims certified under Rule 23(b)(3). A254-55.

The certified class is as follows: "All individuals who have been or will be subject to a fitness-for-duty examination as a result of a reportable health event at any time from September 18, 2014 until the final resolution of this action." A256.

SUMMARY OF ARGUMENT

I.A. The plaintiffs allege that Union Pacific's reportable-health-events policy violates the ADA because it discriminates, on its face, against a "class of individuals with disabilities" and is not justified by "business necessity." 42 U.S.C. § 12112(b)(6).

1. That claim is ideally suited for class treatment under Rule 23(b)(2). The policy's existence is not challenged on appeal. Its lawfulness is a common question. And a classwide injunction under 12117 is plainly appropriate if the policy is found unlawful at stage one. So this (b)(2) class is as cohesive as they get. It is in fact the rare case where even the defendant should have an interest in certification: There will either be one injunction or none, but either way the result will apply across the class.

2. The district court also had the discretion to certify a class under Rule 23(b)(3) and allow individual class members to seek individual relief at stage two. The common question at the heart of this case is whether Union Pacific's uniform, facially discriminatory policy violates the ADA. That common question predominates over

Appellate Case: 19-1514 Page: 28 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

any individual issues that might be addressed at stage two (should the policy as a whole be found by a jury to be unlawful). A class action is also superior to requiring "individual lawsuits [that] would duplicate [the] proof over and over again." A252.

B. Title VII precedent, which the ADA incorporates, confirms that the district court did not abuse its discretion in certifying a class and bifurcating the proceedings. The Supreme Court's decisions in *Franks*, *Teamsters*, and *Wal-Mart* authorize this approach for Title VII class actions, and the district court had discretion to follow this approach here. If anything, because this case involves a facially discriminatory policy, it is more suitable for class treatment than a Title VII burden-shifting case, where ascertaining the reason for a given decision can be fact-intensive. In this case, the reason is no mystery: application of the very policy found unlawful at stage one.

II. Union Pacific's attempts to establish an abuse of discretion run into two basic problems: either they ignore the plain text and purpose of the particular ADA provisions at issue in this case, or they run headlong into Supreme Court precedent.

A. In the first category is Union Pacific's contention that class treatment and bifurcation are improper because proving an ADA violation at stage one will require individualized inquiries into qualification. This contention, which infects countless arguments throughout Union Pacific's brief, is simply incorrect. The lawfulness of Union Pacific's policy does not depend on an assessment of whether individual class members are "qualified." *See* 42 U.S.C. § 12112(b)(6); 29 C.F.R. § 1630.10(a).

Appellate Case: 19-1514 Page: 29 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

B. Union Pacific's reliance on *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169 (3d Cir. 2009), suffers from the same flaw. *Hohider* involved a different ADA provision with different requirements, and did not involve a facially discriminatory policy.

C. In the second category is Union Pacific's assertion that decertification is required because the class might include people who lack standing. This argument is foreclosed by the Supreme Court's decisions in *Franks*, *Teamsters*, and *Tyson Foods*.

STANDARD OF REVIEW

This Court's "review of a district court's decision to certify a class is limited." *Stuart v. State Farm Fire & Casualty Co.*, 910 F.3d 371, 375 (8th Cir. 2018). The district court is given "'broad discretion' to determine whether certification is appropriate." *Id.* Although the district court's "rulings on questions of law are reviewed de novo," the court's "application of the law is reviewed for an abuse of discretion," and its "factual findings are reversible only if clearly erroneous." *Id.*

The district court is also afforded "considerable latitude in deciding the most efficient and effective method of disposing of the issues in a case." *Rolscreen Co. v. Pella Prods. of St. Louis, Inc.*,64 F.3d 1202, 1209 (8th Cir. 1995). For that reason, this Court also reviews "the trial court's decision to bifurcate for abuse of discretion." *Id.*; *see Farmers Coop. Co. v. Senske & Son Transfer Co.*, 572 F.3d 492, 498 (8th Cir. 2009).

Appellate Case: 19-1514 Page: 30 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

ARGUMENT

I. The district court did not abuse its discretion in certifying this case as a class action under Rule 23(b)(2) and (b)(3).

A. The ADA claim certified in this case—challenging a facially discriminatory policy against a "class of individuals with disabilities"—is ideally suited for class treatment.

This case involves what the district court found is a "single, uniform reportable events policy." A252. The plaintiffs allege that this policy violates section 12112 of the ADA because it discriminates against a "class of individuals with disabilities" without justification, in violation of subsection (b)(6), and because it constitutes a practice of unlawful discrimination, in violation of subsection (a). They seek classwide injunctive and declaratory relief, plus whatever individual relief may be appropriate. As the ADA's text, structure, and purpose make clear, and Title VII precedent confirms, this claim is perfectly suited for hybrid class treatment under Rule 23(b)(2) and (b)(3).

1. This case is a classic Rule 23(b)(2) class action.

Because the Rule 23 analysis is "inextricably linked with the elements of a particular claim," *Krakauer v. Dish Network, L.L.C.*, — F.3d —, 2019 WL 2292196, *7 (4th Cir. May 30, 2019), we start with the relevant text of the ADA. The class claim here challenges Union Pacific's policy under subsections 12112(a) and (b)(6). When read together, these provisions make clear that the policy is unlawful if it "screen[s] out or tend[s] to screen out an individual with a disability or a class of individuals with disabilities," unless the policy is "shown to be job-related for the position in question

Appellate Case: 19-1514 Page: 31 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

and is consistent with business necessity." 42 U.S.C. § 12112(b)(6). The implementing regulation says the same. *See* 29 C.F.R. § 1630.10(a) (providing that such a policy "is unlawful"). The lawfulness of Union Pacific's policy will therefore depend on (1) whether the policy screens out a "class of individuals with disabilities," and (2) is "consistent with business necessity" (the primary defense Union Pacific has raised).

