# APPENDIX

## TABLE OF CONTENTS

**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

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| NICHOLAS DeFRIES,<br><br>*Plaintiff-Appellant*,<br><br>v.<br><br>UNION PACIFIC RAILROAD COMPANY, a Delaware corporation,<br><br>*Defendant-Appellee*. | No. 23-35119<br><br>D.C. No. 3:21-cv-00205-SB<br><br>OPINION |

Appeal from the United States District Court
for the District of Oregon
Michael H. Simon, District Judge, Presiding

Argued and Submitted February 14, 2024
San Francisco, California

Filed June 14, 2024

Before: Sidney R. Thomas, David F. Hamilton,[*] and Morgan Christen, Circuit Judges.

Opinion by Judge David F. Hamilton

[*] The Honorable David F. Hamilton, United States Circuit Judge for the Seventh Circuit Court of Appeals, sitting by designation.

## SUMMARY**

### Employment Discrimination / Statute of Limitations

The panel reversed the district court's summary judgment in favor of Union Pacific Railroad Co. in an employment discrimination action brought under the Americans with Disabilities Act by Nicholas DeFries.

DeFries was removed from duty as a conductor after he failed color-vision testing and Union Pacific routed him into its fitness-for-duty program. A putative class action had already been filed by a group of Union Pacific employees, referred to as the *Harris* class, in Nebraska district court, alleging that Union Pacific administered its fitness-for-duty program in ways that violated the Americans with Disabilities Act. DeFries qualified as a putative *Harris* class member under the class definition alleged in the original *Harris* complaint, but the *Harris* district court certified a narrowed class proposed by class counsel. The Eighth Circuit reversed class certification, and Defries then filed an individual lawsuit in the District of Oregon, raising claims parallel to the class claims in *Harris*.

The Oregon district court concluded that the commencement of the class action tolled the statute of limitations under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), but the *American Pipe* tolling ended when plaintiffs' counsel in *Harris* voluntarily

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

narrowed the class definition. Accordingly, DeFries's claim was untimely.

Reversing, the panel concluded that there was ambiguity in whether the definition of the certified *Harris* class included color-vision plaintiffs like DeFries, and this ambiguity should be resolved in favor of allowing DeFries, a bystander plaintiff, to rely on *American Pipe* tolling. Thus, DeFries was entitled to tolling as a member of the *Harris* class until the Eighth Circuit issued the mandate for its decision reversing class certification, and his claim was timely. The panel remanded the case for further proceedings.

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## OPINION

HAMILTON, Circuit Judge:

This case raises a question of first impression for this court for class-action practice: when does the narrowing of a class definition end *American Pipe* tolling of the statute of limitations for members of a putative or certified plaintiff class? In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974), the Supreme Court established that "commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class." The end of *American Pipe* tolling is less clearly defined than its beginning. The question in this appeal is when the narrowing of a class definition ends *American Pipe* tolling for particular plaintiffs, especially when the scope of the class definition is disputed and ambiguous as applied to those plaintiffs. We conclude that ambiguity about the scope of a putative or certified class should be resolved in favor of tolling so that bystander members of the class need not rush to file separate actions to protect their rights.

Plaintiff-appellant Nicholas DeFries worked as a conductor for defendant-appellee Union Pacific Railroad Company. After failing Union Pacific's routine color-vision testing, he was routed into Union Pacific's employee health screening system, the fitness-for-duty program. In 2018, DeFries was removed from his job and struggled to obtain a new position at the company. At the time DeFries was removed from duty, a putative class action had already been filed by a group of Union Pacific employees, not including DeFries, alleging that Union Pacific administered its fitness-for-duty program in ways that violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq*. *Harris*

*v. Union Pacific Railroad Co.*, No. 8:16-cv-381 (D. Neb.) ("the *Harris* class").

The parties agree that plaintiff DeFries qualified as a putative class member under the class definition alleged in the original *Harris* complaint. But in a later motion for class certification, *Harris* class counsel narrowed the proposed class definition. The revised definition covered "All individuals who have been or will be subject to a fitness-for-duty examination as a result of a reportable health event at any time from September 18, 2014 until the final resolution of this action," incorporating by reference Union Pacific's Medical Rules and its "Reportable Health Events" policy. The *Harris* district court ("the Nebraska court") certified the narrowed class in February 2019. *Harris v. Union Pacific Railroad Co.*, 329 F.R.D. 616, 628 (D. Neb. 2019). In March 2020, however, the Eighth Circuit reversed class certification for lack of commonality. *Harris v. Union Pacific Railroad Co.*, 953 F.3d 1030, 1032 (8th Cir. 2020).

