No. 21-55229

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTINA RAINES, ET AL.,
Plaintiffs-Appellants,

v.

U.S. HEALTHWORKS MEDICAL GROUP, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of California
No. 3:19-cv-01539-DMS-DER (Hon. Dana M. Sabraw)

[PROPOSED] BRIEF OF LEGAL AID AT WORK, ET AL., AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS KRISTINA RAINES, ET AL.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), undersigned counsel for Amici make the following disclosures: Amici hereby certify that they are each non-profit organizations with no parent corporations and no publicly traded stock.

Dated: June 16, 2021

Respectfully submitted,

/s/ Alexis Alvarez

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LEGAL AID AT WORK

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(a), Legal Aid at Work ("LAAW") and Co-Amici (collectively "Amici"), respectfully submit this brief supporting Plaintiffs-Appellants' Opening Brief and urging reversal of the District Court's decision.

Amici include organizations with extensive experience with the disability discrimination issues raised herein, and are nationally recognized for their expertise in the interpretation of both federal and state disability civil rights laws. The expertise and experience of Amici will assist in resolving the important legal issues presented in the case.

The interests of each Co-Amici and their corporate disclosure information are contained in the Motion for Leave to File Amicus Brief filed herewith. Pursuant to Rule 29(a)(4)(E), Amici state that no party's counsel authored any part of this brief and that no party's counsel or anyone else contributed money intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

California's Fair Employment and Housing Act ("FEHA") was designed to ensure equal access to employment opportunities for all Californians, including Californians with disabilities. Its prohibition of medical inquiries that are not necessary for or related to one's ability to do a job is meant to ensure that no

Californian is denied access to employment simply because of assumptions made based on their medical history or disability. Yet that is precisely the result when third-party administrators of pre-employment medical screenings like Defendants-Appellees U.S. Healthworks, et al. ("USHW") profit from conducting such screenings in a manner that violates FEHA without fear of liability.

In this case, USHW developed an overbroad medical questionnaire, including inquiries about highly sensitive, intimate medical information likely to elicit disability-related information. When contracted by an employer to perform pre-employment medical screenings, USHW required all applicants to complete this questionnaire in full, regardless of whether it requested information that was necessary and related to the job for which they were applying. Should an applicant decline to respond to any portion of the questionnaire, USHW would refuse to continue the screening and inform the prospective employer that the applicant had not completed or passed the medical screening. Upon receiving this information, the employer would no longer consider that applicant for hire.

In granting USHW's motion to dismiss on a matter of first impression under California law, the District Court found, in pertinent part, that they did not constitute "employers" under the FEHA and thus bore no liability for the questionnaire they developed and administered to Plaintiffs-Appellants, nor the decisions they made resulting in many applicants being refused hire. In so holding,

the District Court effectively granted USHW and other third-party administrators carte blanche to continue subjecting applicants to overly invasive medical inquiries that would be unquestionably impermissible if asked directly by an employer.

Unless third-party administrators like USHW are held accountable for their unlawful inquiries, their actions will result in innumerable discriminatory hiring decisions against people with disabilities, who, due to the opacity of the medical screening process, may not recognize or pursue these violations of their rights.

ARGUMENT

I. Third-Party Administrators Like USHW Are Liable for Conducting Discriminatory Medical Inquiries and Examinations That Violate FEHA.

FEHA prohibits an "employer" from engaging in unlawful discrimination, such as subjecting a job applicant to a pre-employment medical examination or inquiry that is *not* job related or consistent with business necessity. *See* Cal. Gov't Code § 12940(e). The Legislature's purpose in enacting this prohibition was to make sure "that no Californians are denied the opportunity to prove themselves at jobs they are capable of doing just because of assumptions made on the basis of their medical history." California Bill Analysis, Cal. Assemb. Comm. on Judiciary, Reg. Sess. 1999-2000, A.B. 2222 (4/11/2000).

Although pre-employment medical examinations are conducted at the direction of an employer, they are implemented and given effect by third-party

administrators like USHW. Where such examinations discriminate, FEHA, as well as the federal employment anti-discrimination laws after which it is modeled, hold third-party administrators liable.

A. Third-Party Administrators Are Employers for Purposes of FEHA.

Under FEHA, liability for "unlawful practices" attaches to "employers." *See* Cal. Gov't Code §§ 12926(d), 12940. An "employer" encompasses principal employers, which fall within the common sense of the word, as well as entities that are not employers in the traditional sense but if not covered would frustrate the statute's purpose. *See id.* § 12993(a) ("The provisions of this part shall be construed liberally for the accomplishment of the purposes of this part.")

