

United States District Court, E.D. Wisconsin.
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, Plaintiff,

v.

THE BURLINGTON NORTHERN AND SANTA
FE RAILWAY COMPANY, Defendant.
Civil Action File No. 02-C-0456

May 8, 2002.

TRIAL ORDER

AGREED ORDER

I. Introduction

*1 This Agreement is made and entered into between Plaintiff, the Equal Employment Opportunity Commission ("EEOC"), and the Defendant, The Burlington Northern Santa Fe Railway Company ("BNSF"), collectively referred to as "the parties."

On May 8, 2002., the EEOC instituted a lawsuit in the United States District Court for the Eastern District of Wisconsin, Civil Action Number, 02.C.0456, against Defendant, BNSF. The EEOC alleges that BNSF engaged in unlawful employment practices in violation of 42 U.S.C. § 12112(d) and § 12203 of Title I of the Americans With Disabilities Act ("ADA"), by requesting that certain employees who claimed that they had developed work-related carpal tunnel syndrome submit to an evaluative 34-item medical examination conducted by outside health-care providers. One item of that examination was a diagnostic blood test for a genetic marker. The EEOC further alleges that BNSF retaliated against those employees who refused to submit to genetic testing- The EEOC does not allege that BNSF screened asymptomatic employees for any employment action.

BNSF denies that it or any of its agents engaged in any unlawful testing or other conduct, or violated any person's rights under the ADA or otherwise. BNSF believes feat its procedures and inquiries are proper and that it has not unlawfully retaliated against anyone in violation of the ADA or otherwise. BNSF

further categorically denies that it in any way discriminates or has discriminated against any of its employees in violation of the ADA.

The parties desire to compromise and settle the differences reflected in this lawsuit, and intend that the terms and conditions of the compromise and settlement be set forth in this Agreement.

NOW, THEREFORE, in consideration of the mutual promises and agreements set forth herein, the sufficiency of which is hereby acknowledged, the parties agree as follows, the Court finds appropriate, and therefore, it is ORDERED, that:

II. Definitions

1. "Protocol" means Carpal Tunnel Syndrome Protocol or any other protocol which resulted in obtaining samples of any kind for purposes of genetic testing.
- 2 "Document" means recorded information of any kind regardless of how the information is stored. This includes "without limitation all types of electronic storage, media, mechanical, or paper storage.
3. "Sample" means blood, urine, hair, or other bodily fluids or tissue ?? for the purpose of genetic testing.
4. "Genetic testing" means analysis of a sample to determine DNA sequencing.
5. "Safety Rule 26.3" refers to the current safety rule and any subsequent version of such a rule.

III. Monetary Relief

1. Monetary Relief To EEOC Claimants

a. Conditioned on timely receipt of an executed release from such of the individuals listed in Exhibit A, pursuant to the terms set forth in this section III.1. below, BNSF agrees to pay a monetary sum to individuals up to a maximum amount of Five Hundred Thousand Dollars and No Cents

(\$500,000.00) in resolution of all claims made by the EEOC in this action for otherwise unrepresented claimants. Such individuals will be responsible for all taxes associated with said payments, BNSF will issue a Form 1099 to such individuals that recognizes that no part of such payment is for alleged lost wages or benefits.

*2 b. Within five (5) days of all parties' execution of this Settlement Agreement, the EEOC will provide BNSF with the proposed dollar amount each individual is to be paid. The EEOC will further notify each individual on whose behalf it seeks relief of the proposed distribution. Each individual claimed shall be notified that he or she cannot receive any of the proposed distribution unless he or she executes the release of ADA claims relating to genetic testing against BNSF as provided in Exhibit C, and returns the executed release to Laurie Vasichek, EEOC, 330 2nd Ave. S., Suite 430, Minneapolis, MN 55419. On or before sixty (60) days following the execution of this Agreement, the EEOC shall provide BNSF those signed releases that have been provided to the EEOC,

c. Within fifteen (15) business days of the timely receipt of each of the signed releases, BNSF will mail via certified mail the appropriate check to the individual who has signed and delivered to BNSF the release provided as Exhibit C. Within ten (10) days after the later of the date the last check is mailed or the deadline above for submission of the releases to BNSF, BNSF will mail a copy of each check to the EEOC. The parties expressly recognize that time is a material term in the payment due under this provision.