Shortly after the Eighth Circuit's decision, DeFries filed this individual lawsuit in the District of Oregon, raising claims parallel to the class claims in *Harris*. Union Pacific moved for summary judgment, arguing that DeFries' claims were barred by the statute of limitations. Anticipating the *American Pipe* tolling issue, Union Pacific argued that the narrowed class definition certified by the Nebraska court had unambiguously excluded color-vision plaintiffs like DeFries.[1] DeFries had been placed in the fitness-for-duty

[1] The term "color-vision plaintiff" refers to a plaintiff who "underwent a fitness-for-duty evaluation solely because he failed the visual acuity test required by the Federal Railroad Administration recertification process." *DeFries v. Union Pacific Railroad Co.*, No. 3:21-cv-00205-SB, 2023 WL 1777635, at *2 (D. Or. Feb. 6, 2023).

program solely because he failed routine color-vision testing required by the Federal Railroad Administration ("FRA"). Union Pacific argued that failing a routine regulatory exam did not satisfy its definition of a "reportable health event" on the theory that those employees experienced no new diagnosis or change in their color vision. Consequently, Union Pacific argued, *American Pipe* tolling ended for color-vision plaintiffs in August 2018, when *Harris* class counsel moved to certify the class using the narrower definition.

Whether the narrowed class definition included or excluded color-vision plaintiffs like DeFries is the central question of this appeal. The district court accepted Union Pacific's argument and granted summary judgment, finding that color-vision plaintiffs' *American Pipe* tolling ended when the class definition was voluntarily narrowed by plaintiffs' counsel. The district judge in Oregon adopted a magistrate judge's recommendation that tolling ended on August 17, 2018, the day class counsel moved for a narrower definition. The magistrate judge also noted that even if tolling had ended only when the Nebraska court accepted this narrower definition by certifying the class on February 5, 2019, plaintiff DeFries' claim would still be untimely. *DeFries v. Union Pacific Railroad Co*., No. 3:21-cv-00205-SB, 2022 WL 18936061, at *5 n.6 (D. Or. Nov. 23, 2022), *report and recommendation adopted*, No. 3:21-CV-00205-SB, 2023 WL 1777635 (D. Or. Feb. 6, 2023). DeFries has appealed.

We proceed as follows. Because the end of *American Pipe* tolling has received no attention from the Supreme Court and little attention from the circuit courts, we first explain in Part I the origins and equities of *American Pipe* tolling. In light of both the purposes of *American Pipe*

tolling and the guidance available from other circuits, we conclude that a relevant ambiguity in the scope of a class definition should be resolved in favor of allowing a bystander plaintiff to rely on *American Pipe* tolling. We then turn in Part II to the factual and procedural details of this case. We set out the standard of review in Part III, and in Part IV, we apply the rule to this case. While we believe the better reading of the definition of the certified *Harris* class included color-vision plaintiffs like DeFries, we recognize that there is room for reasonable argument to the contrary. Because a relevant ambiguity in the scope of the class should allow bystander plaintiffs to rely on *American Pipe* tolling, DeFries was entitled to tolling as a member of the *Harris* class until the Eighth Circuit issued the mandate for its decision reversing class certification. DeFries' case is timely.

## I. *The Origins and Equities of American Pipe Tolling*

*American Pipe* established that "commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554. "Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied." *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 354 (1983). "At that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action." *Id*.

*American Pipe* tolling is "a rule based on traditional equitable powers, designed to modify a statutory time bar where its rigid application would create injustice." *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 582 U.S. 497, 510 (2017). "The watchwords

of *American Pipe* are efficiency and economy of litigation . . . ." *China Agritech, Inc. v. Resh*, 584 U.S. 732, 748 (2018). The doctrine is intended to further both "the principal function of a class suit" and the "functional operation of a statute of limitations." *American Pipe*, 414 U.S. at 551, 554. A class action is intended to function as "a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." *Id.* at 550. To promote the purposes of class actions, *American Pipe* tolling must enable class members to rely on class counsel and the district court to represent their interests *without the need to seek to intervene or file individual suits*.