Liberally construed, "employer" encompasses third-party administrators of an employer's pre-employment medical examinations, such as USHW, for two reasons discussed in further detail below: (1) they are agents of the principal employer, *see* Cal. Gov't Code § 12926(d); and (2) they significantly affect access to employment opportunities. *See e.g.*, *Vernon v. State*, 116 Cal. App. 4th 114, 126 (2004) (citation omitted).

i. Third-Party Administrators Are Liable for Discriminatory Actions Taken as Agents of Employers.

Under FEHA, the definition of the term "employer" is "any person regularly employing five or more persons, or any person acting as an *agent* of an employer,

directly or indirectly." Cal. Gov't Code § 12926(d) (emphasis added). "An agent is one who represents another, called the principal, in dealings with third persons." Cal. Civ. Code § 2295. An agent "must have authority to act on behalf of the principal and '[t]he person represented [must have] a right to control the actions of the agent.'" *Mavrix Photographs, LLC v. Livejournal, Inc.*, 873 F.3d 1045, 1054 (9th Cir. 2017) (quoting Restatement (Third) of Agency § 1.01, cmt. c (2006) (AM. L. INST. 2006)).

In the Third Amended Complaint ("TAC"), Plaintiffs-Appellants alleged that their prospective employers had delegated to their agent, USHW, the decision to deny their employment and that they controlled USHW's exam administration by providing requirements and approving forms. Appellants' Excerpts of Record ("AER") 70-72 at ¶¶ 30-32. While the District Court's Order found that Plaintiffs-Appellants had "sufficiently pled that USHW was an agent of [their] prospective employers," it held that FEHA only imposed *respondeat superior* liability on principal employers and that agents like USHW could not be held directly liable as a matter of law. AER 9:3-4, 12: 3-5.

To reach its conclusion, the District Court relied primarily on *Janken v. GM Hughes Elecs.*, 46 Cal. App. 4th 55 (1996) and *Reno v. Baird*, 18 Cal. 4th 640 (1998), cases that it acknowledged dealt with individual liability under FEHA, *not* employer liability. *See* AER 7:5-10:5. Indeed, in *Reno*, the California Supreme

Court "specifically express[ed] no opinion on whether the 'agent' language merely incorporates respondeat superior principles or has some other meaning.'" 18 Cal. 4th at 658. Instead, it concluded only "that individuals *who do not themselves qualify as employers* [in that they do not regularly employ five or more persons] may not be sued under the FEHA for alleged discriminatory acts." *Id.* at 663 (emphasis added).

The California Supreme Court has not revisited FEHA's "agent" language outside of the context of individual liability, nor have California courts addressed whether an entity that itself qualifies as an employer may be held directly liable for discriminatory actions as another employer's agent. However, Amici did find one (unpublished) federal case that has addressed this very issue. *See Troisi v. Cannon Equip. Co.*, 2009 WL 249789 (C.D. Cal. Jan.30, 2009).

In *Troisi*, the plaintiff, a sales representative, sued his employer and a manufacturing facility for age discrimination, harassment, and failure to prevent the same. *Id.* at *2-3. The employer moved to dismiss the manufacturing facility as a fraudulent third-party defendant, arguing that the facility merely provided its sales associates with offices on occasion and thus could not be considered the plaintiff's employer or be liable in any way to the plaintiff. *Id.* at *3. The plaintiff alleged, however, that he worked out of the third-party facility and used its equipment, and that the facility had participated in forcing him out of his job by

not permitting him to access its equipment or office space. *Id.* at 4. In doing so, the plaintiff argued, the facility acted as the employer's agent and thus was liable under FEHA. *Id.* at *7. The court agreed, denying the employer's motion to dismiss based, in part, on its determination that "an agent of the employer can also constitute an employer under FEHA for purposes of discrimination liability." *Id.* (citing Cal. Gov't Code § 12926(d)).

Additionally, most federal courts that have examined the issue of agent liability in connection with claims arising under federal statutes analogous to FEHA—Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act ("ADEA"), and the Americans with Disabilities Act ("ADA") (collectively, the "federal statutes")—have similarly concluded that third-parties that qualify as employers are liable for the unlawful acts they commit as agents of employers. *See, e.g., Carparts Distrib. Ctr. v. Auto. Wholesaler's Ass'n*, 37 F.3d 12, 17 (1st Cir. 1994) (vacating district court's dismissal of plaintiff's complaint, in part, on the ground that defendant third-party administrators could be liable as agents of the employer under the ADA); *Brown v. Bank of Am., N.A.*, 5 F. Supp. 3d 121, 134, 137 (D. Me. 2014) (denying third-party administrator's motion to dismiss ADA claims based on plaintiff's allegations that it acted as the employer's agent); *Nealey v. Univ. Health Servs., Inc.*, 114 F. Supp. 2d 1358, 1369-70 (S.D. Ga. 2000) (denying summary judgment, in part, on the

