11-6088

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VELMA SUE BATES; CLAUDIA BIRDYSHAW; MARK LONG; JON TOUNGETT; CAROLYN WADE; RICHARD WHITE

Plaintiffs/Appellees

WILLARENE FISHER

Plaintiff

v.

DURA AUTOMOTIVE SYSTEMS, INC.

Defendant/Appellant

On Appeal from the United States District Court
for the Middle District of Tennessee, Columbia Division

Brief of Appellant Dura Automotive Systems, Inc.

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Appellant makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No.

s/ Robert E. Boston
Counsel for Appellants

October 4, 2012
Date

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument would likely assist the Court in addressing the important issues presented in this appeal and would enable the Appellant to address directly any questions the Court might have. Accordingly, the Appellant requests that the Court grant oral argument.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this civil case pursuant to 28 U.S.C. § 1331. This matter arises out of Appellees' claims under the Americans with Disabilities Act (the "ADA"). 42 U.S.C. §§ 12101, *et seq*.

At trial, Appellant moved for Judgment as a Matter of Law pursuant to Rule 50 at the close of Appellees' proof. (July 14, 2011 Transcript, Record Entry ("RE") 237, at PageID # 6264-6290). The Motion was denied. (*Id.*at 6286-6290). Appellant renewed its Motion at the close of all proof. (July 15, 2011 Transcript, RE 238, at PageID # 6527-6532). The renewed Motion was taken under advisement, and the case was submitted to the jury. (*Id.*). The jury rendered its verdict in favor of Appellees. (Jury Verdict, RE 195, PageID # 4494-4503). The district court then denied Appellant's renewed Motion. (July 19, 2011 Transcript, RE 233, at PageID # 5796-5797). On July 26, 2011, the District Court entered its Judgment as rendered by the jury. (Judgment, RE 201, PageID # 4527-4528).

On August 16, 2011, Appellant filed a Renewed Motion for Judgment as a Matter of Law or, Alternatively, for a New Trial. (Renewed Motion for Judgment as a Matter of Law, RE 209, PageID # 4661-4662; Memorandum in support of Renewed Motion for Judgment as a Matter of Law, RE 210, PageID # 4663-4682). The Court denied Appellant's Renewed Motion for Judgment as a Matter of Law on August 29, 2011. (Memorandum regarding Renewed Motion for Judgment as a

Matter of Law, RE 215, PageID # 4747-4758; Order Denying Renewed Motion for Judgment as a Matter of Law, RE 216, PageID # 4759). Appellant timely filed a Notice of Appeal to this Court on September 28, 2011. (Notice of Appeal, RE 222, PageID # 4859-4860).

Following disposition of all post-trial motions, the judgment and orders appealed by Appellant are final. Accordingly, the Sixth Circuit Court of Appeals has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Did the district court err by ruling as a matter of law that Dura's former drug testing was not a qualification standard but was, instead, both a medical examination and disability-related inquiry?

II. Did the district court err by ruling as a matter of law that Freedom from Self, an independent third-party drug-testing company, was Dura's agent?

III. Did the district court err by ruling that individuals whose claims of disability discrimination were dismissed because they were not disabled may receive money damages under Section 12117(a) of the Americans with Disabilities Act?

IV. Did the district court err by holding that Appellees provided sufficient evidence from which a reasonable jury could find that Dura engaged in conduct that supports the imposition of punitive damages?

V. Did the district court err by holding that the verdict that Dura's drug testing was not job-related and consistent with business necessity was not against the clear weight of the evidence?

STATEMENT OF THE CASE

Appellant, Dura Automotive Systems, Inc. ("Dura"), appeals from the jury verdict in the United State District Court for the Middle District of Tennessee, Columbia Division, finding that Dura's former drug testing policy was an illegal medical examination or disability-related inquiry under the Americans with Disabilities Act ("ADA") because it was not job-related and consistent with business necessity.

In their Complaint, Appellees averred that Dura's drug testing policy—prohibiting employee use of specified drugs while on duty at Dura's factory in Lawrenceburg, Tennessee—violated the ADA. (*See* Amended Complaint, RE 28, at PageID # 167-168). According to Appellees, Dura's drug testing was an "unlawful medical examination" under § 12112(d)(4)(A) of the ADA. (Amended Complaint, RE 28, at PageID # 189-190).

The parties filed cross-motions for summary judgment on March 6, 2009. In resolving the parties' cross motions, the district court held (i) that six of the seven plaintiffs[1] were not disabled as a matter of law, (ii) that plaintiffs' claims were

[1] These six non-disabled plaintiffs are the Appellees in this appeal. The Court found on summary judgment that the jury could find that Willarene Fisher had a "record of" disability. (Memorandum on Summary Judgment, RE 77, at PageID # 2791-2792). The jury ultimately found in Dura's favor on both Ms. Fisher's Section 12112(d)(4)(A) claim and Ms. Fisher's disability discrimination claim. (Judgment, RE 201, at PageID # 4527). As such, Ms. Fisher is not part of this appeal.

more properly evaluated as a "qualification standard" under Section 12112(b)(6) of the ADA, rather than a "medical examination" under Section 12112(d)(4)(A), because the testing was not prompted by individual conduct, and (iii) that an individual need not be disabled to pursue a claim under Section 12112(b)(6). (Memorandum on Summary Judgment, RE 77, at PageID # 2788-2793; Order on Summary Judgment, RE 78, PageID # 2800-2801).

Upon Dura's motion, the district court certified for interlocutory appeal the issue of whether an individual must be a qualified individual with a disability to have standing to bring a claim under Section 12112(b)(6). (Memorandum on Motion for Clarification, RE 84, at PageID # 2881; Order on Motion for Clarification, RE 85, PageID # 2885-2886). This Court granted interlocutory review and reversed the district court's decision, holding that an individual must in fact be disabled to pursue a claim under 42 U.S.C. § 12112(b)(6). (Opinion of the Sixth Circuit, RE 90, PageID # 2897-2904). Because six plaintiffs were not disabled as a matter of law, their claims were subject to dismissal under Section 12112(b)(6).

Appellees then filed a Motion for Reconsideration with the district court, seeking to assert a claim under Section 12112(d)(4)(A) of the ADA averring that instead of a qualification standard, Dura's drug testing was an illegal medical examination or disability-related inquiry. Because a plaintiff need not be disabled

to state a claim under Section 12112(d)(4)(A), the Appellees claims—subject to a dispute about any monetary remedy being available—would, in effect, be resurrected if successful on their motion. The district court granted Appellees' Motion. (Memorandum on Motion to Reconsider, RE 97, PageID # 2936-2948; Order on Motion to Reconsider, RE 98, PageID # 2949). It found that Section 12112(b)(6) and 12112(d)(4)(A) could be pursued, and that there was "no legitimate reason that the plaintiffs should not be allowed to proceed under the statute that they originally invoked, Section 12112(d)(4)(A), simply because their claim arguably better fits within the scope of Section 12112(b)(6)." (Memorandum on Motion to Reconsider, RE 97, at PageID # 2945). Cross-motions for summary judgment on the Section 12112(d)(4)(A) claims were then filed, and denied. (Memorandum on Summary Judgment on Medical Examination Claims, RE 116, PageID # 3589-3601; Order on Summary Judgment on Medical Examination Claims, RE 117, PageID # 3602).

Prior to trial, Appellant filed a Motion for Leave to File a Motion to Dismiss all Appellees' claims, on the grounds that Section 12117 of the ADA only permits individuals who establish claims of disability discrimination to receive money damages. (Motion for Leave, RE 170, PageID # 4047-4064). Appellant's motion was denied, the district court holding that "whether this private right of action [under Section 12112(d)(4)(A)] springs from § 12117 or whether it is judicially

created, it exists." (Memorandum and Order on Motion for Leave, RE 177, at PageID # 4303-4304).

