No. 26-29

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK GRANAS,
Plaintiff-Appellee,

v.

UNION PACIFIC RAILROAD COMPANY,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Oregon
No. 1:21-cv-00116 (Hon. Ann Aiken)

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF APPELLEE AND IN FAVOR OF AFFIRMANCE

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INTRODUCTION

A jury found that Union Pacific Railroad Company discriminated against Mark Granas on the basis of disability (an anterior shoulder dislocation) by issuing permanent work restrictions that prevented him from returning to his job as a trainman. The district court concluded that sufficient evidence supported the jury's verdict and denied Union Pacific's renewed motion for judgment as a matter of law. This Court should affirm that ruling for three principal reasons.

1. Sufficient evidence supports the jury's finding that Granas was a "qualified individual." In urging otherwise, Union Pacific maintains that Granas was not qualified because its doctors determined there was a greater-than-one-percent chance that Granas could re-dislocate his shoulder, which the company deemed an unacceptable safety risk. But that argument inverts the parties' respective burdens. Whereas the plaintiff must show he was a qualified individual (i.e., he could perform his essential job functions with or without reasonable accommodation), it is the employer's burden to show, as part of its direct-threat affirmative defense, that the plaintiff posed a significant safety risk. *See Echazabal v. Chevron USA, Inc.*, 336 F.3d 1023, 1027 (9th Cir. 2003).

2. Here, Union Pacific's safety-related arguments go toward its direct-threat defense (on which it held the burden) rather than the qualified-individual analysis. To hold otherwise would impermissibly require the plaintiff to *disprove* the employer's direct-threat defense, which is contrary to the statutory text and this Court's precedents. Nor can Union Pacific succeed on its direct-threat defense. The district court determined that Union Pacific forfeited the defense, a ruling the company does not challenge on appeal. And even if this Court were to excuse that forfeiture, the jury reasonably found that Union Pacific did not meet its burden to prove its direct-threat defense.

3. Sufficient evidence also supports the jury's finding that Union Pacific did not prove its business-necessity defense. To prevail on that defense, Union Pacific had to show that its safety standard at issue—which effectively barred the continued employment of any rail worker who posed a greater-than-one-percent risk of sudden incapacitation per year—was job-related and consistent with business necessity. The jury reasonably found that this standard was not job-related because it did not fairly or accurately measure Granas's actual ability to perform his essential job functions.

In sum, under the correct legal standards, Union Pacific was not entitled to judgment as a matter of law.

STATEMENT OF INTEREST

This appeal raises important questions concerning the parties' respective burdens under Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12111 *et seq.*, and the standards for establishing direct-threat and business-necessity affirmative defenses under that statute. Because the Equal Employment Opportunity Commission (EEOC) administers, enforces, and interprets Title I of the ADA and has a significant interest in the proper resolution of these questions, it offers its views to the Court. *See* 42 U.S.C. §§ 12116, 12117(a). The EEOC files this brief under Federal Rule of Appellate Procedure 29(a)(2).

STATEMENT OF THE ISSUES

1. Whether, under the correct legal standards, sufficient evidence supports the jury's finding that Granas was a qualified individual.

2. Whether Union Pacific's safety-related arguments relate to its direct-threat defense (on which it holds the burden of proof) rather than the qualified-individual analysis and, if so, whether that defense fails.

3. Whether, under the correct legal standards, sufficient evidence supports the jury's finding that Union Pacific did not prove its business-necessity defense.[1]

STATEMENT OF THE CASE

A. Statement of the Facts

We draw these facts largely from the district court's findings in its order and opinion on damages, which summarize the evidence and testimony presented at trial. *See* 1-ER-26-49. Because this is an appeal from the denial of a renewed motion for judgment as a matter of law, the evidence must be viewed in the light most favorable to Granas, all reasonable inferences must be drawn in his favor, and all evidence favorable to Union Pacific that a jury is not required to believe must be disregarded. *See Bell v. Williams*, 108 F.4th 809, 818 (9th Cir. 2024).

Granas, a veteran of the United States Army, worked for Union Pacific as a trainman for sixteen years. 1-ER-27; 2-ER-151. Granas's job duties included breaking down, assembling, and moving trains. 1-ER-27; 2-ER-151, 209-211. These duties sometimes required Granas to climb ladders

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[1] The EEOC takes no position on any other issue in this appeal.

on the sides of railcars, to ride on moving railcars by holding onto metal handholds, and to carry heavy objects. 2-ER-202, 255; 3-ER-344; 4-ER-695.