ground that defendant management corporation qualified as "employer" under Title VII by virtue of its agency relationship with plaintiff's employer); *see also DeVito v. Chicago Park Dist.*, 83 F.3d 878, 882 (7th Cir. 1996) (acknowledging that defendant personnel board that reviewed employment termination decisions for plaintiff's employer would be liable under the ADA as an agent of that employer if it satisfied the employee-numerosity requirement); *Alam v. Miller Brewing Co.*, 709 F.3d 662, 668 (7th Cir. 2013) (citing cases "for the proposition that Title VII plaintiffs may maintain a suit directly against an entity acting as the agent of an employer"); *Satterfield v. Tennessee*, 295 F.3d 611, 617 (6th Cir. 2002) (recognizing three potential "legal theories" on which liability can be asserted against a third party who did not employ plaintiff directly, including agency theory). Courts, in interpreting FEHA, "'have adopted the methods and principles developed by federal courts in employment discrimination claims arising under' the federal acts'" because "'[t]he language, purpose and intent of California and federal antidiscrimination acts are virtually identical,'" "[t]he substance of the relevant language involved here—including the 'agent' provision—is found in each of the analogous federal statutes," thus this "rule applies to the issue in this case." *Reno*, 18 Cal. 4th at 659.

With regard to third-party administrators like USHW who conduct medical examinations and screen out applicants, a recent decision, *EEOC v. Grane*

Healthcare Co., 2 F. Supp. 3d 667 (W.D. Pa. 2014), is squarely on point. In *Grane Healthcare*, the Equal Employment Opportunity Commission ("EEOC") sued a management company that recruited and hired the workforce for an employer and, in the process, subjected prospective employees to unlawful medical inquiries in violation of the ADA. *Id.* at 680. The defendant challenged the EEOC's ability to sue it as an agent of the prospective employer, arguing that the ADA's imposition of liability on an agent was simply an expression of *respondeat superior*. *Id.* at 682-83. The court disagreed, noting that outside the context of individual agents/supervisors, courts have imposed liability on the agent itself where the agent independently satisfies the requirement of a covered entity under both the ADA and Title VII. *Id.* at 684 (citations omitted). The court further noted that the prohibition of individual agent liability was the result of efforts to "str[ike] a balance between the goal of stamping out all discrimination and the goal of protecting small entities from the hardship of litigating discrimination claims," a concern that does not apply when the agent engaging in discriminatory conduct falls within the applicable statutory coverage criteria. *Grane Healthcare Co.*, 2 F. Supp. 3d at 680 (quoting *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1281 (7th Cir. 1995)). Accordingly, the court denied summary judgment as to the management company on the grounds that it could be sued as an agent of the entity that was to employ the plaintiff. *Id.* at 685-686, 704. *Accord Oliver v. Spartanburg*

Reg'l Healthcare Sys. Inc., No. 7:15-4759-MGL-KFM, 2016 WL 5419459, at *4 (D.S.C. Sept. 8, 2016) (report and recommendation) (holding that plaintiff alleged facts sufficient to show that healthcare organization that conducted pre-employment physicals was agent of employer), *adopted*, No. 7:15-4759, 2016 WL 5390312, at *1 (D.S.C. Sept. 27, 2016).

Notably, the EEOC has also endorsed agent liability for entities like USHW that engage in discriminatory conduct on behalf of employers. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2000-2, EEOC COMPLIANCE MANUAL § III.B.2 (May 12, 2000), *available at* https://www.eeoc.gov/policy/docs/threshold.html#2-III-B-2 ("Liability of Agents") ("An entity that is an agent of a covered entity is liable for the discriminatory actions it takes on behalf of the covered entity.").

ii. Third-Party Administrators are Liable for Discriminatory Conduct Where They Significantly Affect or Interfere with Access to Employment Opportunities.

A third-party administrator like USHW may also be liable under FEHA where it exerts control over access to the job market or employment opportunities, and its discriminatory conduct interferes with a plaintiff's access to the same. *Vernon*, 116 Cal. App. 4th at 128-31 (discussing *Sibley Mem. Hosp. v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973) and *Assoc. of Mexican–American Educators v. State of*

California, 231 F.3d 572 (9th Cir. 2000)); *see Lutcher v. Musicians Union Loc. 47*, 633 F.2d 880, 883 n.3 (9th Cir. 1980).

Like the agency theory, the "access" theory of liability is espoused by federal courts in connection with claims arising under federal law. For example, in *Sibley*, the DC Circuit found the defendant hospital liable under Title VII even though the plaintiff was directly employed by patients, because the hospital ran the patient referral service and had the power to "foreclose, on invidious grounds, access … to employment opportunities otherwise available to him" with those patients. 488 F.2d at 1341-42. *Cf. Vernon*, 116 Cal. App. at 134 (declining to hold State liable under "access" theory when it was sued by a firefighter employed by City, reasoning that the plaintiff had "not alleged that the State directly interfered with employment opportunities or access to the job market").