In addition, "[t]he application of Rule 23 often turns on the cause of action." *Krakauer*, 2019 WL 2292196, at *7. Here, the ADA grants a cause of action to "any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations," and it expressly incorporates Title VII's "powers, remedies, and procedures" into the cause of action. 42 U.S.C. § 12117(a). This means that "any person" affected by Union Pacific's policy may sue "to prevent [the company] from engaging in [that allegedly] unlawful employment practice." *Id* § 2000e-5(a), (f)(1) (expressly incorporated by section 12117). And if the person proves that the policy is unlawful, they may obtain an injunction against "such unlawful employment practice." *Id.* § 2000e-5(g)(1) (same).

Once these statutory provisions are properly understood, the appropriateness of certifying a claim for equitable relief becomes apparent. Rule 23(b)(2) asks whether "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." The answer here is a resounding yes.

Appellate Case: 19-1514 Page: 32 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

As the district court found, Union Pacific has a "single, uniform reportable events policy" that is "company-wide," and is "applied across-the-board" by "the same group of decision-makers" in a way that "do[es] not vary by position." A238-39, A245, A252, A254. This includes "the 1% Rule [which] is applied across-the-board to all decisions to remove a worker from service based on a reportable health event." A239. These fact findings are reviewable only for clear error, *see Stuart*, 910 F.3d at 375—a standard that Union Pacific does not even attempt to meet. So this case has exactly what was missing in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 355 (2011): "a uniform employment practice that would provide the commonality needed for a class action." *See Postawko v. Mo. Dep't of Corr.*, 910 F.3d 1030, 1040 (8th Cir. 2018) (explaining that, when plaintiffs challenge a "single," "uniformly applied" policy, "*Wal-Mart* supports, rather than weakens," certification). Although Union Pacific may "challenge the existence and parameters of the alleged policy at trial, at this stage [it is] unable to show that the district court abused its discretion in holding that sufficient evidence of a common policy existed to comply with Rule 23(b)(2)." *Id.*

The lawfulness of this uniform policy is also a common issue that demonstrates the cohesiveness of the class. The claim for classwide injunctive and declaratory relief does not challenge the particular way in which the policy was *applied* to individual class members; it challenges the lawfulness of the policy *itself*. And the lawfulness of the policy will be decided by answering the following questions: Does the policy

Appellate Case: 19-1514 Page: 33 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

constitute a discriminatory practice because it "screen[s] out or tend[s] to screen out" a "class of individuals with disabilities" (a phrase that expressly contemplates a class action)? 42 U.S.C. § 12112(b)(6). If so, can the policy nevertheless be justified because it is "consistent with business necessity," *id.* , or because it prevents a "direct threat to the health or safety of other individuals," *id.* § 12113(b)?

The answer to each of these questions will be the same as to all class members, and will therefore "resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350. If the policy is found to be lawful, the class claim will fail. If the policy is found to be unlawful, the district court will have the authority to enjoin the policy in full under section 12117. *See id.* at 366 (explaining that this equitable remedy is available under Title VII's "detailed remedial scheme," which the ADA expressly incorporates). Either way, the answer will "drive the resolution of the litigation," *Postawko*, 910 F.3d at 1038 (quotation marks omitted), and the equitable relief will be the same across the class.

So this is not a case "where the individual proof necessary to resolve the issues abound[s]," and the equitable relief sought is "unique" to each class member rather than "universal." *Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 478 (8th Cir. 2016). As the Supreme Court has explained: "The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted." *Wal-Mart*, 564 U.S. at 360. The class must be seeking a "single injunction or declaratory judgment"—not "a *different*

Appellate Case: 19-1514 Page: 34 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

injunction or declaratory judgment" for "each individual class member." *Id.* The class here readily satisfies that "key" requirement. *See Chicago Teachers Union, Local No. 1 v. Bd. of Educ. of City of Chicago*, 797 F.3d 426, 442 (7th Cir. 2015) ("[T]he 23(b)(2) plaintiffs here seek the same declaratory and injunctive relief for everyone.").

And it is not just the plaintiffs who should prefer this outcome. A class action here is also in the interests of the defendant (to say nothing of the courts). After all, if Union Pacific were successful in defending its policy in an individual action, that victory would not stop different plaintiffs from bringing their own actions challenging the overall reportable-events policy as unlawful. Not so here. If Union Pacific prevails on the class claim, it will get the benefit of res judicata on that particular claim. *See Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 880 (1984).

With benefits on both sides, and clear judicial efficiency gains, it is easy to see why the Supreme Court has said that "civil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of permissible classwide proceedings. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). This case is thus a quintessential class action: "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). The district court did not abuse its discretion in recognizing as much.

Appellate Case: 19-1514 Page: 35 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

2. The district court did not abuse its discretion in finding that common questions predominate over individual issues and a class action is superior.

Nor did the district court abuse its discretion in certifying a hybrid class action under Rule 23(b)(2) and (b)(3) to allow class members (should it be necessary) to pursue claims for individualized relief, in keeping with decades of Supreme Court precedent. *See Wal-Mart*, 564 U.S. at 366. Rule 23(b)(3) permits certification if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The district court made these findings here, and it was right to do so.

a. *Predominance.* Begin with predominance. This issue concerns "the relation between common and individual questions in a case." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016). "An individual question," the Supreme Court has explained, "is one where 'members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof.'" *Id.* (brackets omitted). "The predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Id.* (quotation marks omitted).