The matter was tried to a jury beginning July 12, 2011. (Minute Entry Day 1, Jury Trial, RE 191, PageID # 4448). At trial, Appellant moved for Judgment as a Matter of Law pursuant to Rule 50 of the Federal Rule of Civil Procedure at the close of Appellees' proof. (July 14, 2011 Transcript, RE 237, at Page ID # 6264-6290). This Motion was denied. (*Id.* at PageID # 6286-6290). At the same time, the district court ruled sua sponte as a matter of law that Dura's drug testing was both a medical examination and a disability-related inquiry. (*Id.*). Appellant renewed its Motion for Judgment as a Matter of Law at the close of all proof. (July 15, 2011 Transcript, RE 238, at Page ID # 6527-6532). The renewed Motion was taken under advisement, and the case proceeded to submission to the jury. (*Id.*).

Following a jury charge conference, Appellant objected to certain jury instructions, including the district court's intended instruction that Freedom From Self, an independent third-party drug testing business, was Dura's agent. (July 18, 2011 Transcript, RE 232, at PageID # 5746-5752). The district court denied Dura's objection to that agency instruction, and charged the jury. (*Id.* at PageID # 5760; Jury Instructions, RE 194, PageID # 4453-4493). The jury rendered its verdict in favor of Appellees' on the Section 12112(d)(4)(A) claim. (Jury Verdict, RE 195, PageID # 4494-4503). The district court then denied Dura's renewed motion for

judgment as a matter of law with regard to punitive damages. (July 19, 2011 Transcript, RE 233, at PageID # 5796-5797). On July 26, 2011, the District Court entered its Judgment on the verdict rendered by the jury. (Judgment, RE 201, PageID # 4527-4528).

On August 16, 2011, Appellant filed a Renewed Motion for Judgment as a Matter of Law or, Alternatively, for a New Trial. (Renewed Motion for Judgment as a Matter of Law, RE 209, PageID # 4661-4662; Memorandum in support of Renewed Motion for Judgment as a Matter of Law, RE 210, PageID # 4663-4682). The Court denied Appellant's Renewed Motion for Judgment as a Matter of Law on August 29, 2011. (Memorandum regarding Renewed Motion for Judgment as a Matter of Law, RE 215, PageID # 4747-4758; Order Denying Renewed Motion for Judgment as a Matter of Law, RE 216, PageID # 4759).

Appellant timely filed a Notice of Appeal to this Court on September 28, 2011. (Notice of Appeal, RE 222, PageID # 4859-4860).

STATEMENT OF THE FACTS

Dura makes glass window units for cars, trucks, and buses at its facility in Lawrenceburg, Tennessee. (Memorandum on Summary Judgment, RE 77, at PageID # 2771-2772). Appellees were employed by Dura. (*Id.*).

Dura's factory is a vibrant, active and mobile workplace. (July 13, 2011 Transcript, RE 236, at PageID # 5893-5895). It is a dynamic manufacturing environment that in which workers use a variety of heavy equipment and active machinery, including high temperature injection molds, presses, air powered tools, cutting machines, die casts, fork lifts, tow motors, hi-lo lifters, and portable cranes. (*Id.*; July 14, 2011 Transcript, RE 237, at PageID # 6317-6336; Notice of Filing Trial Exhibits, RE 240, Defendant's Trial Exhibit 102, at PageID # 6759-6768). Safety is a top priority at Dura because of dangers from the equipment and materials used and the busy work environment. (July 13, 2011 Transcript, RE 236, at PageID # 5867-5875).

In 2006 and 2007, Dura learned that some of its employees were using legal and illegal drugs during their working time at the factory. For example, the plant had experienced substantially more work-related accidents than Dura's other facilities. (July 13, 2011 Transcript, RE 236, at PageID # 5910-5912). It had several employee accidents, with the employees involved testing positive in post-accident testing for prohibited drugs. (July 13, 2011 Transcript, RE 236, at PageID

6025-6026). Lawrenceburg police had approached Dura's local management to advise it of illicit drug activity taking place at the plant. (July 13, 2011 Transcript, RE 236, at PageID # 5910-5912).

Given the hazardous factory environment, even a single worker who was under the influence of a drug that reduced mental acuity or motor skills was deemed to be an unacceptable safety risk to other Dura employees. (July 13, 2011 Transcript, RE 236, at PageID # 6025-6026). To address this confluence of circumstances, Dura took the necessary and job-related step to protect its workers by implementing a new drug testing policy. Its new policy prohibited employees from (i) being under the influence of illegal drugs and (ii) being under the influence of some legal, but controlled, prescription drugs that carried with their use a manufacturer's safety warning about not operating dangerous machinery while taking them. (July 13, 2011 Transcript, RE 236, at PageID #5876-5893, 5904-5909; Notice of Filing Trial Exhibits, RE 240, Defendant's Trial Exhibits 1 and 12, at PageID # 6677-6680, 6687-6758).

To ensure accurate and legally-compliant drug-testing, Dura contracted with a professional third-party drug testing company called Freedom From Self ("FFS"). (July 13, 2011 Transcript, RE 236, at PageID # 5889-5890, 5912-5917, 5958, 6020-6022; July 15, 2011 Transcript, RE 238, at PageID # 6364-6378). The drug test was designed to be consistent with the Tennessee Drug Free Workplace

Act, a Tennessee law that allows employers to test their employees for certain legal and illegal substances to help curb work-related accidents and injuries. (July 13, 2011 Transcript, RE 236, at PageID # 5843-5845, 5866, 5888-5889, 5912-5915; July 15, 2011 Transcript, RE 238, at PageID # 6367-6376, 6397-6398). FFS recommended that Dura test for twelve drug substances, including cocaine, amphetamine, methamphetamine, marijuana, methadone, ecstasy, opiates, oxycodone, propoxyphene, PCP (phencyclidine), barbiturates, and benzodiazepines, each of which are either illegal or, even if legally prescribed and used, may impair an individual's mental alertness or motor skills. (July 15, 2011 Transcript, RE 238, at PageID # 6367-6376; Notice of Filing Trial Exhibits, RE 240, Defendant's Trial Exhibit Number 5, at PageID # 6681-6682). Mark Jent, Dura's Safety Specialist during the relevant time, contacted the Tennessee Department of Labor to ensure compliance with the Tennessee Drug-Free Workplace Act in its testing. (July 13, 2011 Transcript, RE 236, at PageID # 5843-5845, 5867, 5888-5889). Dura was approved to be a member of the Tennessee Drug-Free Workplace. (July 13, 2011 Transcript, RE 236, at PageID # 5843-5845).

In May 2007, pursuant to its new policy and with the advice of FFS, FFS conducted facility-wide drug testing of all employees at Dura's Lawrenceburg facility. (July 13, 2011 Transcript, RE 236, at PageID # 5846-5847, 6015). Based on FFS's testing, Dura sent home from work employees who tested positive for

any of the 12 substances until he or she, with the assistance of a physician, stopped using the prohibited substance or found one that was not subject to a safety warning about operating machinery or driving. (July 13, 2011 Transcript, RE 236, at PageID # 5922; July 15, 2011 Transcript, RE 238, at PageID # 6387). The FFS professionals who administered the drug test did not inquire of nor identify any employee's medical conditions, diseases, injuries, or any physical or mental impairment they might have had that was related to their drug use. (July 15, 2011 Transcript, RE 238, at PageID # 6387-6388). The drug test only identified the existence of a prohibited substance, not why it was taken or used. (July 13, 2011 Transcript, RE 236, at PageID # 5892-5893). Dura was not concerned with why an employees took a particular drug, only whether being on it posed a danger in the Dura factory.

Employees who tested positive for one of the 12 prohibited substances were asked to disclose privately to FFS at its company headquarters, outside of the presence or knowledge of Dura personnel, any prescription medications that contained the prohibited drug compounds. (July 15, 2011 Transcript, RE 238, at PageID # 6384-6386). In its role as a third-party drug-testing organization, FFS would then independently determine (i) whether an employee's prescriptions contained any of the 12 prohibited substances, and (ii) whether the drug's manufacturer warned against using that substance while driving, or operating,

machinery at work or otherwise. (July 15, 2011 Transcript, RE 238, at PageID # 6384-6386).