Several other circuits, including this one, have followed *Sibley's* lead, and held that a third party is liable if it interfered with the plaintiff's employment opportunities, despite the absence of a direct employment relationship between the plaintiff and third-party. *See, e.g., Christopher v. Stouder Mem'l Hosp.*, 936 F.2d 870, 875–76 (6th Cir. 1991) (relying on *Sibley* to hold that defendant hospital that did not directly employ plaintiff could nonetheless be liable for revoking plaintiff's authorization to work in the hospital, thereby significantly affecting access to employment opportunities); *Gomez v. Alexian Bros. Hosp. of San Jose*, 698 F.2d

1019, 1021–22 (9th Cir. 1983) (applying *Sibley* and holding defendant hospital liable for interfering with the plaintiff's prospective employment with another employer, noting that "it would contravene Congress's intent … to permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, while it could not do so with respect to employment in its own service"); *Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054, 1063 (2d Cir. 1982) (citing *Sibley* in finding liability under Title VII of third-party administrator whose systems discriminated on the basis of sex because they "significantly affect[ed]" the plaintiff professor's "access … to employment opportunities,"), *vacated and remanded sub nom. Long Island Univ. v. Spirt*, 463 U.S. 1223 (1983), *reinstated on remand*, 735 F.2d 23 (2d Cir. 1984), *cert. denied*, 469 U.S. 881 (1984).

Based on the foregoing, it is clear that Defendants-Appellees' substantial role in the design, administration, and implementation of discriminatory pre-employment medical inquiries and examinations renders them liable under FEHA, both as agents of Plaintiff-Appellants' prospective employer and for significantly affecting Plaintiff-Appellants' access to employment with that employer. [1]

[1] Importantly, many courts have also concluded that the determination of who is an "employer" under federal antidiscrimination laws "will rarely be resolved on a motion to dismiss [because] ... this assessment is highly fact-bound. Where a

Accordingly, the District Court's decision must be reversed.

II. Allowing the District Court's Ruling to Stand Would Impede Jobseekers with Disabilities from Securing Gainful Employment.

Misconceptions, biases, and stereotypes are largely to blame for the un- and underemployment of people with disabilities. Aware of the stigma often attached to disability, job seekers who are able to conceal their disability throughout the hiring process often choose to do so.

However, USHW and other third-party administrators routinely administer overbroad medical questionnaires and evaluations to job applicants which force them to disclose health information likely to reveal the existence of a disability – in many cases, a disability that does not interfere with and is not relevant to their ability to perform the job to which they applied. [2] Consequently, some disabled

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complaint alleges that a defendant is an employer or agent …, the allegation alone is typically sufficient to withstand dismissal." *Brown*, 5 F. Supp. 3d at 135 (D. Me. 2014) ("If a defendant contends that it is neither the employer nor agent, the wiser course is for the parties to engage in discovery, isolate undisputed and disputed facts, and present the issue as a matter of law based on a fully developed factual record."); *see also Oliver*, 2016 WL 5419459, at *4 (quoting *Brown*).

[2] *See* AER 74 at ¶¶ 37, 38 (explaining that Defendants-Appellees questionnaire inquired broadly about intimate medical information, including but not limited to the following: venereal disease, painful or irregular vaginal discharge or pain, irregularity of or other problems with menstrual periods, penile discharge, prostate problems, genital pain or masses, cancer, tumors, mental health disabilities, HIV, permanent disabilities, painful or frequent urination, hair loss, hemorrhoids, diarrhea, black stool, constipation, organ transplant, stroke, a history of tobacco or alcohol use, pregnancy status, all over-the-counter and prescribed medication, and prior on-the-job injuries or illnesses).

applicants may choose to opt out of the medical screening, resulting in their automatic disqualification from a job. Others may submit to the screening, only to be rejected for hire based on disability-related information that a third-party administrator chooses to disclose to the prospective employer.

The latter group is rarely privy to what information the third-party medical screener has shared with the potential employer, much less whether the employer based its hiring decision on that information. Consequently, these rejected applicants are likely unaware of whether an employment violation was committed – or, even if they believe that their rights were violated, they are less likely to take legal action regarding such violations.

Unless third-party administrators are held responsible for the medical screening tools they develop and administer (typically, as here, without any input from the employer with whom they are contracted), these overbroad inquiries and exams will continue to effectively screen out applicants with disabilities, force them to disclose medical details that they would otherwise keep private, and result in discriminatory failures-to hire that applicants are less likely to recognize or pursue.