While off-duty and working on his farm, Granas fell off a haystack and dislocated his right shoulder. 1-ER-29; 2-ER-151. A doctor put Granas's shoulder back into place, which did not require surgery. 1-ER-30; 2-ER-151. After several months of physical therapy, Granas's treating orthopedic surgeon, Dr. Kevin Heaton, and physical therapist, Dr. Sharryn Jones Smith,[2] cleared Granas to return to work without restrictions. 1-ER-30-33; 2-ER-151. Both agreed that, based on their personal evaluations, Granas was fit to work and posed little risk of dislocating his shoulder again. 1-ER-30-33; *see also* 4-ER-608-617 (Dr. Heaton); 3-ER-347-348 (Dr. Jones Smith).

Despite these recommendations, Union Pacific did not allow Granas to return to work. The company had a blanket policy of imposing permanent work restrictions for any train employee who held what the company deemed a "safety sensitive" position and suffered an anterior shoulder dislocation. 1-ER-40; *see also* 1-ER-12, 15. This policy was the

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[2] Although the district court and parties referred to Dr. Jones Smith as "Ms. Jones Smith," the record reflects that she holds a doctorate in physical therapy. *See* 1-ER-32; 3-ER-338.

product of Union Pacific's broader "one-percent rule," which deemed an employee unfit for safety-critical positions if the employee had a greater-than-one-percent risk of sudden incapacitation per year. 1-ER-39-40; 2-ER-151-152. Applying that rule, Union Pacific's doctors determined that Granas was unfit to return to work because there was a greater-than-one-percent chance per year that anyone who suffered an anterior shoulder dislocation would re-dislocate his shoulder. 1-ER-41, 43, 45; *see also* 4-ER-709-710. These doctors did not offer Granas an individualized functional capacity test or physical examination. 1-ER-37.[3]

At trial, Granas's medical expert, Dr. Kevin Trangle, explained that Union Pacific's evaluation was flawed and inadequate. *See* 1-ER-45-49. Dr. Trangle testified he was unaware of any medical literature or research

[3] Union Pacific resists the district court's characterization of its one-percent rule as "a blanket rule that automatically disqualified anyone with a shoulder dislocation." UP Br. at 39. But the company's own chief medical officer agreed that he had "instituted a policy that if any employee in train service suffered or had a history of an anterior shoulder dislocation, with or without surgery, [he] would not let them go back to work without restrictions." 4-ER-731-732. The same medical officer later agreed that if a worker "suffered an anterior shoulder dislocation, [they] were done as a conductor at Union Pacific" unless they could be accommodated. 4-ER-756; *see also* 3-ER-484-485.

supporting Union Pacific's one-percent rule, which he characterized as an outlier in the railroad industry. 1-ER-45-46; *see also* 3-ER-481, 506-507, 520. He testified it was inappropriate for Union Pacific to apply a blanket rule effectively disqualifying any employee who suffers a shoulder dislocation, and that Union Pacific should have conducted an individualized evaluation of Granas, but failed to do so. 1-ER-46-48; *see also* 3-ER-482-490, 507-510. He further testified that an individualized evaluation would have shown that Granas was fit and capable of performing the tasks associated with the trainman position, 1-ER-48, and he opined that Granas's annual risk of recurrence was "way less than 1 percent," 3-ER-537.

Consistent with Dr. Trangle's opinion that Granas was physically able to perform the trainman position, Granas testified that he regularly performed physically strenuous activities comparable to those he performed for Union Pacific. 1-ER-34-38. Around the time Union Pacific was conducting its evaluation, Granas found a job in construction requiring him to climb ladders to work on rooftops as high as three stories and carry ladders, lumber, and 100-pound bags of cement. 1-ER-36; 2-ER-233, 242. Granas later took a job as a postal worker, where he sometimes walked 14.5-mile routes carrying a mailbag and often got into tall mail trucks by pulling himself up on railings. 1-ER-38; 2-ER-240-241, 243. Granas also continued working on his farm, where he also climbed ladders and carried 120-pound hay bales. 1-ER-34, 58; *see also* 2-ER-240-241; 4-ER-616, 715.

B. District Court's Decisions

Granas brought this action under the ADA and state law. 6-ER-1177-1181. The case went to trial on his claims that Union Pacific had discriminated against him on the basis of disability by (i) issuing work restrictions, removing him from his job, and refusing to allow him to return; and (ii) imposing selection criteria (the one-percent rule) that screen out or tend to screen out individuals with a disability. 2-ER-150. Union Pacific asserted two affirmative defenses: that Granas posed a direct threat to the safety of himself or others, and that any medical examination or inquiry the company imposed was job-related and consistent with business necessity. 2-ER-150, 155-156.