2. Monetary Relief to Represented Claimants.

a. Conditioned on timely receipt of an executed release from each of the represented claimants identified in Exhibit B, pursuant to the terms set forth in this paragraph, BNSF agrees to pay to the represented claimants up to a maximum sum of One Million Seven Hundred Seventy-Five Thousand Dollars (\$1,775 million) in complete and final resolution of all of the claimants' claims under state and federal law related to genetic testing. The conditions and terms of payment are contained in separate agreements between the represented claimed and BNSF.

b. In addition to the payment described in section III.2.a. above, BNSF shall pay up to a maximum of \$805,000 to the represented claimants in connection with other claims. The conditions and terms of payment are contained in separate agreements between the represented claimants and BNSF.

IV. Equitable Relief

1. BNSF agrees as follows:

a. BNSF, its officers, agents, employees will not, directly or indirectly, alone or in concert with others:

i. require or request its current or former employees to submit to genetic testing;

ii. submit blood samples previously obtained from ?? or former employees to any process of genetic testing;

iii. analyze genetic samples previously extracted from blood samples from current or former employees of ENSF;

iv. use (including without limitation, evaluate, analyze or consider) any genetic test analysis previously performed on any of its current or former employees; or

v. threaten or take any adverse employment actions of any kind because of an employee's or former employee's participation in EEOC proceedings challenging the legality of genetic testing or opposition to genetic testing,

*3 b. BNSF, its officers, agents, and employees shall;

i. return to each of the individuals listed on Exhibits A and 3 hereto his genetic samples, if any, in the possession, custody, or control of BNSF in respect of each such individual and shall not disclose to the public or to any BNSF employee the results of any genetic testing performed on any current or former employees. ^{FNI}BNSF shall also instruct in writing any medical provider or the laboratory that administered such genetic tests to return all such samples to the persons who provided the samples or to certify to BNSF that all such samples have been ?? This provision does not bar BNSF from disclosing the

results to the person whose blood was subjected to genetic testing, or to the EEOC or any other governmental agency or body charged with investigating BNSF's actions, or to any person with the lawful right to know the results of the genetic test, such as a legal guardian or a conservator. Following proper notice to medical providers as described above, BNSF shall have no further responsibility for return of samples by third party medical providers or laboratories under this Agreed Order.

[ENL](#). In the event that a nonmanagement employee of BNSF discloses to the public or to any other BNSF employee the results of any BNSF genetic testing on another employee, then such conduct shall not be a violation of this agreement if, after written notice of such conduct from the EEOC, BNSF takes prompt remedial action that is reasonably calculated to ensure that such conduct does not reoccur.

ii. expunge from its records and deliver to the employees or former employees with respect to whom and to the extent they relate (except for documents maintained by the legal department for the purposes of future litigation, if any) to the following: (a) all documents relating in any way to their samples; (b) all documents relating in any way to the genetic testing of their samples; (c) all documents relating to all results arising out of genetic testing of their samples; and (d) all personnel file documents relating to (a), (b), and (c) above.

iii. authorize, request, and direct, in writing, any person, corporation, or other entity that it reasonably believes to have possession, custody or control of any of the items described in Section IV, Subsection ii(a) - (d) above, to return them to the employee to whom they relate, or to certify to BNSF that all such documents have been destroyed; and if BNSF fully materially complies with such obligations, it shall have no liability for the refusal of such person's, entity's, or corporation's failure to comply with its express written directions under this Agreed Order. Within fifteen (15) days of the execution of this agreement, BNSF shall provide the EEOC with a list of all known providers to whom such notice is to be sent, and provide the EEOC with a copy of its proposed written communication. The EEOC shall promptly notify BNSF of any suggested

modifications of the proposed substance or recipients of the notification, and BNSF will make good faith efforts to incorporate the EEOC's suggested changes.