An employee who tested positive for one of the prohibited substances could complete another urine screen within a thirty-day leave of absence. (July 13, 2011 Transcript, RE 236, at PageID # 5947-5948, 5985; Notice of Filing Trial Exhibits, RE 240, Plaintiff's Trial Exhibit 47, at PageID # 6781-6783; July 15, 2011 Transcript, RE 238, at PageID # 6411-6412). If the second test did not reflect the presence of a prohibited substance, then the safety risk from the prior drug use would have abated, and the employee was free to return to work—and many did just that. (July 13, 2011 Transcript, RE 236, at PageID # 5947-5948). Two of the seven Plaintiffs in this case returned to their jobs at Dura following the plant-wide test. (July 14, 2011 Transcript, RE 237, at PageID # 6157 (Wade), 6206-6207 (Fisher)).

If, however, the employee remained under the influence of a prohibited substance's use and failed a second test, the employee was placed on an indefinite layoff, with termination of employment after six months. (July 13, 2011 Transcript, RE 236, at PageID # 5947-5948, 5986-5987). Five of the Plaintiffs did not stop taking prohibited drugs, or subsequently retested for prohibited drugs, and were not returned to work at Dura because their continued use of the drug presented an unacceptable safety risk to them and their co-workers. (July 12, 2011 Transcript,

RE 239, at PageID # 6595-6600 (Birdyshaw), 6670-6671 (Long); July 13, 2011 Transcript, RE 236, at PageID # 5817 (Long), 6050-6053 (Bates); July 14, 2011 Transcript, RE 237, at PageID # 6099-6101 (Toungett), 6230-6236 (White)).

Following the plant-wide test, the accident rate and amount of property damage at Dura's Lawrenceburg facility all decreased. (July 13, 2011 Transcript, RE 236, at PageID # 5938-5939).

SUMMARY OF THE ARGUMENT

There were five errors made by the district court that require Dura be granted a new trial or have the judgment reversed and entered in Dura's favor. First, the district court erred by ruling as a matter of law that Dura's drug testing was not an ADA qualification standard, but was, instead, both a medical examination and disability-related inquiry. Because Dura's drug screen was a qualification standard, the Appellees' claims should be dismissed because they are not disabled as a matter of law. Alternatively, the case should be remanded for a new trial because the mixed question of law and fact regarding whether the test was a qualification standard, medical examination, or disability-related inquiry was not submitted to the jury.

Second, the district court erred by ruling as a matter of law and instructing the jury that Freedom from Self, an independent third-party drug testing company, was Dura's agent. This instruction gave the jury an incorrect understanding of the law and attributed any illegal act of FFS to Dura. This was prejudicial to Dura, and a new trial should be granted to it.

Third, the district court's judgment should be reversed and granted in Dura's favor because it awards money damages to the Appellees, none of whom are disabled under the ADA. Because only those who allege discrimination on the

basis of a disability, a claim none of the Appellees had as a matter of law, are entitled to the remedies of the ADA, the judgment cannot stand.

Fourth, the district court's judgment with regard to punitive damages should also be reversed because plaintiffs did not provide sufficient evidence from which a jury could find that Dura engaged in conduct that would support the imposition of punitive damages. The proof introduced at trial compels just the opposite: That Dura tried to craft and carry out its understandable policy in compliance with the law, not in willful or reckless disregard of it.

Fifth and finally, the district court's judgment should be reversed and judgment should be granted in favor of Dura because the verdict that Dura's drug testing was not job-related and consistent with business necessity is against the clear weight of the evidence. The evidence at trial showed that Dura took reasonable and justifiable steps necessary to protect the health and welfare of its workplace and those employees in it.

ARGUMENT

I. STANDARD OF REVIEW

A. Motions for Judgment as a Matter of Law Under Rule 50

A motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b) should be granted where, in viewing the evidence in the light most favorable to the non-moving party, no genuine issue of material fact remains for the jury and all reasonable minds would necessarily find in favor of the moving party. *Gray v. Toshiba Am. Consumer Prods., Inc.*, 263 F.3d 595, 598 (6th Cir. 2001). This Court reviews a district court's denial of a motion for judgment as a matter of law on a *de novo* basis. *Mike's Train House, Inc. v. Lionel, LLC*, 472 F.3d 398, 405 (6th Cir. 2006).

B. Motions for a New Trial Under Rule 59

A court may grant a new trial under Federal Rule of Civil Procedure 59(a) "if the verdict is against the weight of the evidence, if the damages award is excessive, or if the trial was influenced by prejudice or bias, or otherwise unfair to the moving party." *Conte v. Fen. Housewares Corp*, 215 F.3d 628, 637 (6th Cir. 2000). A motion for a new trial based on an assertion that a jury instruction incorrectly states the law should be granted where such instruction makes the instructions, as a whole, misleading or legally inadequate. *Arban v. West Publishing Group*, 345 F.3d 390, 404 (6th Cir. 2003); *Rivet v. State Farm Mut.*

Auto. Ins. Co., 316 F. App'x 440, 446 (6th Cir. 2009). In deciding a motion for a new trial based on the assertion that the verdict or award is against the weight of the evidence, a trial court may compare and weigh the opposing evidence. *Conte*, 215 F.3d at 637. The jury's verdict should be accepted only if it "could reasonably have been reached." *Id.* This Court reviews a district court's denial of a Rule 59(a) motion for an abuse of discretion. *Clarksville-Montgomery Co. Sch. Sys. v. U.S. Gypsum Co.*, 925 F.2d 993, 1002 (6th Cir. 1991).

II. THE DISTRICT COURT ERRED BY RULING AS A MATTER OF LAW THAT DURA'S DRUG TESTING WAS NOT A QUALIFICATION STANDARD BUT WAS, INSTEAD, BOTH A MEDICAL EXAMINATION AND DISABILITY-RELATED INQUIRY.

Over Dura's objection, the district court erroneously found as a matter of law that Dura's drug test was a medical examination and a disability-related inquiry under 42 U.S.C. § 12112(d)(4)(A) (July 14, 2011 Transcript, RE 237, at PageID # 6286-6290), and instructed the jury accordingly. (*See* Jury Instructions, RE 194, at PageID # 4469; July 18, 2011 Transcript, RE 232, at PageID # 5763-5764). The reversible effect of this is that Appellee's claims were analyzed under Section 12112(d)(4)(A) and not Section 12112(b)(6).

First, Dura's drug test is properly analyzed as a qualification standard under Section 12112(b)(6), just as the district court originally and correctly articulated. (Memorandum on Summary Judgment, RE 77, at PageID #2793; Memorandum on

Motion for Clarification, RE 84, at PageID # 2876). Second, Appellees did not present evidence sufficient to establish that Dura's drug test was a medical examination or disability-related inquiry. Finally, even if the district court was correct in its legal analysis, the question of whether Dura's drug test was a medical examination or disability-related inquiry is properly a question of fact for the jury.

A. Dura's drug screen is properly reviewed as a Section 12112(b)(6) qualification standard.

As the district court held after the initial summary judgment briefing and when ruling on Dura's Motion for Clarification, Dura's drug screen does not fit within the medical examination or disability-related inquiry language of Section 12112(d)(4)(A) of the ADA. (Memorandum on Summary Judgment, RE 77, at PageID #2793; Memorandum on Motion for Clarification, RE 84, at PageID # 2876). Dura's drug screen is properly reviewed as a "qualification standard" claim under 42 U.S.C. § 12112(b)(6), because the testing was not prompted by individual employee conduct, but rather by plant-wide concerns of employee safety. Individual employee conduct can be a triggering event for a medical examination or disability-related inquiry, but not a qualification standard. Indeed, here the testing applied to everyone, regardless of their activity, health, history, or conduct. Section 12112(b)(6) provides that an employer discriminates against a qualified individual with a disability where it uses:

> qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity

Dura's test did not screen out or tend to screen out persons with disabilities. It applied to all.

A "qualification standard" is further defined in the ADA's regulations as "the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired." 29 C.F.R. § 1630.2(q) (emphasis added). Just as did Dura's testing, these attributes apply to all as qualification requirements.