Meanwhile, the purposes of statutes of limitations are "to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights." *Crown, Cork & Seal,* 462 U.S. at 352. *American Pipe* tolling begins upon the filing of a putative class action complaint, which "commences a suit and thereby notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." *American Pipe*, 414 U.S. at 555. Alerted by the complaint, a class-action defendant has "the essential information necessary to determine both the subject matter and size of the prospective litigation," *id.*, and to become "aware of the need to preserve evidence and witnesses respecting the claims of all the members of the class," *Crown, Cork & Seal*, 462 U.S. at 353.

Upon the filing of a class action complaint, the fair-notice purpose of statutes of limitations is satisfied "as to all those who might subsequently participate in the suit as well as for the named plaintiffs." *American Pipe*, 414 U.S. at 551; *see also Crown, Cork & Seal*, 462 U.S. at 355 (Powell,

J., concurring) ("When thus notified, the defendant normally is not prejudiced by tolling of the statute of limitations."). Consequently, for purposes of *American Pipe* tolling, "the claimed members of the class [stand] as parties to the suit until and unless" they opt out or class certification is denied. *American Pipe*, 414 U.S. at 551.

The end of *American Pipe* tolling is less clear-cut than its beginning. The problem has split many district courts, including those addressing the same *Harris* class action against Union Pacific. *See Zaragoza v. Union Pacific Railroad Co.*, 606 F. Supp. 3d 427, 435 (W.D. Tex. 2022) ("Broadly speaking, this is a difficult issue that has divided courts for decades."). One line of cases attempts to establish a rule for determining when the voluntary abandonment of a claim by class counsel ends tolling for all class members on that particular claim. *Id*. at 434 (outlining two competing approaches to issue). This appeal concerns a distinct question: how should courts determine when the narrowing of a class definition by class counsel or a district court ends *American Pipe* tolling for particular members of the putative or certified class. Only two federal circuits have expressly considered these narrower issues in precedential opinions. We review those two opinions next.

A. *Other Circuits on Ending American Pipe Tolling*

The Tenth and Fourth Circuits addressed how to determine the end of *American Pipe* tolling when the scope of a class definition is contested in *Sawtell v. E.I. du Pont de Nemours & Co., Inc.*, 22 F.3d 248, 252–54 (10th Cir. 1994), and *Smith v. Pennington*, 352 F.3d 884, 892–96 (4th Cir. 2003).

In *Sawtell*, the Tenth Circuit held that a plaintiff in a product liability action was not entitled to *American Pipe*

tolling and therefore affirmed dismissal of her claim as time-barred. 22 F.3d at 254. The plaintiff was a New Mexico resident and had filed her claim under New Mexico law. She sought *American Pipe* tolling based on three putative class actions filed in Minnesota, arguing that she was a putative class member entitled to tolling under the broad class definitions from both the initial complaints in Minnesota and the motions for class certification filed a month later. *Id.* at 250, 253.

Disagreeing with the New Mexico plaintiff's interpretations of the class definitions, the Tenth Circuit found that the evidence before it indicated the class "was intended to be Minnesota residents only." *Id.* at 253. Specifically, the court noted that the suits "were initiated within the Minnesota state court system and pursuant to the Minnesota class action statute," and "did not specify a national class." *Id*. The court added: "Although the complaints filed in the Minnesota class actions were broad in their descriptions of the class," the plaintiffs' motions for class certification a month later made "the narrowness of the class definitions . . . clear. The plaintiffs moved to certify classes of 'those who received the [allegedly defective product] in Minnesota.'" *Id.*

Against this clear evidence of intent to exclude out-of-state plaintiffs, including the unambiguous narrowing in the motion for class certification, the New Mexico plaintiff "presented no evidence supporting the inference she was a putative member of the class." *Id.* The Tenth Circuit distinguished a district court decision concluding that the same class definition was sufficiently ambiguous to extend *American Pipe* tolling to an out-of-state plaintiff for the month prior to clarifying class certification motions. *Id.* at 253 n.11. That conclusion, explained the Tenth Circuit, had

been based on "different evidence" that was not part of the record in *Sawtell*. *Id.* (distinguishing *Ganousis v. E.I. du Pont de Nemours & Co.*, 803 F. Supp. 149 (N.D. Ill. 1992)). The Tenth Circuit's more limited evidentiary record showed unambiguously that the New Mexico plaintiff had never been included in the proposed class. *Sawtell*, 22 F.3d at 253. The Tenth Circuit thus affirmed the denial of *American Pipe* tolling for the New Mexico plaintiff. *Id.* at 254. The court also noted that, even if the New Mexico plaintiff had been arguably included in the Minnesota complaint's class definition before the clarifying class certification motion, one additional month of tolling would not have made a difference. *Id.* at 253 n.11.