During the trial, Union Pacific moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(a). SER-35; 1-ER-66. In that motion, Union Pacific argued that Granas did not meet his burden to show he was a qualified individual, but the company did not argue it was entitled to judgment as a matter of law on its direct-threat or business-necessity defenses. *See* SER-38-39; 1-ER-66-67. The district court denied the motion. 1-ER-19, 68.

The jury returned a verdict for Granas. 2-ER-136-138. On its verdict form, the jury found that Granas was a qualified individual and that Union Pacific had discriminated against him by removing him from his job and refusing to allow him to return to it, as well as by imposing selection criteria (the one-percent rule) that screened out or tended to screen out individuals with a disability. 2-ER-136-137. The jury also found that Union Pacific had not proven its direct-threat or business-necessity defenses. 2-ER-137.

After the jury verdict, Union Pacific filed a renewed motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b) and, alternatively, for a new trial. SER-3, 10. There, Union Pacific again argued that Granas failed to prove he was a qualified individual. SER-12-15. But unlike in its Rule 50(a) motion, Union Pacific now argued it was entitled to judgment as a matter of law on its direct-threat and business-necessity defenses. SER-15-19.

The district court denied Union Pacific's renewed motion. 1-ER-16. As relevant here, the court first determined that sufficient evidence supported the jury's finding that Granas could perform the essential functions of the trainman position and was thus a qualified individual. 1-ER-8-10. Next, the court declined to consider Union Pacific's direct-threat defense because the company failed to raise the defense in its pre-verdict motion under Rule 50(a). 1-ER-10 n.2. Finally, the court determined that sufficient evidence supported the jury's finding that Union Pacific failed to prove its business-necessity defense.[4] 1-ER-10-13.

The district court ultimately entered judgment for Granas. 1-ER-17-18. Union Pacific appealed. 6-ER-1184-1185.

ARGUMENT

This Court reviews de novo a district court's denial of a renewed motion for judgment as a matter of law. *Alves v. Cnty. of Riverside*, 135 F.4th 1161, 1168 (9th Cir. 2025). Reversal is appropriate only where "the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to that of the jury." *Dunlap v. Liberty Nat. Prods., Inc.*, 878 F.3d 794, 797 (9th

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[4] The district court did not explain why it addressed the business-necessity defense even though Union Pacific did not raise that defense in its Rule 50(a) motion.

Cir. 2017) (citation omitted). Conversely, "[a] jury's verdict must be upheld if it is supported by substantial evidence that is adequate to support the jury's findings, even if contrary findings are also possible." *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1242 (9th Cir. 2014).

Under the correct legal standards, sufficient evidence supported the jury's findings that (1) Granas was a qualified individual and (2) Union Pacific did not prove its business-necessity defense.

I. Sufficient evidence supports the jury's finding that Granas was a qualified individual.

Union Pacific first argues that it was entitled to judgment as a matter of law because Granas could not *safely* perform the essential functions of the trainman position and thus was not a qualified individual. *See generally* UP Br. at 23-33. That argument misapprehends the parties' respective burdens under the ADA. While a plaintiff bears the burden to show that he was a qualified individual (i.e., that he could perform essential job functions with or without reasonable accommodation), it is the employer's burden to establish that the plaintiff posed a significant risk to the health or safety of himself or others as part of the employer's direct-threat defense.

Here, the evidence supported the jury's finding that Granas could perform the essential functions of the trainman position, and Union Pacific's safety-related arguments go toward its direct-threat affirmative defense on which it held the burden of proof. Furthermore, Union Pacific is not entitled to judgment as a matter of law on that defense. As the district court determined, Union Pacific forfeited its direct-threat defense by failing to timely raise it. And even if this Court were to excuse that forfeiture, sufficient evidence supports the jury's finding that Union Pacific did not prove its direct-threat defense at trial.

A. The qualified-individual analysis and direct-threat defense are separate inquiries subject to distinct burdens of proof.

The ADA prohibits a covered entity from "discriminat[ing] against a qualified individual on the basis of disability" with respect to the terms or conditions of employment. 42 U.S.C. § 12112(a). To prove a disability-discrimination claim, a plaintiff must show that he is a "qualified individual." *Smith v. Clark Cnty. Sch. Dist.*, 727 F.3d 950, 955 (9th Cir. 2013). The ADA defines a "qualified individual" as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C.