The district court from which this appeal is taken previously held that drug tests and screenings to which all employees submit that are not—just like the situation with the test at issue here—prompted by an individual's conduct are analyzed as qualification standards, and not as medical examinations or disability-related inquiries. *See EEOC v. Murray*, 175 F. Supp. 2d 1053, 1062 (M.D. Tenn. 2001); *see also Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 992-993 (9th Cir. 2007) (noting that qualification standards apply "across the board"). Whether Dura's drug test is a qualification standard or not is important to the outcome here. Why? Because, as this Court has held in this case, only disabled individuals are

allowed under the statute to bring claims that a qualification standard is discriminatory. *Bates v. Dura Automotive Systems, Inc.*, 625 F.3d 283, 287 (6th Cir. 2010). Because each of the Appellees was found prior to trial not to be disabled as a matter of law, a drug test that is accurately a qualification standard compels that their claims would be dismissed.

The evidence offered at trial shows that Dura's drug-testing was just such a qualification standard. It was facility-wide. Every employee was tested for the drugs that Dura, on the counsel of FFS, deemed prohibited in order for it to have a safe working environment. This was done regardless of that employee's position, tenure, or skill set. The drug testing was not prompted by any individual employee's conduct or specific condition. No proof was offered that Dura ever singled out any individual employee to be tested. Dura's drug screen should be analyzed as a qualification standard claim as established in *Murray* and the EEOC's guidance.

The district court's changed approach to the consideration of this case not to approach trial as one of a qualification standard creates uncertainty in the law about what can constitute a qualification standard under ADA. Although prior decisions within a district are not given any more weight than their intrinsic persuasive merits, a district judge should not depart from prior district precedent unless the district judge is "clearly convinced . . . more good than harm would

result from a departure from precedent." *Hastings Building Products, Inc. v. National Aluminum Corp.*, 815 F. Supp. 228, 233-234 (W.D. Mich. 1993). It is this Court's responsibility to maintain the law's uniformity, and to resolve this important issue of statutory construction. *Id.* This Court should recognize that the district court correctly articulated the factual circumstances that create a qualification standard in *Murray*, and that the same factual circumstances exist in this case. Because this case is correctly analyzed as one dealing with a uniformly-applied qualification standard, the Appellees claims should be dismissed because they are not disabled as a matter of law. *Bates v. Dura Automotive Systems, Inc.*, 625 F.3d 283, 287 (6th Cir. 2010); (Memorandum on Summary Judgment, RE 77, at PageID # 2788-2793).

B. Dura's drug screen is not a medical examination or disability-related inquiry under Section 12112(d)(4)(A).

The ADA does not define the terms "medical examination" or "disability-related inquiry." *See* 42 U.S.C. § 12101 *et seq.* Neither do its regulations. *See* 29 C.F.R. § 1630.2. However, the EEOC's Compliance Manual provides a guide, giving a multi-factor, fact-intensive test for each of these terms.[2]

[2] The EEOC's Compliance Manual is not binding on the Court, but is given deference in the absence of clear case law. *Johnson v. University of Cincinnati*, 215 F.3d 561, 579, n.8 (6th Cir. 2000).

i. Medical Examination

The EEOC defines a medical examination as "a procedure or test that seeks information about an individual's physical or mental impairments or health." EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (Number 915.002), 1995 WL 1789070, at *7 (October 10, 1995). To determine whether a procedure or test is "medical," the EEOC requires that the following be considered:

- Is it administered by a health care professional or someone trained by a health care professional?
- Are the results interpreted by a health care professional or someone trained by a health care professional?
- Is it designed to reveal an impairment or physical or mental health?
- Is the employer trying to determine the applicant's physical or mental health or impairments?
- Is it invasive (for example, does it require the drawing of blood, urine or breath)?
- Does it measure an applicant's performance of a task, or does it measure the applicant's physiological responses to performing the task?
- Is it normally given in a medical setting (for example, a health care professional's office)?
- Is medical equipment used?

Id. The Compliance Manual provides that "a combination of factors will be relevant to figuring out whether a procedure or test is a medical examination." *Id.*

Appellees failed to offer proof at trial sufficient to prove that the uniform drug test at Dura was a medical examination. For example, there is no record

evidence to support a finding that, by FFS's use of legitimate and commonly-used drug testing procedures, Dura obtained any information about any employee's alleged "physical or mental impairments or health." The evidence at trial showed only that the information Dura representatives may have obtained regarding an employee's physical status or medical history was information voluntarily disclosed by the employee for reasons unrelated to the challenged drug test. (*See* July 14, 2011 Transcript, RE 237, at Page ID # 6102-6103). Moreover, there is no evidence that Dura's drug test was in any way designed for it to obtain information about an individual's physical or mental impairments or health, the EEOC's third bullet point above. No evidence was presented that any information about any individual's health condition was obtained or communicated to Dura from the drug screen. This absence is fatal to the Appellees' claim that Dura's testing policy was a medical examination. In fact, to become such would have required Appellees to prove that Dura was seeking information about each and every employees physical and mental impairments or health. No such proof is in the record.

While the ADA does not define "medical examination" by statute, it does define what is not a medical examination: "[A] test to determine the illegal use of drugs shall not be considered a medical examination." 42 U.S.C. § 12114(d). Dura's drug testing was a test for illegal drugs, a test for illegal use of legal medications, and a test for substances carrying a manufacturer's warning against

the use around machinery and equipment such as that found in Dura's Lawrenceburg facility. Dura's drug testing policy, which is practically identical to testing conducted by employers across the United States, is simply not a medical examination under the ADA. To conclude that a urine drug screen like Dura's is a medical examination would mean that any employer who drug tests presumptively violates the ADA unless the employer can then prove the drug test is job-related and consistent with business necessity. Such is certainly not the law.

Further, if an employee tests positive on a drug test, the employer is lawfully allowed, if not compelled, to ask about lawful drug use or possible explanations for the positive result, including asking whether the employee is taking prescription medication. EEOC Enforcement Guidance (Number 915.002), 1995 WL 1789070, at *6. Here, to the extent that Appellees were asked after failing their drug test—asked not by Dura, but by FFS's medial review officer, Dr. Seth Portnoy, or the drug testing company, FFS—about whether they were taking substances, legal or illegal, that could trigger a positive result, it was a permissible question under the ADA. The proof showed that these questions, when made by FFS, were made in a narrowly focused effort to allow Appellees to explain their results: no medical information was disclosed, beyond the non-medical fact the employee took a particular drug or drugs that could pose a danger in Dura's workplace, or was shared with Dura.

No facts were presented at trial that could lead the jury reasonably to conclude that Dura's drug test did, or was in any way designed, for it to obtain information about an individual's physical or mental impairments or health. Dr. Portnoy testified that he never spoke to anyone at Dura. (July 15, 2011 Transcript, RE 238, at PageID # 6461-6462). FFS sent only very limited information about individuals' prescription drug use to Dura senior management when the employee tested positive for a prohibited substance, and then it only sent information about the prescription medication containing the particular prohibited substance, not why it was taken or for what condition, if any. (July 13, 2011 Transcript, RE 236, at PageID # 5958, 5999-6000, 6014-6015, 6022). No evidence was presented that any information about an individual's health condition was obtained or communicated to Dura. (July 15, 2011 Transcript, RE 238, at PageID # 6387-6388). What occurred at Dura was not a medical examination under the law or in fact. The district court erred when it took the issue away from the jury and decided otherwise.

ii. Disability-related inquiry

Nor was Dura's drug screen a disability-related inquiry. The EEOC defines a "disability-related inquiry" as a "question that is likely to elicit information about a disability." EEOC Enforcement Guidance (Number 915.002), 1995 WL 1789070, at *2. A "disability" is a physical or mental impairment that substantially

limits one or more major life activities of such individual, a record of such an impairment, or being regarded as having such an impairment. 42 U.S.C. § 12102(1).