In the Fourth Circuit case, *Pennington*, would-be intervenors with securities-law claims invoked *American Pipe* tolling based on their purported inclusion within a class definition. 352 F.3d at 886. The Fourth Circuit had to "decide whether, and to what extent, evidence outside of the complaint can be used to construe a definition of a plaintiff's asserted class that is more narrow than what the complaint alone would dictate for the purposes of determining a party's entitlement to tolling." *Id*. at 891. The court decided that it was not "confined to examine *only* the complaint in determining the scope of the class [plaintiffs] sought to certify." *Id*. at 893 (emphasis in original). Instead, "[t]he scope of a plaintiff's asserted class for tolling purposes is that class for which" the purpose of the statute of limitations has been satisfied: the defendant had fair notice as to the substantive claims, number, and generic identities of the potential plaintiffs. *Id*. "In performing this analysis, we can consider evidence outside of the complaint that demonstrates the extent of the class the plaintiff represented to the district court that he desired to have certified—especially when the

complaint itself is unclear." *Id.* Looking to *Sawtell*, the *Pennington* court wrote that, "when a plaintiff moves for class certification by asserting an unambiguous definition of his desired class that is more narrow than is arguably dictated by his complaint, his asserted class for tolling purposes may be limited to that more narrow definition." *Id.* at 894. Ultimately, the Fourth Circuit found that class counsel, on behalf of the plaintiff, had "unequivocally" maintained a narrow class definition for at least a year after filing the original complaint. *Id.* at 894. Because the would-be intervenors sought *American Pipe* tolling for a period that postdated adoption of the unambiguously narrowed definition, the court affirmed the district court's denial of tolling. *Id.* at 895–96.

The key lesson we draw from *Pennington* and *Sawtell* is that to end *American Pipe* tolling, the exclusion of a plaintiff from a revised class definition must be "unambiguous." 352 F.3d at 894. Where the scope of the class definition in an initial complaint "arguably" includes particular bystander plaintiffs, they remain entitled to *American Pipe* tolling unless and until a court accepts a new definition that unambiguously excludes them.

B. *Ambiguity and Ending American Pipe Tolling*

*American Pipe* tolling strikes a balance among the efficiency gains of class actions, the procedural due process rights of class-action plaintiffs, and the fair-notice rights of class-action defendants. To maintain this balance, we must attend to the choices that confront bystander plaintiffs like DeFries. Specifically, the tolling rule must clearly instruct bystander plaintiffs that they need not intervene or file independent actions and can instead wait and rely on class counsel and the district court to protect their interests. To

accomplish the purpose of *American Pipe* tolling, bystander plaintiffs should be able to take that passive approach unless and until an unambiguous action removes them from the putative or certified class.

Ending *American Pipe* tolling with anything short of unambiguous narrowing would undermine the balance contemplated by the Supreme Court. It would encourage putative or certified class members to rush to intervene as individuals or to file individual actions. To preserve their right to pursue their individual claims after a potential narrowing, bystander plaintiffs would have to follow the class action closely, looking for any change in the class definition and carefully parsing what it might mean.

That approach would, of course, often require individual plaintiffs to consult attorneys to ensure that they understand their rights as the class action litigation proceeds. In the many class actions that offer only a small recovery to each class member, such a requirement would quickly become financially unreasonable. "[P]otential absent class members will only be able to alert the court to their exclusion if they have knowledge of the pendency of the action, access to legal representation to present their claims, and claims sufficient in size to justify the expense of such representation." Nancy Morawetz, *Underinclusive Class Actions*, 71 N.Y.U. L. Rev. 402, 404–05 (1996). Finding counsel to pursue individual claims after a class action is narrowed may be difficult or impossible for many plaintiffs. *Id.* at 422 ("Even when the excluded class members retain the theoretical right to sue, it may be difficult for those who were excluded to find counsel to pursue relief. . . . There simply may not be another private attorney willing to take on the case of those who were left out of the case." (footnotes omitted)).

