

EEOC v. BNSF: The Risks and Rewards of Genetic Exceptionalism

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Dean Partlett invites us to consider the case for regulating genetic information through common-law adjudication instead of legislation and administrative regulation. The lawsuit brought by the federal Equal Employment Opportunity Commission (EEOC) against The Burlington Northern Santa Fe Railway Company (BNSF),¹ as the action actually was and not as it was largely reported, permits a glimpse of how the thesis holds up in practice. Litigants and their lawyers routinely complain about oversimplified or otherwise inaccurate coverage by the media, even the legal media. But the *BNSF* case combined the usual journalistic imperatives with political posturing (both governmental and academic), as well as genetic exceptionalism, virtually ensuring a badly distorted public portrayal. Much of what was broadcast on television or published in the media and academic literature about the case was simply wrong. I will return to this point later when evaluating the feasibility of using tort law to control what employers can and cannot do with genetic information.

But first let me focus on an aspect of the case that supports Dean Partlett's thesis. I take as my text a passage from an excellent article he cites, *Genophobia: What Is Wrong With Genetic Discrimination?*: “[G]overnment regulation – especially regulation that denies to one contracting party information in the possession of the other – is rarely an efficient response to . . . market failures.”²

The EEOC did not charge BNSF with disability discrimination in violation of the Americans with Disabilities Act³ (ADA), except in a highly technical sense. The part of the ADA that the EEOC claimed BNSF ran afoul of says that employers “shall not require a medical examination . . . unless such examination or inquiry is shown to be job-related and consistent with business necessity.”⁴ That prohibition helps implement the broader policy on health information adopted by Congress when drafting the ADA: the less employers know about the health of applicants and current employees, the better. Congress built

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1. *EEOC v. Burlington N. Santa Fe Ry. Co.*, No. C 01-4013-MWB (N.D. Iowa 2001). Although there were no reported decisions in the case, the author has personal knowledge stemming from his work for BNSF.

2. Colin S. Diver & Jane Maslow Cohen, *Genophobia: What Is Wrong With Genetic Discrimination?*, 149 U. PA. L. REV. 1439, 1460 (2001).

3. 42 U.S.C. §§ 12101-12213 (2002).

4. *Id.* § 12112(d)(4)(A).

into the ADA, in other words, the same information asymmetry that is at the core of the most common legislative response to public fears about misuse of genetic information: If employers cannot get it, they cannot misuse it.⁵

Dean Partlett worries that legislative or regulatory resolutions of the information-sharing problem may be somewhat lacking in the sensitivity to factual nuance that is the hallmark of common-law adjudication. The problem is most acute in fields where the pace of scientific and practical developments makes it hard for legislators to keep up. One might think that the prohibition on post-employment medical examinations in the ADA should help allay those concerns; after all, it prohibits only examinations that are not “job-related and consistent with business necessity.” Surely that standard gives the enforcement authorities and the courts just the kind of leeway they need to adapt the law to unanticipated or changed circumstances in the employment setting?

Wrong. Congress included the notion “job-related and consistent with business necessity” in 42 U.S.C. § 12112(d)(4)(A) apparently because the terms were familiar to it from prior excursions into changing the employment-discrimination statutes. The phrase is an amalgam of two standards that represent opposite ends of the spectrum describing a defense to a facially neutral employment practice or policy shown to adversely affect substantially more protected employees than non-protected employees. “Job-related” means simply that the employer could prove some plausible business reason for the challenged practice; “business necessity,” by contrast, means that the practice is essential to the employer’s continued operation.⁶ Combining the two in one phrase was thus the legal equivalent of demanding a glass of water that is “cold and hot.”