The proof at trial showed that throughout the drug testing process, no one at Dura asked about any employee's mental state, physical state, or their visits to their doctor (if any), which might have elicited information about a disability. (July 13, 2011 Transcript, RE 236, at PageID # 5922-5926, 6022-6024). Dura did not make any inquiries into an employee's health, physical or mental, and only the third-party drug-testing company and the independent medical review officer privately inquired into whether an employee may be on a medication that caused a positive drug test result. As such, Dura's testing policy does not come within the scope of a disability-related inquiry claim. *See Lee v. City of Columbus*, 636 F.3d 245, 254-55 (6th Cir. 2011).

As noted above, if an employee tests positive on a drug test, the employer is lawfully allowed, if not compelled, to ask about possible explanations for the positive result, and any questions by the medial review officer or FFS about whether the employee could explain why the prohibited substance was in their system was a permissible question under the EEOC guidance. *Id.* There is no evidence that any information related to an employee's health condition was transmitted to anyone at Dura.

This Court recently addressed what is not a disability-related inquiry under the ADA, and in a way that is instructive in this case. In *Lee v. City of Columbus*, an employer asked its employees returning to work from sick leave to describe the "nature" of their illness. 636 F.3d 245, 248 (6th Cir. 2011). This Court concluded that even such questions as that one are not disability-related inquiries under Section 12112(d)(4)(A). *Id.* at 258. It reasoned that a uniform inquiry into a general diagnosis is not necessarily a question into whether an employee is disabled, and thus not an illegal disability-related inquiry. *Id.* at 254-255. Dura's uniform inquiry into whether an employee was generally able to safely work for Dura—the purpose and effect of its drug testing—was even less "intrusive" than the actual questioning in *Lee*, where each employee was specifically asked about their illness that had prompted an individual need for sick leave. As in *Lee*, Dura's even more benign inquiry, asking by uniform test whether an employee was using a drug with a prohibited safety warning, was not an illegal inquiry because it was not targeted toward employees with disabilities, nor did it necessitate revealing a disability.

By contrast, this Court has held that where an employee was required to answer form questions intended to allow the employer to diagnose a disability, the questionnaire was a disability-related inquiry. *Miller v. Whirlpool Corp.*, 807 F. Supp. 2d 684, 687 (N.D. Ohio. 2011). In *Miller*, the employer required employees

who drive powered industrial vehicles to answer a detailed medical questionnaire. *Id.* at 685. The questionnaire asked employees whether they had any illnesses, injuries, or past accidents. *Id.* If the answer was "yes," the employee was required to list the onset date, their diagnosis, and their treating physician. *Id.* The employee was at the same time required to disclose all medications used "regularly or recently." *Id.* Finally, employees were required specifically to indicate whether they suffered from depression, skin disorders, digestive problems, or allergies. *Id.* The employer admitted that the questionnaire was designed to allow it to diagnose the employee's medical conditions. *Id.* Such an inquiry was an illegal disability-related inquiry under the ADA.

The facts here are very different than *Miller*, and compel the opposite result from it. Neither Dura nor FFS asked in the testing or otherwise any employee about any alleged medical conditions, specific or general. Dura did not require any of its employees to disclose all medications to it. Dura did not seek to "diagnose" any employee's medical conditions. FFS merely sought to identify the drugs that could pose a hazard in the workplace as were noted by their manufacturers. That is not an illegal action; it is a prudent and understandable one.

Because there is no basis for a finding that Dura's drug test was a medical examination or disability-related inquiry, judgment as a matter of law should be granted in favor of Dura. The case should be dismissed.

C. Alternatively, whether Dura's drug test was a qualification standard, medical examination, or disability-related inquiry was a fact question for the jury.

Even if the district court correctly articulated the legal standard, it erred by taking the mixed question of law and fact away from the jury. If the resolution of a legal question is dependent upon which version of facts one believes, then a jury must determine liability. *See Landis v. Baker*, 297 F. App'x 453, 459 (6th Cir. 2008) (discussing analysis of mixed question of law and fact regarding qualified immunity); *Arnold v. Luedtke Engineering Co.*, 196 F. App'x 331, 331 (6th Cir. 2006) (analyzing whether district court erred by taking mixed question of law and fact regarding Jones Act from jury).

In this case, the ADA classification of Dura's drug test could have depended on whether the jury credited the testimony of Dura's witnesses, or the testimony of the Appellees. For instance, and as noted above, each of Dura's witnesses testified that they did not inquire into any employee's health condition during the drug test, but the job of weighing the witnesses credibility would lie with the jury. Accordingly, whether Dura's drug test was a qualification standard, medical examination, or disability-related inquiry should have been submitted to the jury. The district court erred by taking the resolution of that question away from them.

III. THE DISTRICT COURT ERRED BY RULING AS A MATTER OF LAW THAT FREEDOM FROM SELF, AN INDEPENDENT THIRD-PARTY DRUG-TESTING COMPANY, WAS DURA'S AGENT.

The district court should not have included a jury instruction regarding the purported "agency" relationship between FFS and Dura. The district court's instruction on the alleged agency relationship made the instructions misleading as a whole because it resulted in the jury being told, as a matter of law, that all the information obtained by FFS in its role in its testing was "legally" known by Dura under principles of agency. That is not factually accurate in any respect and a complete contradiction of the proof of Dura's knowledge in the trial record. This prejudiced Dura because it was held accountable for the actions or knowledge of a non-agent that it paid to conduct standard drug testing.

Title I of the Americans with Disabilities Act prohibits a covered employer from discriminating against a qualified individual on the basis of disability. 42 U.S.C. § 12112(a). The ADA defines an "employer" as a person engaged in an industry affecting commerce who has 15 or more employees, and "any agent of such person." 42 U.S.C. § 12111(5)(A).[3]

[3] There is no significant difference between the definition of the term "employer" in the Americans with Disabilities Act and the definition of the term "employer" under the Civil Rights Act of 1964 ("Title VII"). *Compare* 42 U.S.C. § 2000e(b) (Title VII) *with* 42 U.S.C. § 12111(5)(A) (ADA). Dura accordingly refers to cases interpreting Title VII for guidance. *Accord Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England, Inc.*, 37 F.3d 12, 16 (1st Cir. 1994).

"Agent" is not defined by the ADA. Courts have found, however, that an agent within the context of the ADA to bind an employer must "be an agent with respect to employment practices." *See Deal v. State Farm County Mutual Insurance Co.*, 5 F.3d 117, 119 (5th Cir. 1993); *Swallows*, 128 F.3d at 996. Courts look to the common law of agency to determine whether an individual is an agent, and as such, an "employer" under the Act. *See Swallows v. Barnes & Noble Book Stores, Inc.*, 128 F.3d 990, 996 & n.7 (6th Cir. 1997). According to the common law of agency, an agent is one who consents to act on behalf of another and subject to the other's control. *See* Restatement (Second) of Agency § 1 (1958); *see also Sodexho Management, Inc. v. Johnson*, 174 S.W.3d 174, 178 (Tenn. 2005) (describing the long-settled test for agency in Tennessee as "whether the principal has a right to control the conduct of the agent with respect to matters entrusted to the agent").

The district court erroneously instructed the jury that:

> I have found, as a matter of law, that Freedom From Self Alcohol and Drug Education and Counseling Services ("Freedom From Self") and its employees were the agents of Dura. Therefore, with regard to the drug testing of the plaintiffs, you are to consider any act of Freedom From Self and its employees to be an act of Dura.

(Jury Instructions, RE 194, at PageID # 4465).

The district court's ruling that FFS was an agent of Dura, and that it was responsible for any act of it, is error. The proof established that the duties

contracted to FFS included only conducting standard drug testing and reviewing the prescription medications of employees who tested positive for prohibited substances for relevant safety warnings. (July 13, 2011 Transcript, RE 236, at PageID # 5846-5847, 5985, 6015). Dura did not exercise any control over the manner in which FFS performed these duties. The methodology and protocol for testing were left entirely in FFS's discretion and control. Dura's involvement was that FFS requested for convenience the drug testing take place on Dura's property, and Dura agreed to that location.