*4 c. BNSF shall certify in writing to each individual and the EEOC that it has complied in every material respect with all the provisions of Section IV(1)(b), above. The accuracy and truthfulness of such certification are material to any settlement made or release given by any such employee regarding this matter. Each employee who receives such a certification shall upon written request be provided an opportunity by BNSF to review that employee's BNSF personnel and medical files.

d. BNSF recognizes its obligation to comply with the Americans With Disabilities Act, and nothing in this Agreement shall relieve BNSF of any legal obligation, including the obligation to comply with the ADA, with respect to its medical practices and protocols (including Safety Rule 26.3), The BNSF Medical and Environmental Health Group ("MEH"), apart of the BNSF Human Resources Department, shall be responsible for periodic review of company medical practices and protocols, Any substantive changes recommended by MEH shall be submitted to the BNSF Vice President of Human Resources and senior legal counsel for review and approval and any major substantive changes shall be submitted to senior management and senior legal counsel for review and approval prior to such change becoming effective or implemented. After such approval by senior management, MEH will cause such change to be appropriately communicated to affected persons and in doing so identify the purposes for such change.

e. BNSF shall provide to employees directed to attend a medical examination pursuant to BNSF's current Safety Rule 26.3 (or any subsequent provision similar in substance or intent) a copy of the written examination instructions provided by the MEH to the physician who will be conducting the examination contemporaneously with the examination instructions being sent to the physician, instructions shall contain a statement to the physician stating that the physician is to inform the employee, irrespective of whether the employee requests the information, of all diagnostic tests that will be conducted as part of the examination. If BNSF fully materially complies with its obligations under this

subparagraph e., then it shall have no liability, under this Agreed Order, for the physician's noncompliance -with such directions.

f. BNSF shall inform employees directed to attend a medical examination pursuant to BNSF's current Safety Rule 26.3 (or any subsequent provision similar in substance or intent) the reasons for the examination, BNSF represents that pursuant to the terms of its Collective Bargaining Agreement, employees are afforded an opportunity to grieve an order to attend a medical exam to which they object.

g. BNSF recognizes the confidential nature of employee medical records and the need to protect BNSF employees' medical records and information from improper use or disclosure. Such medical records will therefore be maintained by the MEH Department in files that are separate and distinct from employee personnel files and will only be disclosed for (1) fitness for duty status (?? due to disability or illness), (2) consideration of reasonable accommodations under the Americans with Disabilities Act or state laws, (3) potential safety risk to the employee or others, (4) compliance with government reporting obligations or inquiries, and (5) other such circumstance where there is a legitimate need by BNSF to make such disclosure and such need is job related and consistent with business necessity and authorized by law. When the medical information is disclosed to company management, confidentiality will be maintained by that manager. Nothing in this paragraph shall be interpreted to prohibit BNSF from adopting reasonable medical confidentiality policies and practices to comply with law, including the federal Health, Insurance Portability and Accountability Act and similar state laws.

*5 h. Employees may receive a copy of their own medical records maintained by MEH by submitting a signed written request to the MEH Department which will respond to such request within thirty (30) business days. When an employee desires to have a copy of his/her records sent to another party, that must be so stated by the written request. Employees requesting disclosure of their medical records may be required to sign a release of claims arising out of the disclosure.

i. BNSF shall provide mandatory ADA training to all

of its MEH and Claims Department supervisors, managers, and medical personnel who are responsible for drafting, implementing, reviewing or processing medical protocols, or handling FELA claims. The training will include a detailed ?? the ADA'S provisions relating to disability-related inquiries and medical testing. BNSF shall provide the EEOC with a copy of the draft training module within 90 days of the effective date of this Agreement. The EEOC shall have 30 days to comment to the BNSF on the draft module; and if the EEOC provides comments to BNSF within such 30-day period, then BNSF shall consider such comments in good faith and include or implement them in the training module as it deems appropriate to do so, The training shall be performed annually during the term of this Agreement

j. Nothing herein is intended to prohibit or authorize BNSF from ?? medical information in a court proceeding under the provisions governing those proceedings, from responding to court orders to provide information in connection with court proceedings, or from responding to a voluntary and knowing request for medical testing by an employee,

V. Enforcement

1. The parties agree that this Agreement does not constitute an admission by BNSF of any violation of the ADA, or any other anti-discrimination or other laws.