With that helpful instruction from Congress, the EEOC interpreted the phrase in the context of § 12112(d)(4)(A) to mean employers can require medical examinations of current employees for basically just one reason: to determine their current ability to safely perform essential job functions.⁷ The Commission no doubt believes it has sound enforcement reasons for its categorical interpretation, and the approach does faithfully reflect Congress’s decision that the purposes of the ADA are best achieved by keeping employers largely in the dark about the health of their employees. But since employers

5. See Diver & Cohen, *supra* note 2, at 1454.

6. See BARBARA LINDEMANN & PAUL GROSSMAN, 1 EMPLOYMENT DISCRIMINATION LAW 106-10 (3d ed. 1996).

7. 42 U.S.C. § 12112(d)(4)(B). See generally EQUAL EMPLOYMENT OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE: DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (ADA) (July 27, 2000).

have various compelling reasons for requiring medical examinations – for reports to government agencies as well as to evaluate claims of work-related injury and illness, to name just two – the Commission quickly found it necessary to engage in some interpretative creativity to allow certain medical examinations without expressly abandoning the position that the ADA permits them solely to determine current ability to safely perform essential job functions.

Now to return to BNSF. The company's medical and risk-management departments developed a protocol designed to help assess the work-relatedness of the carpal tunnel syndrome (CTS) reported by many maintenance-of-way employees. The protocol grew out of an extensive review of the medical and scientific literature on possible causes of CTS and was intended to allow a meaningful differential diagnosis. Differential diagnosis is the process by which a physician "considers all relevant potential causes of the symptoms and then eliminates alternative causes."⁸ Courts consider the differential diagnosis method of medical evaluation as an accepted and even indispensable tool for assessing CTS claims under the Federal Employers' Liability Act⁹ (FELA) in the railway industry.¹⁰ BNSF's CTS protocol ultimately included some thirty-four data points, only one of which was a test for the genetic marker for Hereditary Neuropathy with Liability to Pressure Palsies, or HNPP, a condition often accompanied by CTS.¹¹ BNSF intended to and did use the protocol just with employees who were claiming CTS symptoms and whose personal physicians diagnosed CTS.

BNSF had two reasons for wanting the information required by the protocol. Most important, the Federal Railroad Administration was dissatisfied with the company's reports about whether working conditions caused the CTS claimed by employees. For years BNSF had described all CTS as not work-related, relying on ergonomists' studies which concluded that the physical exertion required by railroad jobs could not cause the syndrome. Secondarily, the company wished to develop a database on CTS that it could use to evaluate and negotiate resolution of the FELA claim that accompanies every report of work-related CTS. Recall that the legal responsibility of railroads for their employees' work-related injuries is governed not by a traditional workers' compensation scheme but instead by the FELA, which retains essentially the common-law method for resolving and, if necessary, adjudicating the claims. To avoid going to court about every re-

8. FED. JUD. CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 214 (1994).

9. 45 U.S.C. §§ 51-60 (2002).

10. See generally *Hardyman v. Norfolk & W. Ry. Co.*, 243 F.3d 255 (6th Cir. 2001).

11. See *What Is HNPP?*, at <http://www.hnpp.org/whatis.htm> (last updated Oct. 1998) (stating that HNPP "causes carpal tunnel syndrome in approximately 90% of people").

ported work-related injury, railroads developed a practice of resolving most claims by pre-lawsuit settlement, which provides employees with compensation sooner and allows the railroads to limit their litigation costs. To make the process work, the railroad must gather the information it needs outside the usual administrative or judicial processes.

One tool BNSF used for such information-gathering is its long-standing Safety Rule 26.3:

The Medical Department will determine when medical examinations are necessary, the content of such examinations, and requirements for participation as the needs arise. Employees subject to these examinations must follow any and all requirements as issued.¹²

BNSF had reason to think that using the rule to help evaluate claims of work-related injury would not violate section § 12112(d)(4)(A) of the ADA. In one of those creative interpretations mentioned earlier, the EEOC had issued an enforcement guidance document saying, “[T]he ADA does not prohibit an employer or its agent from asking disability related questions or requiring medical examinations that are necessary to ascertain the extent of its workers’ compensation liability.”¹³ But in a reverse twist, the EEOC’s lawsuit against BNSF asserted that the guidance did not apply to a CTS-protocol examination, or, more precisely, it did not apply to the HNPP-test portion of the examination.