On the other side of their relationship, there are no facts in the record suggesting that Dura ever delegated its rights as an employer or its employment practices to FFS. In the absence of such facts, Dura cannot be liable under the ADA for any negligent or tortious actions by FFS. *See Williams v. City of Montgomery*, 742 F.2d 586, 589 (11th Cir. 1984) (holding that Montgomery City-County Personnel Board was an agent of the City of Montgomery where Alabama law expressly granted the Board rights traditionally reserved to the City as an employer, including the rights to set a pay plan for City employees, set qualification for each position, evaluate City employees, and transfer, promote, demote, and reinstate City employees).

There was no evidence presented that FFS had any legal control at all over any employment decisions at issue in this case. *See Bartlett v. W.T. Harvey Lumber*

Co., 398 F. Supp. 2d 1311, 1317-18 (M.D. Ga. 2005). FFS was not vested with any management authority. It had absolutely no influence or control over the Appellees' positions at Dura. It did not make any decision as to what was to occur if any of them failed their drug test.

Neither did FFS participate in the decision-making process related to the Plaintiffs' temporary absence, suspension, or termination from employment. All of these decisions were made exclusively by Dura. In contrast, in *Jiminez v. Dyncorp Int'l, LLC*, the sole basis on which the defendant employer terminated an employee was whether or not psychologists employed by a third-party contractor gave that employee a passing score on a subjective psychological evaluation. *Jiminez v. Dyncorp Int'l, LLC*, 635 F. Supp. 2d 592, 602 (W.D. Tex. 2009) (holding psychologists were agents of an employer). That psychological evaluation was conducted entirely at the discretion of the third-party psychologist, who was not required to provide the employer any reasons why an employee passed or failed. *Id.* Because the employer relied only on the psychologist's subjective evaluative decision, it did not make its own decision to terminate an employee. *Id.* The Court found the psychologist was the employer's agent who had been given the authority to make termination decisions. *Id.* Accordingly, the Court attributed any gender discrimination in the psychological evaluation to the employer. *Id.* at 603-04.

Unlike the psychologist in *Jiminez*, FFS did not exercise any discretion in making its report in which such discrimination could have played any role. *Id.* at 604. FFS read an objective instant panel drug test that was either positive or negative. It wrote down prescription label warnings copied directly from what the Plaintiffs provided to it. Disability discrimination could not have played a role in FFS's reports to Dura because these limited steps by it disclosed nothing about any disability. The actions of FFS in doing its testing should not be attributed to Dura.

This agency instruction error is highly prejudicial: There is no common law duty imposed on employers with respect to substance abuse testing performed by third party laboratories. *Webster v. Psychemedics Corp.*, No. 2010-01087-COA-R3-CV, 2011 WL 2520157, at *4 (Tenn. Ct. App. June 24, 2011). If FFS negligently created or conducted the drug test, Appellees should have made a claim against FFS under Tennessee tort law. "When an individual is required, as a condition of employment, to submit a sample for testing, a duty of care is imposed between the professional testing entity and the employee." *Id.* at *6. FFS was not a party to this case. Appellees should not be permitted to make Dura liable for claims that Appellees should have brought, if anywhere, against a third party.

This agency instruction gave the jury an incorrect understanding of the law. It made FFS an agent of Dura as a matter of law and attributed any supposed illegal or tortious acts of FFS fully and without qualification as to act or the real

scope of any agency to Dura, when in fact Dura had no control on the circumstances of the testing. This was prejudicial to Dura in that it is being held responsible for actions that were not its own and should not be attributed to it under existing law. A new trial should be granted to Dura.

IV. THE DISTRICT COURT ERRED BY RULING THAT THE ADA SUPPORTS A CLAIM FOR MONETARY DAMAGES FROM AN INDIVIDUAL WHOSE CLAIMS OF DISABILITY DISCRIMINATION HAVE BEEN DISMISSED.

The district court ruled that none of these Appellees have an actual disability, a record of disability, or were regarded as disabled under the ADA. (Memorandum on Summary Judgment, RE 77, at PageID # 2788-2793). The district court clearly held that Appellees' "disability discrimination claims" were dismissed prior to trial. (*Id.*) Accordingly, Appellees are not entitled to remedies of the ADA which are only set by statute for those who allege "discrimination on the basis of disability." 42 U.S.C. § 12117(a); *Equal Employment Opportunity Commission v. Murray, Inc.*, 175 F. Supp. 2d 1053, 1058 (M.D. Tenn. 2001) (holding that "an individual who is not disabled under the ADA cannot seek the protections of the statute") (J. Trauger). Simply stated, the damages provision of the ADA adopted by Congress allows by its language for damages only for discrimination on the basis of a statutorily-defined disability.

Appellees were not disabled as a matter of law. It is axiomatic that without claims for disability discrimination, they are not entitled to money damages under the Act. The ADA provides that:

> The powers, *remedies*, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, *or to any person alleging discrimination on the basis of disability* in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

42 U.S.C. § 12117(a) (emphasis added).

In *Murray*, the EEOC sued Murray and brought two claims against it: (1) a claim of improper medical examination under the ADA on behalf of an individual named Tommie Waits and (2) a pattern or practice claim of use of an improper medical examination under the ADA. *Id.* at 1056. District Judge Trauger found in *Murray* that the EEOC was not entitled to seek money damages under the ADA on behalf of the individual under *any circumstances* because of his non-disabled status. This Court explained:

> Regardless of the basis of the EEOC's claims, however, the EEOC must show that the defendant has discriminated against individuals with disabilities. The statutory language of the enforcement provision of the ADA limits claims to those "alleging discrimination on the basis of disability…" 42 U.S.C. § 12117(a). "Discrimination" under the ADA is defined in section 12112(a), where it states that "[n]o covered entity shall discriminate *against a qualified individual with a disability because of the disability of such an individual* in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms,

> conditions, and privileges of employment. . . .” Unless the EEOC’s individual claim on behalf of Waits is brought within that framework, it is not a proper claim under the ADA (emphasis in original).

Id. at 1058.

Based on the referenced provisions of the ADA, the district court in *Murray* concluded “[t]hus, all claims under the ADA must, at their core, involve allegations of discrimination against individuals with disabilities. As the defendant argues, an individual who is not disabled under the ADA cannot seek the protections of the statute.” *Id.* The court then granted summary judgment to Murray on the improper medical examination claim brought on behalf of Waits because the EEOC could not show that Waits was disabled under the ADA. *Id.* at 1059.

The pertinent facts in *Murray* are practically identical to those in the instant matter: Six non-disabled former Dura employees bring individual claims under the ADA for damages related to the challenged drug testing policy. Because they are not disabled as a matter of law—regardless of whether their claims are for an allegedly discriminatory qualification standard or an illegal medical examination or disability-related inquiry—“they cannot seek the protections of the statue”[4] as it relates to monetary damages. *Id.*

[4] While there are cases holding that a non-disabled individual may bring suit under 42 U.S.C. § 12112(d), they are distinguishable from this case and *Murray* because they focus on a plaintiff’s standing under the ADA, as opposed to whether the

The district court analyzed this argument and its opinion in *Murray*. It held that "whether this private right of action [allowing a non-disabled plaintiff to recover damages on a § 12112(d) claim] springs from § 12117 or whether it is judicially created, it exists." (Memorandum and Order on Motion for Leave, RE 177, at PageID # 4303). That is the entirety of the rationale provided in its allowance of monetary damages here.