2. This Court shall retain jurisdiction to enforce the provisions set forth in this Agreement in accordance with the provisions hereof.

3. The EEOC accepts this Agreement as a successful resolution by conciliation of the following charges, as amended or supplemented, hereinafter called the "subject charges":

a. Charge No. 260-A1-0523, Brotherhood of Maintenance of Way v. BNSF

b. Charge No. Z60-A1-0524, Brotherhood of Maintenance of Way v. BNSF

c. Charge No. 260-A1-0538, David Escher v. BNSF

d. Charge No. 260-A1-0539, Gary Avary v. BNSF

e. Charge No. 260-A1-0540, John Wiebethans v. BNSF

f. Charge-No. 260-A1-0541, Timothy Nordloef v. BNSF

g. Charge No. 260-A1-0564, Douglas Urbanski v. BNSF

h. Charge No. 260-A1-0580, Charles Nelson v. BNSF

i. Charge No. 260-A1-0587, Lyle Hinman v. BNSF

j. Charge No. 260-A1-0623, Steven Keil v. BNSF

k. Charge No. 260-A1-0625, Brad Watson v. BNSF

l. Charge No. 260-A1-0632, Dana McEachem v. BNSF

m. Charge No. 260-A1-0648, Juan Obaya v. BNSF

n Charge No. 260-A1-0649, Virgil Jackson v. BNSF

o. Charge No. 2600-A1-0765, Robert Damyanovich v. BNSF

*6 p. Charge No. 260-A1-1123, David White v. BNSF

q. Charge No. 260-A2-0013, Michael K. Skinner v. BNSF

r. Charge No. 260-A2-0051,, Leslie D. Whitehead v. BNSF

4. This Agreement resolves all issues in the above-captioned Complaint filed by the EEOC in this civil action. The EEOC waves further litigation on all issues raised in the above-referenced charges and Complaint in this action. The EEOC hereby releases and discharges BNSF and its employees, officers, directors, attorneys, shareholders, subsidiaries and affiliated companies from claims under the ADA arising from or related to BNSF's genetic testing which are the subject of this action. In addition, the parties shall promptly file with the Court in EEOC v.

The Burlington ?? Santa Fe Railway Co., Case No. 01-4013 MWB in the Northern District of Iowa, Western Division (the "Dismissed Case") a joint stipulation advising the Court that all terms in the Agreed Order of April 23, 2001 have been met, that the issues in that case have been fully resolved and that the case is being dismissed with prejudice. Because the Court in this action is maintaining jurisdiction over this settlement, the parties shall not request or take any action intended to cause the Court in the Dismissed Case to retain jurisdiction in that case.

5. EEOC agrees not to use the subject charges as the jurisdictional basis for another civil action under the Americans With Disabilities Act but does not waive or in any manner limit its right to process or seek relief in any other new charge or investigation. The EEOC and BNSF represent that they are not aware of any EEOC charge other than the subject charges having been filed which asserts any claim against BNSF or any subsidiary, its employees, officers, directors, attorneys, shareholders, subsidiaries or affiliated companies in respect of or concerning BNSF's genetic testing which are the subject of this action.

6. The parties agree to a joint press release for distribution to the media. The language agreed to by the parties is attached hereto as Exhibit D. The parties shall not make any statement of fact to the public which is inconsistent with those contained in this press release or the terms thereof.

7. Neither the EEOC nor BNSF shall contest the validity of this Agreement, nor the jurisdiction of this Court to enforce this Agreement and its terms, or the right of either party, to bring an enforcement proceeding upon breach of any term of this Agreement by either such party. Nothing in this Agreement shall preclude either party from enforcing this Agreement in the event that the other party fails to perform its obligations hereunder. Each party reserves their right to seek contempt sanctions for non payment and non-compliance with this Agreement.

8. The EEOC and BNSF may petition the Court to hold the other in violation of this Agreement, but only after: (a) having exhausted the dispute resolution procedures set forth below without having obtained

reasonably effective remedial action, and (b) having, after a reasonable investigation, concluded in good faith that a violation has occurred.

*7 9. The EEOC and BNSF shall not be held in contempt for violation of this Agreement unless the Court finds that there has been an intentional disregard or intentional violation, of a term or terms of the Agreement by that party.