The EEOC gave a variety of reasons for singling out the HNPP test as violating the ADA when the other thirty-three inquiries that made up the protocol apparently did not. Those reasons came down to genetic exceptionalism. Implicitly, the EEOC asserted that BNSF had done something uniquely blameworthy by including a test for a genetic marker in its CTS protocol, and that some law should prohibit it. More practically, the EEOC wished to be seen by the public, and more importantly by Congress, on the front lines of the genetic-discrimination issue. At the same time, as an enforcement agency, it hoped to warn off other employers who might be considering collecting or using any form of genetic information.

That the EEOC resoundingly accomplished its practical goals for the litigation against BNSF cannot be doubted. The lawsuit grabbed the attention of the public and Congress, and the negative publicity and substantial sum of money paid by BNSF to settle the claims doubtless had the desired effect on employers. The EEOC can right-

12. BURLINGTON N. SANTA FE RY., EMPLOYEE SAFETY RULES S-26.3 (Feb. 1, 2001), <http://www.bnsf-ttc.com/bnsftime/EmpSaf062501.pdf>.

13. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, EEOC ENFORCEMENT GUIDANCE: WORKERS’ COMPENSATION AND THE ADA, Question 8 (Sept. 1996).

fully claim to have made the very word “genetic” radioactive for employers in the United States.

But is that good? One way of getting at an answer is to ask whether what BNSF did in the CTS protocol deserved to be banned. The Commission asserted that using the HNPP test as part of a differential diagnosis for CTS amounted to “junk science.” That objection is answered easily. An eminent researcher-clinician-author on HNPP is Dr. Thomas D. Bird of the University of Washington. In January 1998, he posted on the Internet an authoritative summary paper on HNPP, a paper funded by the National Institute of Health. At the time BNSF developed the CTS protocol, Dr. Bird’s paper stated flatly, “HNPP is part of the broad differential diagnosis of . . . compression neuropathies [of which CTS is the most common].”¹⁴ As Dr. Bird has written elsewhere:

A distinction should be made between using a DNA test to establish a diagnosis in an unequivocally symptomatic patient and the presymptomatic testing of a person at risk. The former is a diagnostic test like many others (albeit highly specific) that should be performed with knowledge of the genetic implications. The latter presymptomatic situation requires careful pretest and posttest counseling adhering to protocols followed by experienced genetic counseling centers.¹⁵

If BNSF had been screening presymptomatic employees for HNPP, the accusation of “junk science” might be warranted. But BNSF was in fact using the test to help establish a diagnosis in a symptomatic patient, a purpose for which the scientific justification is unimpeachable, though one might question whether the cost of the test and the liability risk it posed outweighed any marginal benefit of the HNPP results to the overall differential diagnosis.

Still, even if scientifically sound, BNSF’s approach could have been such an aberration that banning it would have little effect beyond the company itself. It may be helpful then to compare BNSF’s approach to CTS claims with that of another large, respected employer that, like BNSF, largely manages its own program for compensating employees who claim job-related injuries. The employer in question is the United States of America; the program is the Federal Employees’ Compensation Act¹⁶ (FECA); and the equivalent of BNSF’s claims department is the Office of Workers’ Compensation Programs (OWCP) within the U.S. Department of Labor.

14. Thomas D. Bird, *Hereditary Neuropathy With Liability To Pressure Palsies*, at www.geneclinics.org/profiles/hnpp (last revised June 27, 2001).

15. Thomas D. Bird & Robin L. Bennett, *Why Do DNA Testing? Practical and Ethical Implications of New Neurogenetic Tests*, 38 *ANNALS NEUROLOGY* 141-46 (1995).

16. 5 U.S.C. §§ 8101-8193 (2002).