Section 12117(a) is not ambiguous. There is nothing reflected in its words from which a finding of monetary damages for a non-disabled person can spring. The Court should decline to construe these words under anything other than a plain reading of the statute. *Kelley v. E.I. DuPont De Demours & Co.*, 17 F.3d 836, 842 (6th Cir. 1994) (finding that a court's use of statutory construction rules is appropriate only "in the 'rare cases [in which] the literal application of the statute will produce a result so demonstrably at odds with the intentions of its drafters' . . . or when the statutory language is ambiguous. . . . In all other instances, '[t]he plain meaning of the statute controls [the court's] interpretation.") (citing *United States*

Plaintiffs are entitled to a non-legislated money remedy as non-disabled individuals under § 12117(a). *Wice v. General Motors*, No. 07-10662, 2008 WL 5235996, *2 (E.D. Mich. Dec. 15, 2008) (court considered whether plaintiff could proceed as a non-disabled plaintiff under § 12112(d); *Cossette v. Minnesota Power & Light*, 188 F.3d 964, 969 (8th Cir. 1999) (the issue of remedies under § 12117(a) not addressed); *Jackson v. Lake County*, No 01-C-6528, 2003 WL 22127743, *8 (N.D. Ill. Sept. 15, 2003) (same); *Connolly v. First Personal Bank*, 623 F. Supp. 2d 928, 932 (N.D. Ill. 2008) (same).

v. Steele, 933 F.2d 1313, 1317 (6th Cir. 1991), cert. denied, 502 U.S. 909 (1991)). A plain reading of the statute mandates that Appellees are not entitled to pursue a claim for money damages against Dura for any asserted violation of the ADA at issue in this lawsuit, because they are not individuals with a disability.

One can recognize what appears on the surface to be a tension between 42 U.S.C. § 12112(d)(4)(A), which seemingly grants a right for any "employee" to bring a claim with regard to medical examinations and disability-related inquiries, and § 12117(a), which just as clearly limits remedies for such a right to only those persons, employees or not, "alleging discrimination on the basis of disability." However, this initial reaction is quickly exposed and reconciled by *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 360-61 (1977) and its progeny, which recognize the ability of the EEOC to pursue a pattern and practice claim under Section 707 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-6) on behalf of a group of individuals in two phases. A Section 707 claim seeks to eradicate systemic, company-wide discrimination and focuses on an objectively verifiable policy or practice of discrimination by an employer. *EEOC v. Mitsubishi Motor Mfg. of America, Inc.*, 990 F. Supp. 1059, 1070 (C.D. Ill. 1998). The EEOC may seek equitable relief under Section 707, such as an injunction to end an illegal employment practice. 42 U.S.C. § 2000e-6(a); 42 U.S.C. § 1981a(a)(1). Such is the

very approach recognized in the Middle District opinion adopted in the *Murray* decision.

Judgment should be granted in favor of Dura because a remedy of money damages is not available under the language of the ADA to the Appellees, none of whom are disabled.

V. THE DISTRICT COURT ERRED BY HOLDING THAT PLAINTIFFS PROVIDED SUFFICIENT EVIDENCE FROM WHICH A JURY COULD FIND DURA ENGAGED IN CONDUCT THAT WOULD SUPPORT THE IMPOSITION OF PUNITIVE DAMAGES.

Appellees did not offer evidence sufficient to show punitive damages should be imposed against Dura. An award of punitive damages in an ADA case requires a showing "that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). "The terms 'malice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535 (1999); *Jeffries v. Wal-Mart Stores, Inc.*, 15 F. App'x 252, 264 (6th Cir. 2001) ("Examples of intentional discrimination that do not constitute reckless disregard for federally protected rights include an employer who is unaware of federal law, who believes that his discrimination is lawful, who believes his discrimination comes within the bona fide occupational qualification defense, or who believes a statutory exception

applies."). In other words, for punitive damages to be awarded, Appellees were required to show that Dura acted "in the face of a perceived risk that its actions w[ould] violate federal law." *Kolstad*, 527 U.S. at 535.

The district court explained this standard to the jury as follows:

> The purpose of an award of punitive damages is, first, to punish a wrongdoer for misconduct and, second, to warn others against doing the same. You may award punitive damages against Dura on any or all of the plaintiffs' claims, if you find that Dura violated the ADA with malice or reckless indifference to the rights of a plaintiff to be free from disability discrimination under the law as I have instructed.

(Jury Instructions, RE 194, at PageID # 4483; July 18, 2011 Transcript, RE 232, at PageID # 5772).

Appellees did not offer any proof at trial that Dura knew or was aware of any risk that its actions would violate the ADA, nor that it acted with malice or reckless indifferent to anyone's rights. In fact, the proof showed precisely the opposite: Dura tried to craft and carry out its policy in compliance with the law. For example, Dura relied upon outside counsel to review and help craft its proposed policy in compliance with the law. (July 13, 2011 Transcript, RE 236, at PageID # 5981-5982, 6011-6012). Mark Jent, Dura's Safety Specialist during the relevant time, contacted the Tennessee Department of Labor to ensure compliance with the Tennessee Drug-Free Workplace Act in its testing. (July 13, 2011 Transcript, RE 236, at PageID # 5845, 5867, 5888-5889). Dura hired a third-party professional drug-testing company to conduct the drug testing in compliance with

state and federal law (July 13, 2011 Transcript, RE 236, at PageID # 5889-5890, 5912-5917, 5958, 6020-6022; July 15, 2011 Transcript, RE 238, at PageID # 6364-6378).

Next, multiple procedural steps were put in place to provide a path to continued work, in a safe manner, including a 30-day suspension and an ability to re-test and return to work. (July 13, 2011 Transcript, RE 236, at PageID # 5947-5948, 5985; Notice of Filing Trial Exhibits, RE 240, Plaintiff's Trial Exhibit 47, at PageID # 6781-6783; July 15, 2011 Transcript, RE 238, at PageID # 6411-6412). These efforts show Dura did not intend to end the employment of an employee without providing a full opportunity to comply with a lawful policy.

Dura's local management stayed out of the drug testing process and let Freedom from Self carry out their contracted role. Lindy Boots, the Lawrenceburg facility's HR Manager, testified she was not asked to review drug tests, that employees dealt with FFS to understand their positive results, and that the only information from FFS she ever reviewed regarding prescription medications was a list of those that carried warnings. (July 13, 2011 Transcript, RE 236, at PageID # 5963, 6020-6022). She did not personally ask any employee about their medical impairments or why they were taking any particular substance. (July 13, 2011 Transcript, RE 236, at PageID # 6023-6024). Neither did Mark Jent, the Lawrenceburg facility's Safety Specialist, ask any employee about what

medications they might be taking or for what need. (July 13, 2011 Transcript, RE 236, at PageID # 5922-5926).

Even certain of the Appellees agreed with that it was good and necessary to have the drug testing. Appellee Long agreed that a drug testing policy is a good thing to have. (July 13, 2011 Transcript, RE 236, at PageID # 5823-5824). Appellee Toungett testified that he was "all for" the drug testing. (July 14, 2011 Transcript, RE 237, at PageID # 6111-6113). Appellee Toungett agreed that the testing was legitimately implemented for safety reasons, and that there was a business necessity for it. (*Id.*).

Without a showing that Dura acted maliciously or with reckless indifference to the ADA, and in fact with only the surplus of evidence that showed Dura sought to follow the letter of the law and was positively regarded by certain of the Appellees for doing so, judgment should be entered in Dura's favor as to punitive damages. There is no basis to punish Dura when it attempted to follow the letter of the law, and the proof reflected that.

VI. THE DISTRICT COURT ERRED BY HOLDING THAT THE VERDICT THAT DURA'S DRUG TESTING WAS NOT JOB-RELATED AND CONSISTENT WITH BUSINESS NECESSITY WAS NOT AGAINST THE CLEAR WEIGHT OF THE EVIDENCE.

Even if somehow Dura's testing could be a medical examination or disability-related inquiry, such are permitted under the ADA if they are job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(4)(A). A medical

examination or disability-related inquiry is job-related and consistent with business necessity where an employer

> show[s] that the asserted "business necessity" is vital to the business. For example, business necessities may include ensuring that the workplace is safe and secure or cutting down on egregious absenteeism. The employer must also show that the examination or inquiry genuinely serves the asserted business necessity and that the request is no broader or more intrusive than necessary. The employer need not show that the examination or inquiry is the only way of achieving a business necessity, but the examination or inquiry must be a reasonably effective method of achieving the employer's goal.