10. Third parties shall not have standing to petition any Court to hold any party in violation of this Agreement. Rather, any individual concerned about compliance with this Agreement by BNSF may so notify EEOC and request that it examine compliance and seek such relief, if any, as may be appropriate in the United States District Court for the Eastern District of Wisconsin.

11. Before petitioning the Court to enforce this Agreement, the following conditions precedent shall have been met:

a. If either the EEOC or BNSF has good reason to believe that a legitimate dispute exists in respect of compliance with this Agreement, the initiating party shall promptly give written notice to the other party, including: (a) a reference to all specific provisions of the Agreement that are involved; (b) a specific statement of each issue; (c) a statement of the remedial action sought by the initiating party, and (d) a brief statement of the specific facts, circumstances and any other arguments supporting the position of the initiating party.

b. Within twenty (20) days after receiving such notice, the non-initiating party shall respond in writing to the statement of facts and arguments set forth in the notice and shall each provide its written position, including the facts and arguments upon which, it relies in support of its position.

c. EEOC and BNSF shall then undertake good-faith negotiations, which should include a meeting by telephone or in person and the exchange of relevant documents and/or other information, to attempt to resolve the areas of dispute or alleged non-compliance.

d. If good-faith efforts to resolve the matter have

railed, and after written notice of "impasse" to the non-initiating party or parties, EEOC or BNSF may file a motion with the Court, with a supporting brief, requesting resolution of the dispute or the issue of non-compliance; provided, however, that such motion shall be limited to the dispute(s) and/or issue(s) as to which the "meet and confer" provisions herein have been exhausted. The parties may also retain the services of a mediator to assist in resolving the dispute if they jointly agree to do so.

e. The non-moving party will have fifteen (15) days to respond to any such motion. Reply pleadings to such response are permitted only by consent of the opposing party or by specific leave of the Court.

f. The provisions of this Section do not prevent the EEOC or BNEF promptly bringing an issue before the Court when, exigent facts and circumstances require immediate Court action to prevent a serious violation of the terms of this Agreement, which otherwise would be without meaningful remedy. The moving papers shall explain the facts and circumstances that allegedly necessitate immediate action by the Court. If any such matter is brought before the Court requesting immediate Court action, the opposing party or parties shall be provided with appropriate actual notice, and an opportunity to be heard in opposition to the motion, pursuant to the Local Rules of the Court and the Federal Rules of Civil Procedure. The Court in its discretion may set such procedures for emergency consideration as are appropriate to the particular facts and circumstances, but no such matter may be conducted on an ex parte basis.

*8 12. The effective date of this Agreement shall be the date upon which it is approved by the Court.

13. The parties agree to bear their own costs and attorneys' fees associated with this action.

14. No notice, request, consent, approval, waiver or other communication required or permitted to be given or received under this Settlement Agreement shall be effective unless it is in writing and is mailed by registered or certified mail, return receipt requested, postage prepaid, or sent by a recognized overnight courier, signature required, addressed to:

EEOC:

Chester V. Bailey

District Director

Equal Employment Opportunity Commission

301 West Wisconsin Avenue - Suite 800

Milwaukee, Wisconsin 53203

BNSF:

Lawrence M Stronk

The Burlington Northern and Santa Fe Railway
Company

2500 Lou Menk Drive - 3rd Floor

Fort Worth, Texas 76131-2828

15. A party can substitute another individual for the ?? in Subsection (V)(14) upon written notice to the other party.

16. The parties can execute this Agreement in parts, with the signers pages incorporated into one whole, which shall then be filed with the Court.

17. Unless otherwise specified herein, time periods shall ran as of the dale of the receipt.

18. The terra of this Agreement shall be for two (2) years from the effective date. The Court hereby dismisses this action with, prejudice, but the Court retains jurisdiction to enforce the terms of this Agreement until expiration of the term hereof

E.D.Wis. 2002.

E.E.O.C. v. Burlington Northern and Santa Fe Ry.
Co.

Not Reported in F.Supp.2d, 2002 WL 32155386
(E.D.Wis.)

END OF DOCUMENT