If individual claims are large enough to justify counsel for individual suits (as perhaps with many ADA claims over lost jobs), the converse problem might arise: "excluded potential class members may choose to litigate separately, thereby leading to duplicative litigation." *Id.* at 405. If bystander plaintiffs' inclusion in the class were even potentially ambiguous, they would need to intervene or file their own individual suits to assert timely claims. Such duplicative filings would "frustrate the principal function" of a class action by encouraging the "unnecessary filing of repetitious papers and motions," the very "multiplicity of activity which Rule 23 was designed to avoid." *American Pipe*, 414 U.S. at 550–51. That is why Rule 23 "both permits and encourages class members to rely on the named plaintiffs to press their claims." *Crown, Cork & Seal*, 462 U.S. at 352–53. Class members have no "duty to take note of" a potential class suit, "or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case" before class notice has been sent. *American Pipe*, 414 U.S. at 552. A sound approach to the end of *American Pipe* tolling thus should allow putative class members to rely passively on class counsel when confronted with ambiguous class definitions so that a class action may continue to function as a "truly representative suit." See *id.* at 550.

In sum, we conclude that to end *American Pipe* tolling for a particular bystander plaintiff based on a revised class definition, a court must adopt a new definition that "unambiguously" excludes that bystander plaintiff. *See Pennington*, 352 F.3d at 894. Ambiguity in the scope of the class definition should be resolved in favor of continuing to extend *American Pipe* tolling to members of the putative or certified class. We now apply this approach to this case.

## II. *Factual and Procedural Background*

### A. *DeFries' Employment History & Color-Vision Testing*

Plaintiff DeFries worked for Union Pacific for fourteen years as a railroad conductor. This is a safety-sensitive position governed by FRA regulations. Conductors must pass routine, periodic color-vision screening tests to be recertified for their positions. These regulations are important for safe and effective use of colored railroad signals in directing trains.

In accordance with FRA regulations, Union Pacific uses a two-stage color-vision screening protocol. First, it subjects employees to a widely accepted color-vision acuity examination known as the Ishihara test.[2] Second, employees who fail the Ishihara test are subject to an additional color-vision "field test." The regulations give the FRA or the railroad discretion to further evaluate employees who fail the initial Ishihara test using a secondary field test to determine if they can satisfy the FRA's color-vision standards.

In 2012, a locomotive engineer misidentified a signal due to a color-vision deficiency and caused a fatal head-on collision between two Union Pacific freight trains. After the accident, the National Transportation Safety Board criticized Union Pacific's color-vision testing program and recommended improvements. In 2014, Union Pacific began making major changes to its internal "fitness-for-duty"

[2] The Ishihara test relies on a series of numbers or other images embedded in dot patterns, with the numbers or images distinguishable from the surrounding dots only by color contrast. A person with normal color vision should be able to identify the embedded numbers or images. Failing to discern the number or image indicates color-vision problems.

program, modifying its Medical Rules so that employees in safety-sensitive positions suspected of having certain medical or physical conditions could be suspended from work without pay, required to undergo further evaluation, and, frequently, restricted altogether from work with the company. These changes included an update to the "field test" portion of Union Pacific's color-vision testing protocol. After 2014, Union Pacific adopted a new, proprietary "Light Cannon" color-vision field test that the company had developed in-house.

As an employee of Union Pacific in a safety-sensitive position subject to FRA regulations, DeFries had been subjected to repeated color-vision testing. He had failed the Ishihara test at least three times during his employment with Union Pacific. On prior occasions, he had passed the follow-up field test designed by Union Pacific to match his everyday working conditions, so he had been able to continue working. DeFries had no safety incidents during his employment at Union Pacific.

In 2018, after Union Pacific changed its fitness-for-duty program, DeFries was again subject to an Ishihara test under Union Pacific's routine regulatory color-vision testing requirements. He failed it again. Union Pacific then required him to take the new "Light Cannon" field test. DeFries failed that test. He was then routed into the fitness-for-duty program. Union Pacific's chief medical officer diagnosed him with a "Color Vision Deficit" that the company found could not be accommodated. As a result, DeFries was removed from his job as a conductor, and Union Pacific imposed permanent work restrictions that barred him from working any position that required the identification of traffic signals. DeFries tried to find other positions within

the company but was unsuccessful. Union Pacific's permanent work restrictions on him have remained in place.

B. *ADA Challenges to the Fitness-for-Duty Program*

Since 2014, when Union Pacific updated its fitness-for-duty program, several thousand employees have suffered adverse employment actions because of the program. In 2016, several of those employees (not including DeFries) filed a class-action lawsuit against Union Pacific alleging that the company discriminated against employees with disabilities and perceived disabilities in violation of the ADA. *Harris v. Union Pacific Railroad Co.*, No. 8:16-cv-381 (D. Neb.); see 42 U.S.C. § 12112(a), (b)(6). The *Harris* plaintiffs argued that the fitness-for-duty policies screened qualified individuals with disabilities out of Union Pacific's workforce "even though, they argue, they had no trouble fulfilling the essential functions of their jobs." *Harris*, 329 F.R.D. at 620.