§ 12111(8). "The 'essential functions' of a job are defined as the 'fundamental job duties,' not including 'the marginal functions of the position.'" *Johnson v. Bd. of Trs. of Boundary Cnty. Sch. Dist. No. 101*, 666 F.3d 561, 564 n.5 (9th Cir. 2011) (quoting 29 C.F.R. § 1630.2(n)(1)); *see also* 42 U.S.C. § 12116 (authorizing EEOC to issue implementing regulations).[5]

The statute defines disability discrimination to include "using qualification standards … that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities." 42 U.S.C. § 12112(b)(6). Even when an employer uses such a qualification standard, it may still avoid liability by proving that the standard is "job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation." *Id.* § 12113(a); *see also id.* § 12112(b)(6). Furthermore, "[t]he term 'qualification standards' may

[5] To be a qualified individual, a plaintiff "must also 'satisf[y] the requisite skill, experience, education and other job-related requirements of the position.'" *Rohr v. Salt River Project Agric. Improvement & Power Dist.*, 555 F.3d 850, 862 (9th Cir. 2009) (alteration in original) (citation omitted); *see also* 29 C.F.R. § 1630.2(m) (same); *Anthony v. Trax Int'l Corp.*, 955 F.3d 1123, 1128-29 (9th Cir. 2020) (discussing "two-step qualified individual test"). Union Pacific's opening brief neither mentions this requirement nor argues that Granas could not satisfy it. Accordingly, we do not discuss it further.

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 statute defines a "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *Id.* § 12111(3); *see also* 29 C.F.R. § 1630.2(r) (defining "direct threat" to also include risks to the individual himself).

Importantly, whether a person is a qualified individual and whether that person poses a direct threat are separate inquiries subject to distinct burdens of proof. Whereas the plaintiff bears the burden to show he is a qualified individual, "the burden of establishing a direct threat lies with the employer." *Echazabal v. Chevron USA, Inc.*, 336 F.3d 1023, 1027 (9th Cir. 2003); *accord Hutton v. Elf Atochem N. Am., Inc.*, 273 F.3d 884, 893 (9th Cir. 2001); *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999).

Thus, when an employer imposes a safety-related qualification standard that tends to screen out individuals with a disability, it is the employer's burden to show that the standard is necessary to prevent a direct threat (or that the standard otherwise is justified by business necessity). As the Seventh Circuit recently explained:

> While it is the plaintiff-employee's burden to show that he is a "qualified individual," which means he can perform the "essential functions" or "duties" of the job with or without reasonable accommodation, it is the defendant-employer's burden to show that qualification standards that "tend to screen out ... individual[s] with a disability" escape liability because those qualification standards are necessary to prevent "a direct threat to the health or safety of other individuals in the workplace."

Pontinen v. U.S. Steel Corp., 26 F.4th 401, 406 (7th Cir. 2022) (alterations in original) (citations omitted); *see also Bodenstab v. Cnty. of Cook*, 569 F.3d 651, 658 (7th Cir. 2009) (although "an individual is not qualified if he presents a 'direct threat' to his own health and safety or that of others," "the employer has the burden to show that an employee posed a direct threat to workplace safety that could not be eliminated by a reasonable accommodation" (citation omitted)).

Along similar lines, whether a person can perform a job's "essential functions" and whether the person can meet an employer's "qualification standards" are distinct inquiries—a difference this Court has described as "crucial." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 990 (9th Cir. 2007) (en banc), *abrogated in part on other grounds in TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021). "Whereas 'essential functions' are basic 'duties,' 'qualification standards' are 'personal and professional attributes' that may include 'physical, medical [and] safety' requirements." *Id.* (alteration in original) (quoting 29 C.F.R. § 1630.2(n)(1), (q)). And although a plaintiff must "show that he can perform the 'essential functions' of the job," he need not show that he "meet[s] each of an employer's established 'qualification standards,' … to show that he is 'qualified.'" *Id*. Instead, "when an employer asserts a blanket safety-based qualification standard—beyond the essential job function—that is not mandated by law[,] and that qualification standard screens out or tends to screen out an individual with a disability, *the employer*—not the employee—bears the burden of showing that the higher qualification standard is" justified. *Id.* at 992-93 (emphasis added).