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A. Due to Anti-Disability Bias, People with Disabilities Have Historically Been and Continue to Be Un- and Underemployed.

Historically, the employment rate of individuals with disabilities has been disproportionately low, regardless of age or educational attainment.[3] These low employment rates have persisted, despite the passage of the ADA and FEHA. In 2009, only 19.2% of individuals with disabilities were employed, as compared to 64.5% of individuals without disabilities.[4] By 2019 – a decade later - the employment rate of people with disabilities had increased by only .1% (to 19.3%), whereas the employment rate of non-disabled individuals increased by 1.8%, (to 66.3%).[5] The employment rate significantly declined again in 2020, during which only 17.9% of persons with disabilities were employed, as compared to 61.8% of persons without disabilities.[6]

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[3] U.S. Bureau of Labor Statistics, *Persons with a Disability: Labor Force Characteristics Summary*, Feb. 24, 2021, https://www.bls.gov/news.release/disabl.nr0.htm [hereinafter 2021 BLS Labor Force Summary].

[4] U.S. Bureau of Labor Statistics, *Persons with a Disability: Labor Force Characteristics News Release*, Aug. 25, 2010, https://www.bls.gov/news.release/archives/disabl_02262020.htm.

[5] U.S. Bureau of Labor Statistics, *Persons with a Disability: Labor Force Characteristics News Release*, Feb. 26, 2020, https://www.bls.gov/news.release/archives/disabl_02262020.htm.

[6] 2021 BLS Labor Force Summary, *supra* note 3.

Even when individuals with disabilities are able to obtain employment, their wages are typically much lower than those of their non-disabled counterparts – on average, a worker with a disability earns 64 cents for every dollar earned by a non-disabled worker.[7] Over the last decade, the median income of workers without disabilities was consistently at least $10,000 more than that of workers with disabilities, and since 2017, that gap has winded to approximately $12,000.[8] Workers with disabilities are also less likely than their non-disabled counterparts to be employed in professional or management positions.[9]

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[7] MICHELLE YIN ET AL., AM. INST. FOR RSCH, *An Uneven Playing Field: The Lack of Equal Pay for People with Disabilities* 2 (2014), https://www.air.org/sites/default/files/Lack%20of%20Equal%20Pay%20for%20People%20with%20Disabilities_Dec%2014.pdf.

[8] U.S. Census Bureau, *Selected Economic Characteristics for the Civilian Noninstitutionalized Population by Disability Status*, American Community Survey Table S1811 (2010 – 2019), https://data.census.gov/cedsci/table?q=S1811&tid=ACSST1Y2019.S1811 [hereinafter American Community Survey].

[9] 2021 BLS Labor Force Summary, *supra* note 3.

The consequences of these employment and pay disparities are dire. People with disabilities are approximately twice as likely to live under the poverty line when compared to people without disabilities[10], and working age adults with disabilities are four times more likely to experience food insecurity.[11]

These persistent un- and under-employment rates are largely attributable to anti-disability biases, stereotypes, and misconceptions.[12] "Employers may be hesitant to hire workers with disabilities because of negative attitudes about disability, perceived lack of skills among people with disabilities, or perceptions that accommodation or other costs are too high."[13] Given the stigma they face, applicants who disclose the existence of a disability are often placed at a disadvantage.[14] Indeed, a 2018 study found that applicants with mental health

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[10] American Community Survey, *supra* note 8.

[11] YIN, *supra* note 7, at 17.

[12] Mason Ameri et al., *The Disability Employment Puzzle: A Field Experiment on Employer Hiring Behavior* 15 (Nat'l Bureau of Econ. Rsch., Working Paper No. 21560, 2015), https://www.nber.org/papers/w21560 (explaining that research "points to employer bias in hiring as an important piece of the puzzle helping to explain the low employment rate of people with disabilities").

[13] Sarah von Schrader et al., *Perspectives on Disability Disclosure: The Importance of Employer Practices and Workplace Climate*, 26 EMP. RESPONSIBILITIES AND RTS. J. 237, 237-38 (2014), https://link.springer.com/content/pdf/10.1007/s10672-013-9227-9.pdf.

[14] *Id*. at 241.

disabilities "who request a modification or accommodation during the hiring process were less likely to be hired than others."[15] Another study evaluated potential employers' response to cover letters, some which disclosed a disability and others which did not.[16] Letters that disclosed a disability were 26% less likely to receive employer interest than were letters that did not include a disclosure.[17]

Applicants with disabilities are all too aware of anti-disability bias and stigma. One-third of people with disabilities have reported that "[s]tigma and negative attitudes of employers toward people with disabilities are major barriers" to employment.[18] Thirty-six percent of job seekers with disabilities surveyed in a 2018 study reported that employers' incorrect assumption that they were unable to perform the job because of their disability was a barrier to employment.[19]

Consequently, applicants often choose not to disclose their disability during the hiring process. Seventy-three percent of respondents in a 2014 study indicated

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[15] Vidya Sundar et al., *Striving to Work and Overcoming Barriers: Employment Strategies and Successes of People with Disabilities*, 48 J. of Vocational Rehab. 93, 94 (2018), https://kesslerfoundation.org/sites/default/files/2019-07/Striving%20to%20Work%20JVR.pdf.