The claims centered on the changes Union Pacific made to its fitness-for-duty program in 2014. The company decided that workers with a wide range of medical conditions posed an unacceptable safety risk to the company. Plaintiffs alleged that the company instructed a small team of doctors and nurses to implement standardized policies to screen those workers out of many jobs. *Id*. The company required workers to disclose any "Reportable Health Event," defined as "any new diagnosis, recent events, and/or change" in a specified list of conditions, which included "significant vision . . . changes." If a worker disclosed such an event or condition, or if Union Pacific came to suspect one on its own, the employee was suspended from work and routed into a fitness-for-duty evaluation. During the evaluations, the company's medical team collected information about the

workers and relied on broad, population-based risk assessments to make final judgments as to whether the workers would be permitted to perform their roles. *Id*. at 623. The result, the *Harris* plaintiffs alleged, was that a large group of Union Pacific employees who were "qualified and performing their jobs with no problems" were nonetheless "pulled from their jobs" and left with no recourse. *Id*. at 620–21, 623.

C. *Harris Class Certification Granted and Reversed*

The parties agree that the *Harris* class, as defined in the operative amended complaint, included color-vision plaintiffs like DeFries. The class was defined as:

> Individuals who were removed from service over their objection, and/or suffered another adverse employment action, during their employment with Union Pacific for reasons related to a Fitness-for-Duty evaluation at any time from 300 days before the earliest date that a named Plaintiff filed an administrative charge of discrimination to the resolution of this action.

Plaintiffs alleged disparate treatment claims on behalf of the class under the ADA, arguing that Union Pacific's fitness-for-duty program discriminated against people with disabilities in violation of section 12112(a) and (b)(6) of the ADA.

As discovery began, Union Pacific argued that this proposed class definition was overbroad because it "could arguably include anyone who was pulled from service temporarily for a regulatory vision or hearing examination—

a total of more than 191,000 employees." Union Pacific argued that the class should include only "fitness-for-duty evaluations related to Reportable Health Events," also phrased as "FFD evaluations initiated because of a Reportable Health Event."

When the named plaintiffs moved for class certification, they proposed a narrower definition of the proposed class: "All individuals who have been or will be subject to a fitness-for-duty examination as a result of a reportable health event at any time from September 18, 2014 until the final resolution of this action." The plaintiffs explained to the court that their definition was intended to correspond to "the list of over 7,000 individuals that [Union Pacific] identified in discovery."

The Nebraska court granted class certification on this narrowed definition of the class. *Harris v. Union Pacific Railroad Co.*, 329 F.R.D. at 628. In granting class certification, the court "approve[d]" sending notice to the "class list" "given to plaintiffs by Union Pacific . . . identif[ying] a total of 7,723 current and former employees" that included individuals situated similarly to DeFries. *Id*. at 627–28.[3]

[3] On the same day that DeFries' case was argued, this panel also heard argument in two other color-vision plaintiffs' cases. *Donahue v. Union Pacific Railroad Co.*, No. 22–16847 (9th Cir. argued Feb. 14, 2024); *Blankinship v. Union Pacific Railroad Co.*, No. 22–16849 (9th Cir. argued Feb. 14, 2024). One of those plaintiffs, Justin Donahue, had signed a sworn declaration in support of the motion for class certification later considered by the Nebraska court in its decision to certify the class. *Harris*, 329 F.R.D. at 624 n.3. The plaintiffs in both of those cases appeared on the 7,723-person class list produced by Union Pacific in discovery, which is part of the record in each case. As DeFries explains in his briefs, he was not included on the class list only because it was

Union Pacific appealed the class certification to the Eighth Circuit, arguing that the certified class totaled more than 7,000 workers who had experienced a "broad[] universe of conditions or events" ranging from those who "suffered a stroke" to others who "experienced vision deficiencies." In its appeal, Union Pacific argued that the class was too broad, in part, because it included employees who had a diverse range of conditions including vision deficiencies, citing the declaration of at least one color-vision plaintiff. On March 24, 2020, the Eighth Circuit reversed the district court, decertifying the class. *Harris*, 953 F.3d at 1032. The Eighth Circuit agreed with Union Pacific that, due in part to the variety of disabilities and health conditions within the class definition, the class should be decertified for a lack of both cohesiveness among the class and predominance of common questions of law or fact. *Id.* at 1036–38. Upon decertification, *American Pipe* tolling ended for all putative members of the *Harris* class, including color-vision plaintiffs, when the Eighth Circuit issued its mandate for its decertification decision. That started or restarted the statute-of-limitations clocks for their individual claims against Union Pacific.