None of this is to suggest that safety-related concerns may never be considered as part of the qualified-individual analysis. Indeed, *Bates* itself accepted that "safe driving" could be an essential function of a delivery driver position and that the employer there could thus require applicants to have a "clean driving record." *Id.* at 992-94. And it may not always be obvious when safety may be considered as part of an essential function rather than a qualification standard. Wherever this line is drawn, however, *Bates* makes clear that an employer may not shift its burden to the plaintiff merely by characterizing "safety" as an essential function. *Id.* at 990; *cf. Klimek v. CentraCare Health Sys.*, __ F.4th __, No. 25-1837, 2026 WL 1724207, at *3 (8th Cir. June 15, 2026) ("Adding the label of 'policy' to a task does not render it an essential job function, and a duty does not become essential by the employer's *ipse dixit*.").

B. Granas offered sufficient evidence that he was able to perform his essential job functions and was therefore a qualified individual.

Here, the qualified-individual analysis should be fairly straightforward. The relevant question is whether the trial record, viewed in the light most favorable to Granas, supports the jury's finding that Granas was a qualified individual (i.e., that he could perform the essential functions of the trainman position with or without reasonable accommodation).

The answer is yes. As outlined above, *see supra* at pp. 5-8, Granas presented ample evidence (from his personal testimony, job history, treating providers, and medical expert) that, when he sought to return to work, he was physically capable of performing the essential functions at issue (namely, climbing ladders, holding onto moving trains, and carrying heavy objects). Accordingly, sufficient evidence supports the jury's finding that Granas was a qualified individual. *See Sanders v. Union Pac. R.R. Co.*, 108 F.4th 1055, 1061 (8th Cir. 2024) (jury reasonably could find that plaintiff was qualified individual where it "heard considerable evidence that [the plaintiff] could lift knuckles and perform other strenuous activities without accommodation," plaintiff's "doctors cleared him for work without lifting limitations," and plaintiff "testified that he regularly performed activities that were more strenuous than his work for Union Pacific"). Aside from its safety-based argument, Union Pacific does not challenge Granas's physical ability to perform the essential functions of his job.

II. Union Pacific's safety-related arguments go toward its direct-threat affirmative defense, on which it holds the burden of proof.

Union Pacific argues Granas had to show not only that he could perform these essential functions, but that he could do so "safely," that is, "without a significant risk of sudden incapacitation." UP Br. at 26. That argument fails because Union Pacific's safety-related arguments go toward its direct-threat affirmative defense, on which it held the burden of proof. Furthermore, Union Pacific is not entitled to judgment as a matter of law on its direct-threat defense: Union Pacific forfeited that defense by not raising it in its pre-verdict Rule 50(a) motion and, even absent such forfeiture, sufficient evidence supports the jury's finding that the company did not prove its direct-threat defense at trial.

A. Union Pacific's safety-related arguments merely restate its direct-threat defense.

Union Pacific's safety-related arguments go toward its direct-threat affirmative defense and thus are properly analyzed under that framework, rather than as part of the qualified-individual analysis.

On their face, Union Pacific's arguments articulate a direct-threat defense rather than a legitimate challenge to Granas's ability to perform his job. While Union Pacific asserts that Granas "could no longer *safely perform* a trainman's essential functions," UP Br. at 26 (emphasis added), that is fundamentally a direct-threat analysis, which assesses "the individual's present ability to *safely perform* the essential functions of the job," *Hutton*, 273 F.3d at 893 (emphasis added) (quoting 29 C.F.R. § 1630.2(r)). Likewise, while Union Pacific asserts that Granas posed "a *significant risk* of sudden incapacitation," UP Br. at 26 (emphasis added), that simply echoes the regulatory definition of "direct threat," which is "a *significant risk* of substantial harm to the health or safety of the individual or others," 29 C.F.R. § 1630.2(r) (emphasis added); *see also* 42 U.S.C. § 12111(3).

The jury instructions, which Union Pacific does not challenge on appeal, similarly framed these safety-related arguments as part of the company's direct-threat affirmative defense. They state that Union Pacific "asserts an *affirmative defense*, claiming that [Granas] was not a qualified individual, because [Granas] *could not safely perform the essential functions of his position*, with or without reasonable accommodation, because he would be a direct threat to the safety of himself or others." 2-ER-150 (emphases added). As these comparisons make clear, Union Pacific's safety-related arguments merely repackage its direct-threat defense.

In essence, Union Pacific's arguments reduce to a contention that Granas could not satisfy a safety-related qualification standard—namely, Union Pacific's one-percent rule. *See* UP Br. at 26 (arguing that Granas was not qualified because Union Pacific's doctors "determined that his shoulder dislocation had more than a 1% annual rate of recurrence"); *id.* at 35 (characterizing the one-percent rule as a "qualification standard"). But as explained above, *see supra* Part I.A, it was Union Pacific's burden to show that its one-percent rule was necessary to prevent a direct threat to the safety of Granas or others. *See Echazabal*, 336 F.3d at 1027; *Pontinen*, 26 F.4th at 406. Union Pacific cannot shift that burden to Granas simply by declaring safety an essential function. *Cf. Klimek*, 2026 WL 1724207, at *3 ("[A] duty does not become essential by the employer's *ipse dixit*.").