[16] Ameri, *supra* note 12, at 15.

[17] *Id.*

[18] Sundar, *supra* note 15, at 95, citing 2013 BLS Economic News Release.

[19] *Id*. at 101.

that the fear of not being hired or of being fired was a "very important" factor influencing their decision to conceal their disability from an employer or prospective employer.[20] "The timing of the disclosure was important to many respondents, who reported that they preferred to wait until hired to disclose."[21] However, by coercing job seekers to respond fully to the overbroad health questionnaires that they independently developed, Defendants-Appellees strip jobseekers of their ability to make the highly personal decision of whether or when to disclose a disability.

B. Third-Party Administrators' Medical Screening Tools Solicit Information Likely to Reveal a Disability.

The medical questionnaire and screening confronted by Plaintiffs-Appellants is precisely the sort of pre-employment hoop that job-seekers with disabilities may be reluctant to jump through. Although the FEHA makes clear that employers are not permitted to make disability-related inquiries unless job-related and consistent with business necessity (Cal. Gov't Code § 12940(e)(3)), third-party administrators' screening tools regularly, and with seeming impunity, seek expansive information extending far beyond this narrowly tailored inquiry.[22]

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[20] von Schrader, *supra* note 13, at 244.

[21] *Id*. at 250.

[22] *See* Joseph Pachman, *Evidence Base for Pre-employment Medical Screening*, 87 BULL. OF THE WORLD HEALTH ORG. 529, 529 (2009),

Here, Defendants-Appellees requested a wide range of health information from job seekers. These third-party administrators are solely responsible for developing and administering an extensive questionnaire that included inquiries neither job-related or consistent with business necessity. *See* AER 70-71 and 75 at ¶¶ 31a., 42. Certain of this information, if disclosed to an employer, would assuredly allow it to determine the existence of a disability or even the likelihood of a future disability.[23] Given job seekers' reasonable reluctance to disclose disabilities to prospective employers, their hesitance to submit to a broad medical screening process is understandable, especially where, as here, they are required to sign an authorization permitting the third-party administrator to disclose to their potential employer any health information obtained through the Questionnaire or subsequent exam. AER 74-75 at ¶ 41.

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https://apps.who.int/iris/bitstream/handle/10665/270462/PMC2704034.pdf?sequence=1&isAllowed=y ("Indiscriminate [pre-employment medical] testing inevitably yields findings that are not relevant. The required follow-up or 'clearance' for these findings can delay employment, result in the spurious rejection of a candidate, divert resources from efforts that might be beneficial to health outcomes, as well as cause unnecessary expense.").

[23] *See* Mark A. Rothstein, *Medical Screening and Employment Law: A Note of Caution and Some Observations*, 1988 UNIV. OF CHI. LEGAL F. 331, 331-332 (1988), http://chicagounbound.uchicago.edu/uclf/vol1988/iss1 ("[Medical screening] tests sometimes invade worker privacy and generate records that may be wrongfully disclosed, and numerous currently healthy workers are rendered unemployable because of future risk of illness.")

The coerced disclosure of intimate medical information, especially when accompanied by an (also coerced) authorization permitting this information to be indiscriminately passed on to a prospective employer, would give anyone pause. Indeed, one of the plaintiffs in this matter chose not to respond to a question asking her to reveal the date of her last menstruation, primarily because she understandably questioned the relevance of this inquiry to the position for which she was applying. AER 77 at ¶ 52. Individuals with disabilities are even more likely to be screened out by these coerced disclosures, whether because they self-select out of a third-party administrator's medical screening process and are thereby disqualified from employment[24], or because they submit to the process and are consequently forced to reveal information indicative of their disability – information that may be used against them by an employer. Unless third-party administrators are held accountable for the medical screening tools that they create and administer, these individuals are in a lose-lose situation.[25]

[24] *Id*. at 27 ("[A]pplicants are often required to complete detailed medical questionnaires and to undergo medical examination and laboratory tests. If the applicant refuses to cooperate he or she is unlikely to be hired.")