D. *DeFries' Individual Suit*

After the Eighth Circuit's decision, DeFries promptly filed an individual charge with the EEOC raising the same claims as the *Harris* class. Within 90 days after the EEOC completed its review of his case, he filed this individual action in federal district court.

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produced in discovery by Union Pacific on February 26, 2018, before DeFries failed the company's color-vision testing and was routed into a fitness-for-duty evaluation. He is otherwise situated identically to Donahue and Blankinship.

In its motion for summary judgment in DeFries' individual case, Union Pacific argued that DeFries' claims were untimely on the theory that the narrowed *Harris* class definition proposed by counsel and adopted by the district court had unambiguously excluded color-vision plaintiffs. As this theory went, DeFries had not experienced "any *change* in his color vision (or even a new medical condition that might have indirectly impacted his color vision)." DeFries admitted that "he was aware of his color vision deficiencies from a young age." Union Pacific administered color-vision testing not "because of any perceived change in Plaintiff's condition; instead, it did so to comply with the FRA's regulations regarding conductor certification." Union Pacific's theory was that DeFries did not "experience the necessary 'reportable health event' to fall within the *Harris* class definition," so "he was not a putative member." On that theory, Union Pacific argued, *American Pipe* tolling ended for DeFries on August 17, 2018, when *Harris* class counsel moved to certify the narrower class (or when the Nebraska district court adopted that definition). DeFries did not file his EEOC charge until April 2020, well outside the ADA's usual 300-day limit for filing an EEOC charge, rendering it untimely.

The district court accepted Union Pacific's argument on this point. The court granted summary judgment to Union Pacific, holding that DeFries' *American Pipe* tolling ceased when counsel voluntarily narrowed the class definition. To resolve DeFries' case, the district court looked to two earlier decisions by other district courts that had already considered *American Pipe* tolling with respect to color-vision plaintiffs, appeals of which were argued before this panel along with this case: *Blankinship v. Union Pacific Railroad Co.*, No. 21-cv-00072- RM, 2022 WL 4079425 (D. Ariz. Sept. 6, 2022),

*appeal docketed*, No. 22–16849 (9th Cir. argued Feb. 14, 2024), and *Donahue v. Union Pacific Railroad Co.*, No. 21-cv-00448-MMC, 2022 WL 4292963 (N.D. Cal. Sept. 16, 2022), *appeal docketed*, No. 22–16847 (9th Cir. argued Feb. 14, 2024).

All three district courts relied on the Tenth and Fourth Circuit opinions discussed above, *Sawtell* and *Pennington*. And all three courts looked primarily to the text of the narrowed class definition and the definition of "reportable health events" incorporated by reference from Union Pacific's Medical Rules. The court here accepted Union Pacific's argument that

> DeFries was not a member of the class the *Harris* plaintiffs sought to, and ultimately did, certify, because he was not subject to a Fitness-for-Duty examination 'as a result of a reportable health event.' Rather, . . . he was subject to the examination to 'recertify as a conductor.' Further, the record demonstrates that DeFries was aware he had color vision deficiency at a young age, many years prior to his employment with Union Pacific. Thus, DeFries's color vision acuity was not a new diagnosis, recent event, or change in condition, and therefore he did not experience a 'reportable health event' as defined by the *Harris* plaintiffs.

*DeFries*, 2022 WL 18936061, at *4 (internal citations omitted). Relying on this textual analysis, the district court agreed with the district courts in *Blankinship* and *Donahue* that the narrowed class definition excluded color-vision

plaintiffs, meaning *American Pipe* tolling ended for DeFries either upon class counsel's certification motion or upon the district court's grant of class certification. Either way, all of DeFries' ADA claims were found to be time-barred.