Appellate Case: 19-1514 Page: 36 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

This inquiry "is qualitative rather than quantitative." *Ebert*, 823 F.3d at 478. It requires only that common issues *predominate* over individual issues—not that there be *no* individual issues. *See Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 469 (2013) ("Rule 23(b)(3) . . . does *not* require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof." (cleaned up)). "When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Tyson Foods*, 136 S. Ct. at 1045 (quotation marks omitted); *see also Stuart*, 910 F.3d at 375 (saying same); *Day v. Celadon Trucking Servs., Inc.*, 827 F.3d 817, 833 (8th Cir. 2016) (saying same and affirming certification of employment class action despite individual issues).

That describes this case. Although Union Pacific contends (at 3) that this case has an "absence of any common questions," the most important question here is common: Is Union Pacific's policy unlawfully discriminatory? *See Chicago Teachers Union*, 797 F.3d at 444-45 ("[T]he key question upon which all of the litigation rises or falls can be answered for every plaintiff: was the [policy] discriminatory?"). That common predominant question entails a number of common subsidiary questions: Does Union Pacific actually have a uniform policy (as the district court found for purposes of class certification)? Does that policy "screen out or tend to screen out an

Appellate Case: 19-1514 Page: 37 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

individual with a disability or a class of individuals with disabilities"? 42 U.S.C. § 12112(b)(6). Can Union Pacific prove one of its affirmative defenses—that the policy is "consistent with business necessity," *id.* , or prevents a "direct threat to the health or safety of other individuals," *id.* § 12113(b)?

If Union Pacific prevails on any of these common questions, it will win the class claim at stage one, thereby confirming the appropriateness of certification. Only if it loses on these issues will the case proceed to consider any individual questions at stage two. In that scenario, the policy will have been found unlawful, and class members will be able to seek individualized relief based on that unlawful policy. It is true that stage two could raise some individual issues. But just as Union Pacific vastly understates the efficiency gains of a class action, it vastly overstates the difficulty in resolving any individual issues and the importance of any differences across the class.

First, Union Pacific points out that class members are required to have suffered an adverse action to recover damages, and that damages will vary from person to person. "The potential need for individualized damages inquiries," however, "is not sufficient to overcome the district court's findings of predominance and superiority." *Stuart*, 910 F.3d at 376; *see Tyson Foods*, 136 S. Ct. at 1045 (holding same in employment case). Determining whether an employee was removed from their position, for how long, and the backpay owed is a ministerial determination that can be calculated by

Appellate Case: 19-1514 Page: 38 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

looking at Union Pacific's records. This is no different than in a Title VII case, where these issues are handled at stage two, consistent with Rule 23.

Second, Union Pacific claims (at 21) that its affirmative "defenses of business necessity and direct threat" are "individualized defenses particular to the specific employee and job in question, and cannot be decided through classwide evidence." This argument provides no basis for reversal. For starters, Union Pacific has not preserved any argument that it will be presenting individualized affirmative defenses. It did not make any developed argument in the district court that it would do so, much less point to any evidence of how its defenses might differ significantly across the class. *See* ECF No. 259 (mentioning business-necessity and direct-threat defenses in only half a sentence on page 69 of its 92-page opposition). That alone is fatal for Union Pacific on abuse-of-discretion review because it has the burden of proof on these defenses. *See EEOC v. Wal-Mart*, 477 F.3d 561, 571 (8th Cir. 2007). A defendant's "unsupported allegation of individual [defense] questions does not undercut the district court's finding that common questions predominate over individual ones." *Barfield v. Sho-Me Power Elec. Coop.*, 852 F.3d 795, 806 (8th Cir. 2017).[1]

[1] *See also True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923, 931-32 (9th Cir. 2018); *Torres v. S.G.E. Mgmt., L.L.C.*, 838 F.3d 629, 644 (5th Cir. 2016) (en banc) ("In the total absence of such evidence" as to an affirmative defense, "we have no evidentiary basis to conclude that the district court abused its discretion in holding otherwise."); *Bridging Cmtys. Inc. v. Top Flite Fin. Inc.*, 843 F.3d 1119, 1125-26 (6th Cir. 2016) ("We hold that the mere mention of a defense is not enough to defeat the predominance requirement of Rule 23(b)(3)."), *cert. denied*, 138 S. Ct. 80 (2017).

Appellate Case: 19-1514 Page: 39 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

In any event, even when a defendant "point[s] to some evidence that a defense will indeed apply to some class members, which is more than [Union Pacific] did here, courts routinely grant certification because 'Rule 23(b)(3) requires merely that common issues predominate, not that all issues be common to the class.'" *Bridging Cmtys.*, 843 F.3d at 1125-26 (quoting *Smilow v. Sw. Bell. Mobile Sys., Inc.*, 323 F.3d 32, 39 (1st Cir. 2003)). "The general rule, regularly repeated by courts in many circuits, is that courts traditionally have been reluctant to deny class action status under Rule 23(b)(3) simply because affirmative defenses may be available against individual members." *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1240-41 (11th Cir. 2016) (cleaned up); *see, e.g.*, *Young v. Nationwide Mut. Ins. Co.,* 693 F.3d 532, 544 (6th Cir. 2012). In *Tyson Foods*, the Supreme Court agreed: certification is not defeated just because the defendant might raise "some affirmative defenses peculiar to some individual class members." 136 S. Ct. at 1045.