[25] Amici have chosen to focus in some depth on the consequences third-party administrator medical screening tools, such as those administered by Defendants-Appellees, have and will continue to have on job seekers with disabilities if left unfettered. However, Amici would be remiss not to mention the other communities who are also screened out by these tools. Women, people of color, and other marginalized groups may also be hesitant to share intimate medical information in a pre-hire screening process. Not only might this information reveal the existence

C. Failing to Hold Third-Party Administrators Liable for Their Discriminatory Pre-Employment Screening Tools Will Render Unlawfully Rejected Applicants Unable to Vindicate Their Rights Fully.

"Hiring discrimination continues to be a pervasive problem,"[26] yet it is perhaps one of the most difficult types of employment discrimination cases to prove:

> The asymmetry of information and power between workers and employers is perhaps nowhere more apparent than in the recruitment and hiring process. […] Job applicants typically have little or no information regarding employers' recruiting practices, resume screening decisions, and other hiring-related decisions and processes. Applicants are rarely provided with an explanation as to why they were denied a job. Nor do they have information regarding the qualifications of other applicants or the decisionmaking process of the employer. Without this information, applicants cannot assess the legitimacy of employers' hiring decisions.[27]

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of a health condition or disability – it could also reveal information about an applicant's race, ethnicity, gender, or pregnancy status. Consequently, as is the case for many individuals with disabilities, other marginalized groups are faced with the impossible decision of either opting out of the medical screening process and being disqualified for a job, or completing the process and providing information that they are uncomfortable sharing with the employer, and/or on which the employer may base its decision not to hire the applicant.

[26] JENNY R. YANG & JANE LIU, ECON. POL'Y INSTITUTE, *Strengthening Accountability for Discrimination: Confronting Fundamental Power Imbalances in the Employment Relationship* 10 (Jan. 15, 2021), https://files.epi.org/pdf/218473.pdf.

[27] *Id.* at 10-11; *see also* Rothstein, *supra* note 23, at 27 ("Applicants are also less likely to sue under any statute or legal theory than are current employees [in part because of lack of insight as to reason for ER decision not to hire]).

Third-party administrator involvement in the hiring process creates yet another hurdle for applicants whose rights have been violated. Such applicants are not only left in the dark about why they were not hired, but are also unable to determine whether that decision was based on medical information disclosed by a third-party administrator to a prospectively employer and, if it was, whether that medical information was relevant to their ability to perform the job in question.[28] As Jenny Yang, a former commissioner, vice-chair, and chair of the Equal Employment Opportunity Commission, observes:

> [B]usinesses are increasingly outsourcing labor to reduce labor costs and responsibility for workers by contracting out work to independent contractors . . . or through temporary staffing agencies. These models create hurdles for workers in obtaining protection under anti-discrimination laws and have fostered a lack of accountability for widespread discrimination in hiring […].[29]

Yang cites as an example temporary staffing agencies, which often know an employer's preferences regarding "race, color, sex, national origin, age, or absence of a disability" and route applicants matching those preference to the respective employers.[30] This practice makes it difficult for an applicant to ascertain both

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[28] *See* Rothstein, *supra* note 23, at 27 ("Applicants usually are not told why they are not hired or given the chance to explain a questionable medical finding.")

[29] YANG, *supra* note 26, at 1.

[30] *Id*. at 24.

whether discrimination occurred and, if so, who was responsible for perpetuating the discrimination.[31] The same problematic practice exists where employers outsource medical inquiries to third-party administrators and grant them the authority to make employment decisions based on the applicants' willingness to respond to those inquiries and the information they obtain as a result.

Here, Plaintiffs-Appellants were required to submit to and pass USHW's pre-employment medical screening – otherwise, they would not be hired. AER 70-71 at ¶ 31a. Accordingly, applicants were refused hire as a direct result of the conduct and decisions of Defendants-Appellants, who not only were solely responsible for the development of the overbroad health questionnaire, but who would also refuse to move forward with the medical screening process if an applicant declined to fully complete their questionnaire. Defendants-Appellees were essentially delegated the authority to disqualify applicants based on their unwillingness to provide highly intimate medical information, regardless of its relevance to the job. Third-party administrators who take no responsibility for ensuring that their pre-employment medical screenings are tailored to the jobs at issue, and yet have the authority to grant or deny employment based on those screenings are actively facilitating discriminatory hiring decisions. If third-party

[31] *Id.*

administrators like USHW are not held accountable for their actions, they will continue to deprive countless qualified individuals of gainful employment and those individuals will be unable to vindicate their rights effectively.

III. Subjecting Third-Party Administrators to Liability for Conducting Unlawful Medical Inquiries and Examinations Is Consistent with California's Long History of Providing Expansive Disability Rights Protections.

For more than 50 years, it has been the policy of the state of California to promote the integration of persons with disabilities in every aspect of social and economic life. This commitment is expressed in a comprehensive statutory scheme barring disability-based discrimination in employment, housing, public accommodations, and government services. Key statutory provisions include the Unruh Civil Rights Act, Cal. Civ. Code § 51 et seq.; the California Disabled Persons act, Cal. Civ. Code§ 54 et seq.; California Government Code section 11135 et seq.; and, as particularly relevant here, the FEHA, Cal. Gov't Code § 12920 et seq.