A federal employee and a BNSF employee are equally entitled to seek treatment for work-related CTS from private physicians of their own choice. But the OWCP does not always simply accept a private treating doctor's diagnosis, any more than does BNSF. BNSF often received nothing more from an employee's treating physician than a bare and unsupported diagnosis of "carpal tunnel syndrome, work-related." The OWCP would reject such a conclusory assertion out of hand. The FECA regulations spell out what every treating physician's report must contain:

In all cases reported to OWCP, a medical report from the attending physician is required. This report should include:

- (a) Dates of examination and treatment;
- (b) History given by the employee;
- (c) Physical findings;
- (d) *Results of diagnostic tests*;
- (e) Diagnosis;
- (f) Course of treatment;
- (g) A description of any other conditions found but not due to the claimed injury;
- (h) The treatment given or recommended for the claimed injury;
- (i) The physician's opinion, with medical reasons, as to causal relationship between the diagnosed condition(s) and the factors or conditions of the employment;
- (j) The extent of disability affecting the employee's ability to work due to the injury;
- (k) The prognosis for recovery; and
- (l) All other material findings.¹⁷

With CTS, the OWCP has apparently found that special measures are often required to accurately determine work-relatedness. Sample letters from the OWCP FECA program procedures guide amount to detailed medical inquiries aimed at assessing possible non-work-related causes for the employee's CTS.¹⁸ The guide also contains elaborate instructions to claims examiners about how to determine whether a reported condition is "causally related" to the work.¹⁹ It explains that there are four kinds of causal relationships, and that the degree of work causation affects the availability and the extent of compensation paid.²⁰ It goes on to state that determining a causal relationship can be "very difficult" and that the employee's "medical history" must be

17. 20 C.F.R. § 10.330 (2002) (emphasis added).

18. FEDERAL EMPLOYEES' COMPENSATION ACT, SAMPLE LETTER TO CLAIMANT, at http://www.scbbs.com/cgi-bin/om_iaspi.dll. .e=DOI-14&jump=2-0806-x6&softpage=ref_Doc (last visited Sept. 25, 2001).

19. FEDERAL EMPLOYEES' COMPENSATION ACT PROCEDURE MANUAL, PART 2, CLAIMS, http://nt5.scbbs.com/cgi-bin/om_iaspi.dll?clientID=458118&infobase=feca-pt2.nfo&softpage=pl_frame (last visited Feb. 26, 2003) [hereinafter FECA PROCEDURE MANUAL].

20. *Id.* § 2-0805.

considered.²¹ Moreover, FECA Program Memorandum No. 265²² makes it plain that “[l]aboratory tests giving blood, serum, urine, and spinal fluid contents” are examples of the sort of “diagnostic tests” that the OWCP expects to be performed in support of medical opinions on work-relatedness. Taken together, the FECA guidelines require information far beyond what BNSF received in the majority of cases from the treating physician to support a claim for work-related CTS.

As observed, the EEOC saw some fundamental impropriety in BNSF’s Safety Rule 26.3. Here are the equivalent provisions from the FECA:

An employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required. . . . If an employee refuses to submit to or obstructs an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops²³

Given the nature of the FELA, BNSF cannot “suspend compensation” to employees who refuse medical examinations; it must use discipline to enforce compliance instead, as it must with all of its hundreds of other safety rules. But neither under the FECA nor BNSF’s rule is the examination optional with the employee who wishes to have his reported CTS accepted by the employer as compensably work-related. The FECA policy guide states, as the first reason why a so-called directed medical examination may be advisable, “the need for a rationalized opinion regarding causal relationship.”²⁴ The CTS protocol arose from the same need.