The same is true here. Union Pacific will be able to present evidence in defense of its reportable-health-events policy at stage one of the litigation. If these classwide defenses fail, Union Pacific will then be able to present any individualized defenses it might have at stage two, including any individualized business-necessity or direct-threat defenses. But it will bear a heavy burden. "The 'business necessity' standard is quite high." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 996 (9th Cir. 2007) (en banc) (quotation marks committed). And "direct threat" requires proof that a particular

Appellate Case: 19-1514 Page: 40 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

employment decision was "made on the basis of individualized risk assessments," rather than population-based risk assessments, and "relie[d] on the most current medical knowledge and/or the best available objective evidence." *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 85-86 & n.5 (2002); *see id.* at 85 n.5 ("It would also be a violation to deny employment . . . based on averages and group-based [safety] predictions. This legislation requires individualized assessments." (quotation marks omitted)); *see also EEOC*, 477 F.3d at 571-72.

For now, at least, the evidence shows that Union Pacific did not make any individualized risk assessments (which it thought were "unnecessary," SA738), but instead applied its policy uniformly, using population-based risk assessments. And the district court so found. On top of that, whether Union Pacific's decisions are based on the "best current medical or other objective evidence" is a common question. *EEOC*, 477 F.3d at 571. The plaintiffs say no; Union Pacific says yes. If the evidence later shows that a "defense is likely to bar claims against at least some class members, then [the district] court has available adequate procedural mechanisms. For example, it can place class members with potentially barred claims in a separate subclass, or exclude them from the class altogether." *Smilow*, 323 F.3d at 39-40 (citations omitted); *see also Torres*, 838 F.3d at 645; *Bridging Cmtys.*, 843 F.3d at 1126. But on this record, the court was not required to deny certification outright.

Appellate Case: 19-1514 Page: 41 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

Third, relying on *Sutton v. United Air Lines*, 527 U.S. 471 (1999), Union Pacific says that "adjudicating class members' claims will require individualized assessments of whether each class member has a 'disability.'" UP Br. 17; *see id* at 24-26. This issue poses no obstacle to certification. The statutory text requires only that a person be "regarded as" disabled. 42 U.S.C. § 12102(1)(C). This requirement is satisfied if a person "has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." *Id.* § 1202(3)(A); *see also* 29 C.F.R. § 1630.2(g)(iii)(3) ("Where an individual is not challenging a covered entity's failure to make reasonable accommodations . . . 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."). Everyone in this class meets that definition. Each was subject to the challenged policy because they were suspected of having at least one reportable health condition—in other words, "because of an actual or perceived physical or mental impairment."

Moreover, when Congress amended the ADA to expand its coverage—to expressly overrule *Sutton*—it said that it did so "to convey that it is the intent of Congress that the *primary object of attention* in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and

Appellate Case: 19-1514 Page: 42 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

to convey that the question of whether an individual's impairment is a disability under the ADA *should not demand extensive analysis*." Pub. L. No. 110-325, § 2(b)(5) 122 Stat. 3553 (emphasis added). The district court heeded that command. The "primary object of attention" here—the predominant issue, if you will—is the lawfulness of Union Pacific's policy. The disability question will "not demand extensive analysis."

Finally, that leaves one potential issue: whether a class member is a "qualified individual." *See* 42 U.S.C. § 12112(a). The district court rightly exercised its discretion in concluding that this potential issue does not bar certification. Again, the issue could arise for individual class members only if the policy itself were found to be unlawful. In that circumstance, every class member—many of whom "worked [at Union Pacific] for years and were allegedly qualified and performing their jobs with no problems," A239—would have been screened out by the unlawful policy. As a result, every class member (at least presumptively) would have met every other job requirement except this one policy, which would have been found unlawful. *See Bates*, 511 F.3d at 990 ("[I]t would make little sense to require an ADA plaintiff to show that he meets a qualification standard that he undisputedly *cannot* meet because of his disability and that forms the very basis of his discrimination challenge."). And even if Union Pacific "might attempt to pick off the occasional class member here or there through individualized rebuttal," that would "not cause individual questions to predominate." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 276 (2014).

Appellate Case: 19-1514 Page: 43 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

Further, we note that the plain text of the relevant provisions does not require class members to show that they're "qualified" to obtain relief. The words "qualified individual" do not appear in subsection 12112(b)(6) or 29 C.F.R. § 1630.10(a). Nor do they appear in the cause of action, 42 U.S.C. § 12117(a). They are only in subsection 12112(a), which makes it unlawful to "discriminate against a qualified individual on the basis of disability." But, by virtue of subsection 12112(b)'s rule of construction, that phrase is defined to include certain specified conduct, set forth in seven provisions. Some of those provisions—(b)(2), (b)(4), and (b)(5)—expressly refer to a "qualified" individual. Others—not just (b)(6), but also (b)(1), (b)(3), and (b)(7)—do not. They deliberately omit this word and instead train their focus on abolishing discriminatory companywide policies. When courts are "engaged in the business of interpreting statutes," they usually "presume differences in language like this convey differences in meaning." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017).