A. FEHA's Purpose Is to Safeguard the Right of *All* Californians to Seek, Obtain and Hold Employment Without Experiencing Discrimination.

Through its passage of the FEHA in 1980, California acknowledged that freedom from job discrimination on specified grounds, including disability, is a civil right entitled to the highest level of protection under the state's law and constitution. Cal. Gov't Code § 12921. The FEHA declares that such

discrimination is against public policy (§ 12920) and an unlawful employment practice (§ 12940). Its express purpose is "to provide effective remedies that will both prevent and deter [such] unlawful employment practices and redress the adverse effects of those practices on aggrieved persons." Cal. Gov't Code § 12920.5.

B. FEHA Incorporates California's Long-Standing Protection of Employees and Applicants from Unnecessary and Intrusive Medical Inquiries or Examinations by Employers.

The FEHA has long made it an unlawful employment practice "for any employer … to make any non-job-related inquiry, either verbal or through use of an application form, which expresses, directly or indirectly, any limitation, specification, or discrimination as to … physical disability [or] mental disability." Cal. Gov't Code § 12940(d). When the FEHA was amended in 2000, the California Legislature made the limitations on "an employer's ability to require medical or psychological examinations, or make … medical or disability-related inquiries" more explicit, permitting them only where they are necessary and meet requirements designed to minimize bias and protect privacy. California Bill Analysis, Senate Floor, Cal. S. Rules Comm., Reg. Sess. 1999-2000, A.B. 2222 (8/28/2000).

FEHA's restrictions on medical inquiries and examinations were meant to "appropriately build upon the ADA's provisions in this area, especially given this

state's long history of strong protections for the privacy rights of all Californians," California Bill Analysis, Cal. Assemb. Comm. on Judiciary, Reg. Sess. 1999-2000, A.B. 2222 (4/11/2000) (citing Cal. Const. Article I, section 1),[32] and to ensure that "no Californians are denied the opportunity to prove themselves at jobs they are capable of doing just because of assumptions made on the basis of their medical history." *Id.* (author of AB 2222's arguments in support of the bill). Yet that is precisely what is happening when third-party administrators like USHW are permitted to monetize employer biases and make a business out of conducting discriminatory medical inquiries and examinations with impunity.

The California Legislature mandated that FEHA's provisions "be construed liberally" to accomplish its purposes. Cal. Gov't Code § 12993(a). A liberal construction of the term "employer" that encompasses third-party administrators who are engaging in discriminatory conduct on a principal employer's behalf and significantly affect access to employment opportunities on invidious grounds, will prevent and deter the unlawful employment practices of third-party administrators like USHW and thus accomplish the FEHA's purposes. *See Robinson v. Fair Emp. & Housing Com.*, 2 Cal. 4th 226, 243 (1992) ("Because the FEHA is remedial legislation … the court must construe the FEHA broadly, not … restrictively").

[32] The phrase "and privacy" was added to the state Constitution when California voters adopted the Privacy Initiative of 1972. *White v. Davis*, 13 Cal. 3d 757, 773 (1975).

IV. Determination of the Scope of California Anti-Discrimination Law Is Appropriate for Certification to the California Supreme Court.

Amici agree with Plaintiffs-Appellants that if this Court has any doubt as to whether FEHA subjects third-party administrators to liability, it should refer this matter of first impression to the California Supreme Court. As demonstrated above, this case presents "significant issues … with important public policy ramifications," particularly for the countless of qualified applicants with disabilities who are being screened out of employment opportunities based solely on assumptions made about their medical history or disability. *Kremen v. Cohen,* 325 F.3d 1035, 1037 (9th Cir. 2003).

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court's decision. Alternatively, this Court should certify the question of third-party administrator liability California law for determination by the Supreme Court of California.

Dated: June 16, 2021

Respectfully submitted,

/s/ Alexis Alvarez

Alexis Alvarez
Rachael Langston
LEGAL AID AT WORK

STATEMENT OF RELATED CASES

Amici are not aware of any related cases pending in this Court.

CERTIFICATE OF COMPLIANCE WITH RULE 32

This brief complies with the type-volume limitation of FED. R. APP. P. 29(a)(5) and 32(a)(7)(B), because this brief contains 6,201 words excluding the portions of the brief exempted by FED. R. APP. P. 32(f).

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LEGAL AID AT WORK

Dated: June 16, 2021

/s/ Alexis Alvarez
Alexis Alvarez

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I hereby certify that on June 16, 2021, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

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/s/ Valerie Sprague
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