This Court's en banc decision in *Bates*, 511 F.3d 974, confirms this allocation of the parties' respective burdens. There, this Court held that the employer, not the employee, holds the burden of establishing that a "blanket safety-based qualification standard" is justified when the standard goes "beyond the essential job function" and tends to screen out individuals with disabilities. *Id.* at 992-93. And although *Bates* addressed a business-necessity defense, it explained that "[t]his approach is parallel to the one adopted in a 'direct threat' case under the ADA." *Id.* at 993.

Bates's discussion of the Seventh Circuit's decision in *Branham v. Snow*, 392 F.3d 896 (7th Cir. 2004), is especially illuminating. In *Branham*, as here, the employer argued that an individual's condition (diabetes) "placed him at risk of 'subtle and/or sudden incapacitation,'" creating a risk of harm that rendered him unqualified for a position requiring an "ability to function safely." *Bates*, 511 F.3d at 993 (quoting *Branham*, 392 F.3d at 900). The Seventh Circuit rejected that argument, holding that "because the [employer's] 'safety' qualification standard regarding the medical condition incorporated the 'direct threat' defense under the ADA, the employer bore the burden of proving that the employee was a direct threat." *Id.* (citing *Branham*, 392 F.3d at 906-07). In other words, as this Court observed, "[t]he employee did not have to *disprove* the claim that he was a direct threat" to show that he was qualified. *Id.* Here too, Union Pacific's argument that Granas is not qualified incorporates the direct-threat defense, and Union Pacific bore the burden of showing that Granas posed a direct threat to the safety of himself or others.[6]

Notably, several district courts have expressly rejected Union Pacific's attempts to shift its burden on this issue in similar cases. For example, in *Baker v. Union Pacific Railroad Co.*, another case involving application of Union Pacific's one-percent rule, the court agreed that whether a plaintiff's condition posed an unacceptable safety risk "is not part of a plaintiff's prima facie case but goes to whether [Union Pacific] can prevail on its direct threat defense." 580 F. Supp. 3d 647, 659 (D. Neb. 2022).

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[6] Again, none of this is to suggest that an employer may never consider safety as part of an essential function. But this case does not require this Court to grapple with that issue. Under *Bates*'s reasoning, requiring an employee to perform his job-related tasks with a less-than-one-percent chance of reinjury is a safety-related qualification standard, not an essential function. Indeed, Union Pacific itself repeatedly characterizes its one-percent rule as a "qualification standard." UP Br. at 3, 6, 20, 33, 35, 36, 37.

Similarly, in *Hurd v. Union Pacific Railroad Co.*, which also involved the company's "one percent cutoff," the court explained that allowing Union Pacific to raise these generalized "safety concerns at the qualified for the job stage, where [the plaintiff] bears the burden of proof, would allow [Union Pacific] to make an impermissible end run around its burden." No. 8:23-cv-00201, 2025 WL 713516, at *5, *13 (D. Neb. Mar. 4, 2025); *cf. Silos v. Union Pac. R.R. Co.*, No. 8:23-cv-00113, 2025 WL 3123997, at *8 (D. Neb. Nov. 7, 2025) (Union Pacific's "safety related arguments" regarding risks associated with plaintiff's condition "are more properly analyzed under [the direct-threat] framework"); *Campbell v. Union Pac. R.R. Co.*, No. 4:18-cv-00522, 2020 WL 5300734, at *5-6 (D. Idaho Sept. 4, 2020) (considering Union Pacific's argument that plaintiff's condition posed an unacceptable safety risk "within the context of Union Pacific's … 'direct threat' affirmative defense").

The decisions that Union Pacific lists at pages 29-31 of its opening brief reinforce this conclusion. Every decision considered Union Pacific's safety-related arguments in the context of the direct-threat defense.[7] Not a

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[7] *See Vasquez v. Union Pac. R.R. Co.*, No. 24-50852, 2025 WL 3034706, at *4-5 (5th Cir. Oct. 30, 2025) (considering whether "genuine issues of material

single one considered those arguments in assessing whether the plaintiff had satisfied his burden to show he was a qualified individual.