To the extent that the EEOC was suggesting that employers must never consider genetic factors when evaluating whether an injury or illness is work-related, it is relevant to observe that many opinions of the FECA Employment Compensation Appeal Board do just that. Two are representative. In the first, a doctor who examined the employee at the direction of the OWCP obtained genetic information, evidently by a history from the patient, and concluded that “nonwork conditions, in this case genetic and familial factors, caused her disease which is producing her present disability.”²⁵ The Board accepted the

21. *Id.*

22. FEDERAL EMPLOYEES’ COMPENSATION ACT, PROGRAM MEMORANDUM, http://nt5.scbbs.com/cgi-bin/om_isapi.dll?clientID=434342&infobase=promemo.nfo&softpage=pl_frame (last visited Feb. 19, 2003).

23. 5 U.S.C. § 8123(a), (d) (2000).

24. FECA PROCEDURE MANUAL, *supra* note 19, § 2-0805.

25. *In re Kreeger & Dept. of the Air Force*, No. 96-142 (Empl. Comp. App. Bd. June 1, 1998).

opinion and affirmed the denial of compensation.²⁶ In the second, the Board considered evidence obtained during a directed examination that the employee had a family history of Charcot-Marie-Tooth syndrome, a condition closely related to HNPP. It ultimately determined that the employee's peripheral neuropathy, of which CTS is also an example, was not work-related.²⁷ In its capacity as employer instead of regulator, then, the federal government has for years relied on genetic information to assess and manage its own workers' compensation liability. BNSF's plan to obtain similar information for the same purpose was mainstream workers' compensation risk management, not an aberrational frolic.

Viewed from a redistributionist perspective, the EEOC's foray into close regulation of genetic information must be counted a success. Employers other than the government itself are effectively denied access to reliable information useful in assessing workplace hazards and evaluating employee claims for workplace injuries. Many doubtful claims will now be paid by employers and some employees will receive higher payouts than they might if the employer had more complete information. Relying on the information asymmetry adopted by Congress in the ADA to discourage disability discrimination, the EEOC used ambiguous statutory language to extend the asymmetry to a setting Congress probably never contemplated. The political and enforcement imperatives of a regulatory regime led to an arguably inefficient outcome for society as a whole. The first half of Dean Partlett's thesis is vindicated.

But BNSF also faced tort claims from individual employees arising from its brief use of the HNPP test as part of the CTS protocol. I suspect, although I do not know, that those claims had far more to do with BNSF's decision to settle than the claims asserted by the EEOC. The principal question the company had to answer to evaluate its exposure to the tort claims is encapsulated in the title of another article cited by Dean Partlett, *Genetic Privacy: New Intrusion a New Tort?*²⁸ A hornbook-type hypothetical helps bring the problem into focus.

F and M are in a personal relationship of some years' standing. The relationship is committed but not sexual. M proposes that the relationship become sexual. F agrees, but only on the condition that M submit first to a medical examination for sexually transmitted diseases. Although slightly offended that F is unwilling simply to accept his word, especially given the length of the relationship, M agrees. F then further stipulates that M must see a doctor of her choosing and

26. *Id.*

27. *In re Lambert & U.S. Postal Serv.*, No. 95-1002 (Empl. Comp. App. Bd. Apr. 4, 1997).

28. Mary Z. Makdisi, *Genetic Privacy: New Intrusion a New Tort?*, 34 CREIGHTON L. REV. 965 (2001).

allow the doctor to submit the report directly to her. Despite more feelings of disappointment in F's seeming lack of trust, M agrees to the further conditions insisted on by F. M goes to the office of the doctor selected by F, where he is informed, as required by law, that the testing will include a screen for HIV. M signs the usual forms. Although given the opportunity to question the doctor about the tests to be administered other than for HIV, he chooses not to do so. The doctor draws several vials of blood and tests for syphilis, herpes, and so on as well as for HIV. But the doctor also tests the blood for the genetic marker of a rare and relatively benign STD known to be highly correlated to a mutation on chromosome 4.²⁹ After reviewing the test results, F is satisfied and starts a sexual relationship with M. M later learns by accident about the genetic test and consults counsel about whether F, her doctor, or both violated his legal rights.