This presumption would make particular sense here given that Congress amended subsection 12112(b) "by striking 'discriminate' and inserting 'discriminate against a qualified individual on the basis of disability.'" Pub. L. No. 110-325, 122 Stat 3553. Yet Congress did not amend the text of subsection 12112(b)(6). Thus, even if it were previously the case (as one circuit suggested) that "only a 'qualified individual with a disability' is protected from the prohibited form of discrimination described

Appellate Case: 19-1514 Page: 44 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

in subsection (b)(6)," the amendment would appear to change this result. *See Bates v. Dura Auto. Sys., Inc.*, 625 F.3d 283, 285 (6th Cir. 2010) (interpreting old language).[2]

But this Court need not resolve that question here. As just explained, even assuming that class members will have to show that they are "qualified" at stage two, the district court had the discretion to conclude that this issue does not prevent class treatment. In short, the court acted within its considerable discretion in finding that the common issue in this case—the lawfulness of Union Pacific's policy, which Congress has said should be the "primary object of attention" in ADA cases like this one, Pub. L. No. 110-325, 122 Stat. 3553—predominates over any individual issues.[3]

---

[2] Otherwise, what effect would it have? "[C]ourts must presume" that an amendment has "real and substantial effect." *Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016). Reading subsection 12112(b)(6) to protect *all* employees with disabilities would give it effect. It would also follow this Court's general textual approach in ADA cases. *See Cossette v. Minn. Power & Light*, 188 F.3d 964, 969 (8th Cir. 1999) (holding that even a person *without* a disability can sue under subsections 12112(d)(3) and (d)(4)). And it would accord with the legislative history, which says that a plaintiff need only show that they have "been subjected to an action prohibited under the Act because of an actual or perceived" impairment. 154 Cong. Rec. S8342-01, S8344 (Sept. 11, 2008).

[3] Union Pacific's typicality argument relies primarily on the same arguments as its Rule 23(b)(2) and (b)(3) objections, and fails for the same reason. "Typicality is fairly easily met so long as other class members have claims similar to the named plaintiff." *Postawko*, 910 F.3d at 1039 (quotation marks omitted). So it is here. Although Union Pacific makes a passing argument that the named plaintiffs' claims are atypical because they aren't pursuing a classwide failure-to-accommodate theory, the only authority it cites (at 34) is a passage from *Wal-Mart* explaining that monetary claims belong under (b)(3) so individuals may opt out. *See* 564 U.S. at 364. This case complies with that rule. Workers who wish to pursue individualized claims based on a failure-to-accommodate theory will be free to do so, if necessary, by opting out. There is no obligation that plaintiffs bring *every* potential theory of liability as a class. To the contrary, Rule 23 favors narrower claims amenable to class treatment.

b. Superiority. The district court was also well within its discretion in finding that a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). By its plain terms, this provision "poses the question whether a single suit would handle the dispute better than multiple suits." *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011).

Union Pacific misapprehends the nature of this question. The "controversy" in this case is the lawfulness of Union Pacific's conduct and whether the affected workers have claims under the ADA. Union Pacific does not propose any alternative that would adjudicate *this* controversy and resolve all of these claims. Presumably, the alternative method for "adjudicating the controversy" that it has in mind would be to require a series of individual lawsuits seeking the same relief. But how would that be superior? The "key question" here is one that "can be answered for every plaintiff: was the [policy] discriminatory?" *Chicago Teachers Union*, 797 F.3d at 444. A common answer "would eliminate the need for repeat adjudication of this question." *Id.* at 445. The district court did not abuse its discretion in declining to require "individual lawsuits [that] would duplicate this proof over and over again." A252.

The only other way of adjudicating the controversy, given the appropriateness of Rule 23(b)(2) certification of the equitable claim, would be to decide that claim on a classwide basis and then, if the class prevails, allow individual workers who wanted to bring claims for individual relief to do so. This option would at least be superior

Appellate Case: 19-1514 Page: 46 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

to having no class at all. But it would not be superior to what the district court did. Stage two of the trial will operate in much the same way as this potential approach, only it will have the benefit of doing so in proceedings overseen by a single judge who can manage the litigation in the most efficient way (including by having hearings on groups of class members if warranted). And consolidating the proceedings in a single litigation from the start means that class members will not be forced to hire their own lawyer and pay a filing fee to bring their own case, only to have it likely be consolidated with other individual claims anyway. The district court was therefore right to conclude that a class action is superior. At the very least, the court did not abuse its discretion. The court's approach is not only "rational," *contra* UP Br. 18, it is the most efficient and sensible way of resolving this dispute.

Union Pacific's arguments to the contrary are unpersuasive. For example, Union Pacific argues (at 37) that class members have an interest in controlling their claims. But the district court's approach respects that interest by allowing them to pursue individual relief at stage two. They can also bring separate individual actions even if the class claim fails—albeit ones that would challenge the application of the policy to their specific circumstances (that is, the lawfulness of their particular adverse actions, rather than the lawfulness of the policy as a whole). *See Cooper*, 467 U.S. at 877-80 (holding that the failure to prove a companywide violation does not bar subsequent actions alleging individual violations).

Appellate Case: 19-1514 Page: 47 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

Nor does the location of this action undermine the court's superiority finding. This case was transferred at Union Pacific's urging, because "[a]ll relevant Fitness-for-Duty policies and procedures [are] implemented through [its] headquarters in Nebraska." ECF No. 28, at 6-7, 12. That admission *supports* certification.

Union Pacific also attacks the manageability of the case and constitutionality of the trial plan as part of its superiority argument. But Union Pacific did not present any constitutional objection below, so that argument is not presented in this appeal. It is also premature because Union Pacific is free to raise the defense in the future. *See Martin v. Behr Dayton Thermal Prods. LLC*, 896 F.3d 405, 417 (6th Cir. 2018). More fundamentally, this argument overlooks the protections built into the two-stage trial plan—a plan that preserves Union Pacific's ability to assert classwide defenses at stage one and individual defenses at stage two. *See EEOC v. McDonnell Douglas Corp.*, 960 F. Supp. 203, 204-05 (E.D. Mo. 1996). As for Union Pacific's manageability complaints, they are overblown. Only a portion of the class will submit claims, and the district court has plenty of tools to ensure that those claims are efficiently resolved, while remaining respectful of Union Pacific's rights.