B. Union Pacific is not entitled to judgment as a matter of law on its direct-threat defense.

Union Pacific cannot prevail on its direct-threat defense. As an initial matter, the company forfeited this defense. The district court expressly determined that Union Pacific was foreclosed from seeking judgment as a matter of law on its direct-threat defense because it "failed to raise this defense in its pre-verdict motion under Rule 50(a)." 1-ER-10 n.2; *see* also *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1028-29 (9th Cir. 2003) ("The failure to raise [an] issue prior to the return of the verdict results in a

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fact preclude summary judgment on [Union Pacific's] direct threat defense," but declining to resolve which party properly held burden); *Carrillo v. Union Pac. R.R. Co.*, No. 22-50782, 2024 WL 3861374, at *3-5 (5th Cir. Aug. 19, 2024) (considering Union Pacific's safety-related arguments as part of its direct-threat defense, but declining to resolve which party properly held burden); *Seals v. Union Pac. R.R. Co.*, No. 4:23-cv-03079, 2025 WL 2061528, at *7 (D. Neb. July 23, 2025) (considering Union Pacific's safety-related arguments as part of its "'direct threat' affirmative defense"); *Christensen v. Union Pac. R.R. Co.*, No. 8:23-cv-00268, 2025 WL 1682676, at *7 (D. Neb. May 23, 2025) (concluding that "Union Pacific has established its direct-threat defense"); *Milan v. Union Pac. R.R. Co.*, No. 3:17-cv-01246, 2019 WL 2030553, at *9 (D. Or. Apr. 19, 2019) (concluding "there is no genuine issue of material fact as to whether plaintiff poses a direct threat to himself and others"), *report and recommendation adopted*, 2019 WL 2030723 (D. Or. May 8, 2019).

complete waiver, precluding our consideration of the merits of the issue."). Union Pacific does not challenge that ruling on appeal.

Even if this Court were to excuse that forfeiture, Union Pacific's direct-threat defense fares no better on its merits. To prove its direct-threat defense, Union Pacific had to show that Granas posed "a *significant* risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3) (emphasis added). As the EEOC has explained: "An employer … is not permitted to deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. The risk can only be considered when it poses a significant risk, i.e., high probability, of substantial harm; a speculative or remote risk is insufficient." 29 C.F.R. pt. 1630, app. § 1630.2(r) (citation omitted).

Union Pacific also had to show that its determination that Granas posed a direct threat was based on "'a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence,' and upon an expressly 'individualized assessment of the individual's present ability to safely perform the essential functions of the job[.]'" *Echazabal*, 336 F.3d at 1026 (quoting *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 86 (2002)). Relevant factors include: "(1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm." *Id.* at 1027 (quoting 29 C.F.R. § 1630.2(r)). An employer's "subjective belief in the existence of a risk, even one made in good faith, will not shield the decisionmaker from liability." *Id.* at 1028 (citing *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998)).

For multiple reasons, the record here allowed the jury reasonably to reject Union Pacific's direct-threat defense. As explained in greater detail below, Union Pacific's application of its one-percent rule did not involve any individualized assessment of Granas's ability to safely perform the essential functions of the trainman position. *See infra* Part III. For that reason alone, Union Pacific cannot establish a direct-threat defense.

Additionally, the jury heard testimony from Granas's medical expert, Dr. Trangle, that Union Pacific's blanket policy was unsupported by medical literature and that the company should have instead performed an individualized evaluation, which would have accurately measured Granas's ability to do the job. *See* 1-ER-45-49; *see also* 3-ER-482-490, 507-510, 520. "A reasonable jury could have accepted this testimony and concluded that the company failed to prove that its decision [to impose work restrictions] was objectively reasonable and based on the best available objective evidence." *Sanders*, 108 F.4th at 1062.

Even putting aside those problems, a jury could readily agree that Union Pacific's one-percent rule was a poor measure of *significant* risk, which is what the statute requires. 42 U.S.C. § 12111(3). To be sure, a low-probability risk may be considered significant where the threated harm is sufficiently severe. *See* 29 C.F.R. § 1630.2(r) (listing "nature and severity of the potential harm" as a relevant factor). But here, Union Pacific points to no evidence suggesting Granas was likely to cause such a harm if he re-dislocated his shoulder on the job. Instead, it simply asserts that Granas might have "caused an accident after re-dislocating its shoulder." UP Br. at 33. Union Pacific's speculation does not substitute for objective medical evidence. *See, e.g.*, *Hamlin v. Charter Twp. of Flint*, 165 F.3d 426, 432 (6th Cir. 1999) (rejecting direct-threat defense based entirely on speculative risk); *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 220-21 (2d Cir. 2001) (similar).