BNSF was accused of "forcing" its employees to undergo a medical examination that included a "secret" genetic test. Did F in the hypothetical "force" M to undergo a medical examination that included a "secret" genetic test? General common-law principles require a "no" answer to both questions. "A hard choice is not the same as no choice";³⁰ M consented to the examination, as BNSF's employees did, because each placed a higher value on the benefits they expected from their respective relationships, personal and employment, than they did on their privacy. As for secrecy, the law in virtually every U.S. jurisdiction places the duty to obtain "informed consent" only on the physician who performs a medical test.³¹ So neither F nor BNSF owed any duty, under general principles, to make special disclosure of the nature of the tests that would be performed on the blood of their relationship partners.

With no tort liability to its employees under normal legal principles, BNSF was compelled to stare genetic exceptionalism squarely in the face. Should it matter, or more practically would it matter, that one procedure among many during the CTS medical examination tested for a genetic mutation? The world now knows how BNSF responded: it blinked, as would have any reasonably prudent company in BNSF's place. Presumably BNSF did so after calculating its chances of neutralizing the sheer emotive power of the idea of a "genetic test" with juries all over the American midwest, a power driven home to the company no doubt by the media's interest in the case. De facto, then, there is a new tort of genetic intrusion, because plaintiffs

29. The genetic STD is hypothetical.

30. See *United States v. Martinez-Salazar*, 528 U.S. 304, 315 (2000); *Henn v. Nat'l Geographic Soc'y*, 819 F.2d 824, 829 (7th Cir. 1987), *cert.denied*, 484 U.S. 964 (1987); *Van Arsdell v. Texas A & M Univ.*, 628 F.2d 344, 345-46 (5th Cir. 1980).

31. See *Wells v. Storey*, 792 So. 2d 1034, 1038-39 (Ala. 1999) (collecting cases).

are threatening to assert it and defendants are paying to settle the claims. But should the law recognize the cause of action and, if so, against whom? I address the latter issue first.

Dean Partlett proposes placing the principal responsibility for the proper use of genetic information on the shoulders of the professionals who order, administer, and interpret genetic tests. Physicians who already complain loudly of ruinous liability-insurance premiums would no doubt take strong exception. But developments in genetic science may largely make the proposal moot anyway: a British company recently announced that it was close to perfecting a method that ultimately will permit it to sequence an individual's entire genome in twenty-four hours at a cost of \$1000.³² The very wealthy are reportedly ordering their genome on a compact disk at considerably greater cost from a U.S. company right now.³³ Consequently, learned intermediaries may soon no longer be in a position to act as gatekeepers of genetic information, even were they otherwise suited for the role.

If genetic information cannot be controlled at its source — if it is no less accessible than a person's banking, educational, or telephone records — are special privacy protections in any form, statutory or common-law, needed for it? The BNSF experience again suggests an answer. As long as most of the population fears genetics and believes that genetic information poses a risk to their personal welfare, the law will protect the information as "private" notwithstanding any ethical, legal, or economic reasoning about need. And the protection will be in essence the same whether it comes in the form of sweeping statutory and regulatory prohibitions, or from the *in terrorem* effect on prospective defendants of fearful and angry juries.

That is the prospect for the foreseeable future. Whether mass deception — mass withholding of accurate and reliable information useful to us in ordering our relationships with one another — is sustainable as a policy over the long run is another matter. If and when the public mind grows more comfortable with genetics, the tendency of the common law toward economically efficient rules will almost certainly reassert itself. At that point, the flexibility and adaptability of common-law adjudication compared with close regulation would offer the advantages that Dean Partlett sketches. But however accurate his prescription, the patient may already be past help. Close regulation appears to have carried the day; who will lead a future effort to repeal the statutory bans on gathering genetic information that have swept the country in recent years?

32. BBC News, *Your Genetic Code on a Disc* (Sept. 23, 2002), available at <http://news.bbc.co.uk/2/hi/science/nature/2276095.stm>.

33. *See id.*