At bottom, Union Pacific's superiority objections reduce to an attack on the two-stage framework itself. If accepted, these arguments would apply equally (if not more so) to Title VII claims, and thus preclude class actions in that context. As we will now discuss, that result would be contrary to binding Supreme Court precedent.

Appellate Case: 19-1514 Page: 48 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

B. Title VII precedent, which the ADA expressly incorporates, confirms the appropriateness of class certification here.

The district court's decision is also firmly supported by Title VII precedent, which the ADA expressly incorporates. Under both the ADA and Title VII, "a plaintiff can prove disparate treatment either (1) by direct evidence that a workplace policy, practice, or decision relies expressly on a protected characteristic, or (2) by using the burden-shifting framework set forth in *McDonnell Douglas* [*Corp. v. Green,* 411 U.S. 792, 802 (1973)]." *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1345 (2015) (ADA case). Here, Union Pacific's policy facially discriminates on the basis of disability by targeting workers suspected of having a reportable health condition. When a case challenges a "facially discriminatory" policy, resort to the burden-shifting framework is "unnecessary." *Bates*, 511 F.3d at 982, 988 ("Because this case involves a facially discriminatory qualification standard, we conclude that the *Teamsters'* burden-shifting protocol is inapplicable."); *see Celestine v. Petroleos de Venezuella SA*, 266 F.3d 343, 355 (5th Cir. 2001) ("A pattern or practice case is not a separate and free-standing cause of action," but is "merely another method by which disparate treatment can be shown."). That makes this case even *more amenable* to class treatment than one challenging a policy that is *not* facially discriminatory, because the policy's existence establishes a practice of discrimination, and the question is whether it can be justified.

And yet even burden-shifting cases have long been allowed to proceed as class actions. In the Title VII context, employers rarely have facially discriminatory

policies (unlike under the ADA, where employers might try to justify facially discriminatory policies for safety reasons). But plaintiffs may still prove disparate treatment on a classwide basis by establishing that their employer has a pattern or practice of unlawful discrimination. Over 40 years ago, the Supreme Court set forth the procedure to be used in such cases. *See Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772-73 (1976); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 360-61 (1977). More recently, in *Wal-Mart*, the Court reaffirmed this "procedure for trying pattern-or-practice cases" because it "gives effect" to section 2000e-5(g)(1) and (2). 564 U.S. at 366. Under those statutory provisions—which the ADA expressly incorporates, *see* 42 U.S.C. § 12117(a)—a court may "'enjoin the [defendant] from engaging in [an] unlawful employment practice'" if a plaintiff can prove that the practice is unlawful. *Wal-Mart*, 564 U.S. at 366 (quoting 42 U.S.C. § 2000e-5(g)(1)). "But if the employer can show that it took an adverse employment action against an employee for any reason other than discrimination, the court cannot order the 'hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any backpay.'" *Id.* (quoting 42 U.S.C. § 2000e-5(g)(2)(A)).

The *Teamsters* framework gives effect to these provisions through its two-stage process, which the district court adopted here. At stage one, the plaintiffs must "demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer[.]" *Teamsters*, 431 U.S. at 360. During this initial stage, the

named plaintiffs are "not required to offer evidence that each person for whom [they] will ultimately seek relief was a victim of the employer's discriminatory policy." *Id.* at 360; *see also Franks*, 424 U.S. at 772-73. Instead, their "burden is to establish a prima facie case that such a policy existed." *Teamsters*, 431 U.S. at 360. "The burden then shifts to the employer to defeat the prima facie showing of a pattern or practice by demonstrating that the [plaintiffs'] proof is either inaccurate or insignificant," or by offering some other justification. *Id.* If the plaintiffs prove a pattern or practice of unlawful discrimination at stage one, a violation is established and the court may issue the appropriate remedy (usually classwide injunctive relief). *Id.* at 361; *see Cooper*, 467 U.S. at 876 ("[A] finding of a pattern or practice of discrimination itself justifies an award of prospective relief to the class."); *Craik v. Minn. State Univ. Bd.*, 731 F.2d 465, 470 (8th Cir. 1984) ("By proving . . . a pattern or practice of discrimination, [the] class's eligibility for appropriate prospective relief [is] established.").

Stage two then provides "individual relief for the victims" of the unlawful pattern or practice. *Teamsters*, 431 U.S. at 361. This stage typically requires the district court to "conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief." *Id.* The "crucial difference" between this stage and the first stage is that "[t]he inquiry regarding an individual's claim is the reason for a particular employment decision, while 'at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a

pattern of discriminatory decisionmaking.'" *Cooper*, 467 U.S. at 876. Still, the second stage builds off the first: "proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy." *Teamsters*, 431 U.S. at 362. For this reason, "the burden of proof will shift to the company, but it will have the right to raise any individual affirmative defenses it may have, and to 'demonstrate that the individual [claimant] was denied an employment opportunity for lawful reasons.'" *Wal-Mart*, 564 U.S. at 366-67; *see Franks*, 424 U.S. at 772-73 & n.32.