III. Sufficient evidence supports the jury's finding that Union Pacific did not prove its business-necessity defense.

Union Pacific next argues that it was entitled to judgment as a matter of law because its one-percent rule was consistent with business necessity. *See generally* UP Br. at 33-41. That argument, too, is unavailing.

Where, as here, a plaintiff has shown that a qualification standard screens out or tends to screen out an individual with a disability,[8] an employer asserting a business-necessity defense must show that the qualification standard at issue is "(1) 'job-related,' (2) 'consistent with business necessity,' and (3) that 'performance cannot be accomplished by reasonable accommodation.'" *Bates*, 511 F.3d at 995 (quoting 42 U.S.C. § 12113(a)); *see also Rohr*, 555 F.3d at 862; 29 C.F.R. §§ 1630.10(a), 1630.15(b)(1).

Here, the district court focused exclusively on the job-relatedness element. *See* 1-ER-11-13. The court explained that to establish job-relatedness, "Union Pacific needed to prove at trial that the blanket policy

[8] The jury found that Union Pacific discriminated against Granas by imposing selection criteria that screened out or tended to screen out individuals with a disability. 2-ER-137. Union Pacific does not challenge that finding on appeal.

under which it disqualified [Granas] 'fairly and accurately measures the individual's actual ability to perform the essential functions of the job.'" 1-ER-12 (quoting *Bates*, 511 F.3d at 996). Furthermore, "[w]hen every person excluded by the qualification standard is a member of a protected class—that is, disabled persons—an employer must demonstrate a predictive or significant correlation between the qualification and performance of the job's essential functions." 1-ER-12 (quoting *Bates*, 511 F.3d at 996). Applying these standards, the court concluded that sufficient evidence supported the jury's verdict. *See* 1-ER-12-13; 2-ER-137.

For several reasons, that determination was correct. First, in practice, Union Pacific's one-percent rule functions much like "100% healed" or "fully healed" policies, which this Court has held violate the ADA when and because they foreclose an individualized assessment. *McGregor v. Nat'l R.R. Passenger Corp.*, 187 F.3d 1113, 1116 (9th Cir. 1999). As this Court has explained:

> A "100% healed" or "fully healed" policy discriminates against qualified individuals with disabilities because such a policy permits employers to substitute a determination of whether a qualified individual is "100% healed" from their injury for the required individual assessment whether the qualified individual is able to perform the essential functions of his or her job either with or without accommodation.

Id. (collecting cases). Here too, Union Pacific's determinations under its one-percent rule rested on generalized conclusions about individuals who suffer shoulder dislocations rather than individualized assessments of employees and the essential functions of the specific jobs they held.

Second, the jury could reasonably find that the one-percent rule did not fairly and accurately measure an individual's actual ability to perform the essential functions of the trainman position—at least or especially as applied to anterior shoulder dislocations. At a minimum, the jury could reasonably find that the one-percent rule did not accurately measure *Granas's* ability to perform the essential functions of his job despite his alleged inability to satisfy the one-percent rule. As explained above, the evidence showed he was capable of performing those functions (climbing ladders, holding onto moving trains, and carrying heavy objects). *See supra* at pp. 5-8. And even if one were to accept that the ability to safely perform the job was an essential function, Union Pacific did not show that the one-percent rule accurately measured Granas's ability to do so; indeed, the strong weight of evidence indicates that he could. As the district court explained, "[e]vidence at trial was that Union Pacific's decision to remove [Granas] from service permanently was not the result of careful evaluation, but rather the application of a strict policy that automatically disqualified employees with shoulder dislocation." 1-ER-11-12.

Finally, Union Pacific points to no evidence that suggests—let alone demonstrates—a "predictive or significant correlation" between anterior shoulder dislocations and ability to perform essential functions. *See Bates*, 511 F.3d at 996. Instead, Union Pacific simply declares that "[r]equiring that trainmen not present a significant risk of sudden incapacitation (greater than 1% annually) directly correlates with the job's essential functions of safely managing train movements and operations." UP Br. at 37. But that naked invocation of safety cannot be enough to establish job relatedness. If that alone were sufficient, virtually any qualification standard would be deemed job-related no matter how tenuous its connection to actual job duties.

For each of these reasons, the jury was not required to find that Union Pacific's one-percent rule was job-related. The company thus is not entitled to judgment as a matter of law on its business-necessity defense.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's denial of Union Pacific's renewed motion for judgment as a matter of law.

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FOR THE NINTH CIRCUIT

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