Wice v. General Motors Corp., No. 07-10662, 2008 WL 5235996, at *3 (E.D. Mich. Dec. 15, 2008); *see Denman v. Davery Tree Expert Co.*, 266 F. App'x 377, 380 (6th Cir. 2007). As an example, requiring an employee to seek the advice of a physician in order to determine whether the employee's medications would affect his ability to drive a company vehicle serves the business purposes of ensuring the safety of the public and protecting the employer from potential liability. *Wyland v. Boddie-Noell Enterprises, Inc.*, 165 F.3d 913 (table decision), 1998 WL 795173, *3 (4th Cir. 1998). This is the functional equivalent of what Dura's testing and its reliance on stated written warnings related to a defined list of drugs did.

The clear weight of the evidence showed that, when faced with the safety hazard to its employees from use of "warned" drugs at work, Dura developed a legitimate, non-discriminatory drug-testing policy that was job-related and consistent with business necessity. This drug testing prohibited the use of certain

drugs that are known, and blatantly warned of, to carry an identified risk of impairment of an individual's ability to perform safely his or her manufacturing job.

The trial proof without question showed that Dura's Lawrenceburg facility is a vibrant, active and mobile workplace. (July 13, 2011 Transcript, RE 236, at PageID # 5893-5895). Glass, sharp pieces of metal, heavy equipment and moving machinery are constantly in use. (*Id.*; July 14, 2011 Transcript, RE 237, at PageID # 6317-6336; Notice of Filing Trial Exhibits, RE 240, Defendant's Trial Exhibits 101[5] and 102, at PageID # 6759-6768). It is an essential function of every employee's job to have the capacity to operate automated heavy machinery or pneumatic or hydraulic heavy machinery. (July 13, 2011 Transcript, RE 236, at PageID # 5895-5903; Notice of Filing Trial Exhibits, RE 240, Defendant's Trial Exhibits 10 and 11, at PageID # 6683-6686). This drug testing disclosed the prohibited use of drugs that are known to carry a risk of impairment of an individual's ability safely to work. They thus carried a written warning against their use while operating such equipment. (July 13, 2011 Transcript, RE 236, at PageID # 5884-5885; Notice of Filing Trial Exhibits, RE 240, Defendant's Trial Exhibit 12, at PageID # 6687-6758; July 15, 2011 Transcript, RE 238, at PageID #

[5] Defendant's Trial Exhibit 101 is a collection of various work tools used at Dura's Lawrenceburg facility. This physical exhibit is on file with the district court.

6384-6386). If Dura's workers are not alert and in command of their mental activity and motor skills, the workplace can be one with significant risk.

As Mark Jent testified, Dura had good reason to believe that its employees had the potential to hurt themselves or others—Lawrenceburg police had visited the plant and informed management of concerns that its employees were illegally using drugs. (July 13, 2011 Transcript, RE 236, at PageID # 5911). Mr. Jent testified that several post-accident drug tests showed employees who were in accidents were taking both illegal drugs and other prescription medications that warned against taking the medication and operating that workplace machinery. (July 13, 2011 Transcript, RE 236, at PageID # 5911-5912). Appellees similarly testified that Dura had reason to be concerned. Appellee Bates testified that she had seen what she believed to be a "drug deal." (July 13, 2011 Transcript, RE 236, at PageID # 6058-6063). Appellee Toungett testified that he saw tow motor drivers driving erratically or having slurred speech. (July 14, 2011 Transcript, RE 237, at PageID # 6111-6116). Even before his drug test, Appellee White had been stopped by law enforcement after leaving work and on his way home, was found to have slurred speech and to be incoherent, and was arrested for driving under the influence of both Lortab and Xanax. (July 14, 2011 Transcript, RE 237, at PageID # 6246-6263; July 15, 2011 Transcript, RE 238, at PageID # 6518-6527; Notice of

Filing Trial Exhibits, RE 240, Defendant's Trial Exhibit 103, at PageID # 6769-6780).

An employer is not required to wait until after there is an emergency to take action protective of its employees. *Atkins v. Salazar*, 455 F. App'x 385, 399 (5th Cir. 2011) (holding that employer was permitted to design standards to ensure that park rangers are physically able to perform their duties and that their performance does not constitute a threat to the health and well-being of themselves or their fellow employees). Dura did not have to wait for its employees to be seriously injured or to harm fellow employees. It acted by implementing a professionally-vetted drug screen that was related to its understandable job requirements to take steps to protect the safety of its workplace and its employees.

These steps included making sure that its employees were free from a limited and defined list of drugs—whether legal or illegal—that objectively, noted by their manufacturers, could impair an employee's ability to work safely in such a dynamic environment. It would be a clear abuse of discretion to permit the jury to overlook this clear weight of the evidence and find to the contrary.

CONCLUSION

For the reasons set forth herein, the judgment of the district court should be reversed in total and entered in favor of Dura for three reasons. First, the district court erred by ruling as a matter of law that Dura's drug testing was both a medical

examination and disability-related inquiry. Dura's drug screen was neither, but was a qualification standard; accordingly, the Appellees' claims should be dismissed because they are not disabled as a matter of law, a requirement to succeed on a case challenging a qualification standard. Second, the judgment awards money damages to the Appellees, none of whom are disabled under the ADA. Because only those who allege discrimination on the basis of a disability are entitled to the remedies of the ADA, the judgment cannot stand. Finally, the verdict that Dura's drug testing was not job-related and consistent with business necessity is against the clear weight of the evidence. The evidence at trial showed that Dura took steps necessary to protect the health and welfare of its employees.

The judgment of the trial court should be reversed in part with regard to punitive damages. Appellees did not provide sufficient evidence from which a jury could find that Dura engaged in conduct that would support the imposition of punitive damages under the law in this Court. The proof was just the opposite: Dura tried to craft and carry out its policy in compliance with the law.

Alternatively, the case should be remanded for a new trial for two reasons. First, the mixed question of law and fact regarding whether the test was a qualification standard, medical examination, or disability-related inquiry was not submitted to the jury. Second, the district court erred by ruling as a matter of law and instructing the jury that Freedom from Self, an independent third-party drug

testing company, was Dura's agent. This instruction gave the jury an incorrect understanding of the law and attributed any illegal act of FFS to Dura.

Accordingly, the district court's Judgment should be reversed, or a new trial should be granted to Dura.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

Counsel for Appellants hereby certifies that this brief complies with Fed. R. App. P. 32(a)(7)(B). It contains 11,886 words, including headings, footnotes and citations, as counted by Microsoft Word 2010.

s/ Robert E. Boston

CERTIFICATE OF SERVICE

I hereby certify that on this the 4th day of October, 2012, a copy of the foregoing Brief of the Appellant, Dura Automotive Systems, Inc., was filed and served electronically, via the Court's electronic filing system, upon all parties indicated on the electronic filing receipt. Parties may gain access to this filing through the Court's electronic filing system.

s/ Robert E. Boston

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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Memorandum on Summary Judgment	04/23/2009	RE 77	PageID # 2771-2799
Order on Summary Judgment	04/23/2009	RE 78	PageID # 2800-2801
Memorandum on Motion for Clarification	07/29/2009	RE 84	PageID # 2872-2884
Order on Motion for Clarification	07/29/2009	RE 85	PageID # 2885-2886
Opinion of the Sixth Circuit	11/03/2010	RE 90	PageID # 2897-2906
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Order on Motion to Reconsider	12/15/2010	RE 98	PageID # 2949
Memorandum on Summary Judgment on Medical Examination Claims	03/30/2011	RE 116	PageID # 3589-3601
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Description of Entry	**Date Filed**	**Record Entry No.**	**PageID # Range**
Memorandum in support of Renewed Motion for Judgment as a Matter of Law	08/16/2011	RE 210	PageID # 4663-4682
Memorandum regarding Renewed Motion for Judgment as a Matter of Law	08/29/2011	RE 215	PageID # 4747-4758
Order Denying Renewed Motion for Judgment as a Matter of Law	08/29/2011	RE 216	PageID # 4759
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July 15, 2011 Transcript	08/17/2012	RE 238	PageID # 6358-6534
July 12, 2011 Transcript	09/11/2012	RE 239	PageID # 6535-6673
Notice of Filing Trial Exhibits	09/27/2012	RE 240	PageID # 6674-6783