These settled precedents confirm the appropriateness of the district court's decision to certify a hybrid class and to bifurcate the trial plan. As already discussed, the ADA expressly incorporates Title VII's "powers, remedies, and procedures"—including the "pattern or practice" procedure that was already well established when Congress enacted the ADA. *See* 42 U.S.C. § 12117(a) (incorporating section 2000e-6(a), which authorizes suits when an employer is "engaged in a pattern or practice of resistance" to Title VII's provisions). If anything, class certification and bifurcation is even more appropriate here than in the traditional *Teamsters* context because there is no need for any "inference" at stage two that a particular employment decision was "made in pursuit of [the unlawful] policy." *See Teamsters*, 431 U.S. at 362. Union Pacific does not deny that *all* decisions in this case were made in accordance with its

Appellate Case: 19-1514 Page: 52 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

uniform reportable-events policy. That uniform policy either constitutes a "practice" of unlawful discrimination under the ADA or it does not.

Which is why the most straightforward way of thinking about the class claim in this case might be to focus on subsection 12112(b)(6). Because Union Pacific's policy is facially discriminatory and violates the plain text of this subsection, there is no need to use a burden-shifting framework to try to uncover the *reasons* for a particular employment decision. The decision was made *because the policy called for it.*

But even setting aside subsection 12112(b)(6), the plaintiffs are also prepared to prove that Union Pacific's policy violates subsection 12112(a), standing alone, because the policy constitutes a practice of unlawful discrimination against otherwise qualified individuals with disabilities, without a valid justification. The plaintiffs have already produced 44 unrebutted declarations from class members who are qualified individuals with disabilities and were removed from their positions because of the policy, along with data showing that thousands of others were also removed (among voluminous other evidence). A251 n.4. That proof, of course, supports a finding that Union Pacific unlawfully discriminated against a "class of individuals with disabilities" under subsection 12112(b)(6), but it also supports a finding that the company had a practice of repeated individual violations under subsection 12112(a).

If Union Pacific is unable to provide a valid defense for its policy, the policy violates subsection 12112(a) and can be enjoined at stage one under section 12117. *See*

Appellate Case: 19-1514 Page: 53 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

Cooper, 467 U.S. at 876; *Craik*, 731 F.2d at 470. At stage two, Union Pacific will be able to offer any defenses as to particular individuals, just as it could if this were a Title VII case. And as in a Title VII case, the ultimate issue for each person will be whether they were denied an employment opportunity because of the employer's unlawful policy, and not for any legitimate reason. In this case, for instance, Union Pacific might try to argue that particular class members are somehow unqualified for their positions (even though they held those positions without issue before the unlawful policy was put in place). But that inquiry is not meaningfully different than the question in a Title VII case of whether a particular job applicant was denied a position because they were unqualified for it, and not because of, say, a racially discriminatory policy. Nothing in the concept of predominance or superiority draws a meaningful distinction between these two scenarios—let alone one that would require reversal here. If the abuse-of-discretion standard is to mean anything, it must permit a district court to do what the court did here: follow Supreme Court precedent and bring its expertise to bear on managing the litigation going forward.

II. Union Pacific's remaining arguments for an abuse of discretion contravene the ADA's text and purpose and cannot be reconciled with Supreme Court precedent.

Despite needing to show an abuse of discretion, Union Pacific barely engages with the ADA's text or purpose. It acknowledges (at 13-14) that the plaintiffs allege a violation of subsection 12112(b)(6), but it does not grapple with the key text of that

Appellate Case: 19-1514 Page: 54 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

provision or its corresponding regulation, 29 C.F.R. § 1630.10(a). Nor does Union Pacific cite or discuss the text of section 12117, which provides the cause of action and expressly incorporates Title VII's "powers, remedies, and procedures." And nowhere does Union Pacific cite or discuss the text of the provisions that set forth those powers, remedies, and procedures—provisions that are part of the ADA.

It is not hard to see why. These provisions—in combination with binding precedent—provide a complete response to nearly every argument Union Pacific makes for an abuse of discretion.

A. Most of Union Pacific's arguments are predicated on the mistaken belief that the lawfulness of its policy "require[s] individualized inquiries into disability and qualification."

Start with the most fundamental mistake that pervades Union Pacific's brief: the notion that "proving an ADA *violation* requires individualized inquiries into disability and qualification." UP Br. 33. Union Pacific constructs entire arguments around this misunderstanding—typicality, cohesiveness, predominance, superiority, the Rules Enabling Act, you name it. The company even tosses in a waived Seventh Amendment argument built in part on this error. *See* UP Br. 39. This argument is wrong for reasons already explained. Again, the law is clear: "It is unlawful for a covered entity to use [policies] that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the [policy] is shown to be job related for the position in question and is

Appellate Case: 19-1514 Page: 55 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

consistent with business necessity." 29 C.F.R. § 1630.10(a). If Union Pacific's policy fits that description, it violates the ADA and can be enjoined under section 12117. *See Cooper*, 467 U.S. at 876 (proving an unlawful policy "justifies an award of prospective relief to the class"); *Craik*, 731 F.2d 470 (same). There is no requirement that every class member also prove their qualifications to establish an ADA violation.

B. The district court's decision does not conflict with *Hohider*.

This same error also infects Union Pacific's misplaced reliance on *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169 (3d Cir. 2009). Union Pacific claims (at 49) that the decision below "squarely conflicts with *Hohider*." That is incorrect.

Hohider involved claims brought under a different provision of the ADA. The court held that, "[b]y the plain language of 42 U.S.C. § 12112(b)(5)"—the provision at issue there—"whether [the defendant] unlawfully discriminated against employees by failing to grant reasonable accommodations cannot be determined without assessing whether those employees are 'otherwise qualified individuals with disabilities.'" *Id.* at 192. But subsection 12112(b)(6) does not include this language. Unlike the provision in *Hohider*, subsection 12112(b)(6) does not define discrimination by reference to a "qualified individual with a disability," but instead refers only to "an individual with a disability or a class of individuals with disabilities." The regulation does the same. *See* 29 C.F.R. § 1630.10(a). Thus, in stark contrast to *Hohider*,

Union Pacific's policy "can amount to unlawful discrimination without a showing that [it] affected 'otherwise qualified individuals with disabilities.'" 574 F.3d at 198.[4]

This case is distinguishable from *Hohider* in another important respect: it involves a facially discriminatory policy. Indeed, the district court in *Hohider* expressly distinguished cases like this one, in which "a facially discriminatory policy [is] alleged to violate [subsection] 12112(b)(6)" so there is "no need to apply the pattern-or-practice framework." 243 F.R.D. 147, 205-06 (W.D. Pa. 2007).

C. Union Pacific's standing arguments cannot be reconciled with Supreme Court precedent.

Finally, Union Pacific takes the extreme position that the class cannot be certified because it contains people who might not have suffered a compensable injury from the unlawful policy (or would lack standing to seek injunctive relief in an individual action). Union Pacific does not say whether this position emanates from Article III or Rule 23, but it is wrong all the same: This position, too, conflicts with Supreme Court precedent. Limiting classes to only those plaintiffs who show injury would contradict the Court's holding in *Franks* that such a showing is not necessary to certification, but "become[s] material" only at stage two. 424 U.S. at 772. It would

[4] This is not to say that all of *Hohider*'s reasoning is beyond reproach. To the extent it could be read to suggest that pattern-or-practice claims can *never* be brought on a classwide basis under the ADA, that result would not square with the text or purpose of either the ADA or Rule 23, nor with Title VII precedent. That is particularly true for claims involving a uniform, facially discriminatory policy (read: practice) like the one at issue in this case, for the reasons explained in Part I.

Appellate Case: 19-1514 Page: 57 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

also contradict *Teamsters*, which holds that, at the stage one, the plaintiff "is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy." 431 U.S. at 360. So long as a single plaintiff has standing to obtain injunctive relief (and satisfies the required elements of the cause of action), the court is authorized to enjoin the policy across the board, just as it could if that plaintiff had brought an individual action.[5]

To be sure, this Court has occasionally included statements in its opinions that, if read broadly, could suggest that certifying a class with any uninjured class members is categorically impermissible. *See, e.g.*, *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013). But there is no reason to think that this Court, in formulating those sentences, was trying to overturn the Supreme Court's holdings in *Franks* and *Teamsters*. And even if this Court were otherwise inclined to read those statements for all they're worth, the Supreme Court's recent decision in *Tyson Foods* would disallow that reading. There, the Court affirmed a class *judgment* even though it was "undisputed that hundreds of class members suffered no injury." 136 S. Ct. at 1051 (Roberts, C.J., concurring). And for good reason: Given that Rule 23 permits

---

[5] Union Pacific concedes (at 45) that "Stage One will include determining whether the named plaintiffs have proved their ADA claims." To prevail on the class claim at that stage, at least one plaintiff—but only one—will have to establish standing to seek injunctive relief and satisfy the necessary elements of the cause of action (including, if it were statutorily required, that they are qualified). At stage two, class members who submit claims will then have to show that they have been injured by the policy and are entitled to relief. If they cannot do so, they will not obtain relief.

Appellate Case: 19-1514 Page: 58 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

certification of classes with individualized damages, there is no reason why it would prohibit certification just because some class members' damages are $0.

Since *Tyson Foods*, moreover, this Court has emphasized that "[w]hether some plaintiffs are unable to prove damages . . . is a merits question, and the district court has the power to amend the class definition at any time before judgment." *Stuart*, 910 F.3d at 377. By the same reasoning, even if some class members here are ultimately unable to obtain damages because, for instance, they were reimbursed for the time they were on leave, that would not prevent the district court from certifying the class when all class members were subject to the policy, which automatically placed them on leave. At most, there must be a mechanism to ensure that damages are paid "only to injured class members." *See Tyson Foods*, 136 S. Ct. at 1053 (Roberts, C.J.). That mechanism exists here: stage two of the litigation. There is thus no basis to decertify.

CONCLUSION

The district court's decision should be affirmed.

Respectfully submitted,

/s/Matthew W.H. Wessler
Matthew W.H. Wessler
Jonathan E. Taylor
GUPTA WESSLER PLLC
1900 L Street NW, Suite 312
Washington, DC 20036
(202) 888-1741
matt@guptawessler.com
jon@guptawessler.com

Appellate Case: 19-1514 Page: 59 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

James H. Kaster
David E. Schlesinger
Robert L. Schug
Charles A. Delbridge
NICHOLS KASTER, PLLP
4600 IDS Center
80 South 8th Street
Minneapolis, MN 55402
(612) 256-3200
kaster@nka.com
schug@nka.com

June 21, 2019

Counsel for Plaintiffs-Appellees

Appellate Case: 19-1514 Page: 60 Date Filed: 06/21/2019 Entry ID: 4800641 RESTRICTED

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12,824 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Baskerville font. Additionally, this brief has been scanned for viruses with the most recent version of a commercial virus scanning program, VirusTotal, and according to the program is virus-free.

/s/ Matthew W.H. Wessler
Matthew W.H. Wessler

Counsel for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Eighth Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Matthew W.H. Wessler
Matthew W.H. Wessler