The district court also rejected DeFries' arguments, supported by extratextual evidence, that neither class counsel nor the Nebraska court understood or intended the narrower class definition to exclude these color-vision plaintiffs. In addition, the district court rejected DeFries' argument that Union Pacific had admitted color-vision plaintiffs were members of the certified *Harris* class during its successful arguments to the Eighth Circuit that the class should be decertified for a lack of commonality.[4]

III. *Standard of Review*

We review a district court's grant of summary judgment *de novo*. *Simmons v. G. Arnett*, 47 F.4th 927, 932 (9th Cir. 2022). We take the evidence in the light most favorable to the non-moving party to determine whether there are any

[4] After the Eighth Circuit's decertification of the *Harris* class, several federal courts have been presented with similar questions about the end of *American Pipe* tolling based on voluntary actions of class counsel. See *Zaragoza v. Union Pacific Railroad Co*., 657 F. Supp. 3d 905, 913 (W.D. Tex. 2023) (tolling ended for color-vision plaintiffs when class definition was narrowed), *appeal docketed*, No. 23-50194 (5th Cir. Mar. 20, 2023); *DeGeer v. Union Pacific Railroad Co.*, No. 8:23-cv-10, 2023 WL 4535197, at *6 (D. Neb. June 21, 2023) (same), *appeal docketed*, No. 23-2625 (8th Cir. July 13, 2023); *Bland v. Union Pacific Railroad Co.*, No. 4:17-cv-705-SWW, 2019 WL 2710802, at *1 (E.D. Ark. June 27, 2019) (order denying a motion to stay pending resolution of the *Harris* class, though case was later dismissed with prejudice by stipulation; court accepted as undisputed that a color-vision plaintiff was a member of the *Harris* class prior to opting out). We appear to be the first court of appeals to decide this question.

genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *L.F. v. Lake Washington School District #414*, 947 F.3d 621, 625 (9th Cir. 2020). Appellate review is limited to the record presented to the district court at the time of summary judgment. *National Steel Corp. v. Golden Eagle Insurance Co*., 121 F.3d 496, 500 (9th Cir. 1997).

IV. *Discussion*

For the reasons explained above, our task is to determine whether color-vision plaintiffs like DeFries were *unambiguously* excluded from the narrowed *Harris* class definition certified by the Nebraska court. We look first to the text of the revised definition. We conclude that the definition was ambiguous, but that the better reading included color-vision plaintiffs. Looking beyond the text of the definition to documents from the *Harris* litigation confirms our interpretation by demonstrating that neither the Nebraska court nor the parties understood the revision to have eliminated color-vision plaintiffs from the class. Only once the class was decertified was DeFries unambiguously excluded from class coverage.

Accordingly, DeFries was entitled to equitable tolling of his claims from the period between the filing of the *Harris* complaint on February 19, 2016, and the Eighth Circuit's decertification of the class when it issued its mandate after its March 24, 2020 opinion.

We begin by looking to the text of the revised class definition, which the district court interpreted to exclude color-vision plaintiffs on the theory that they were subjected to fitness-for-duty examinations as a result of FRA-required routine color-vision testing rather than as a result of a "reportable health event." *DeFries*, 2023 WL 1777635, at

*1–3. We respectfully disagree and conclude that the revised definition was, at best, ambiguous with respect to plaintiffs like DeFries. Looking to Union Pacific's Medical Rules, which were incorporated by reference into the class definition, we conclude that individuals who were subjected to a fitness-for-duty examination as a result of failing FRA-required color-vision testing probably *were* included in the class definition as certified.

We begin by setting out the text of the relevant definitions. The original class definition contained in the *Harris* complaint defined the class as:

> Individuals who were removed from service over their objection, and/or suffered another adverse employment action, during their employment with Union Pacific for reasons related to a Fitness-for-Duty evaluation at any time from 300 days before the earliest date that a named Plaintiff filed an administrative charge of discrimination to the resolution of this action.

Union Pacific agrees that color-vision plaintiffs like DeFries were covered by this definition.

In the motion for class certification, however, *Harris* class counsel narrowed the definition to the following: "All individuals who have been or will be subject to a fitness-for-duty examination as a result of a reportable health event at any time from September 18, 2014 until the final resolution of this action." All parties agree that the term "reportable health event" refers to Union Pacific's "Medical Rules," a policy document incorporated by reference into the *Harris* class plaintiffs' and DeFries' complaints. The Reportable

Health Events policy states that every employee in a safety-sensitive position "must report to Health and Medical Services any new diagnosis, recent events, and/or change in the following conditions." The list of conditions includes "Significant Vision or Hearing Change including . . . Significant vision change in one or both eyes affecting . . . color vision."

The district court's narrow reading of "reportable health events" to exclude plaintiffs who failed Union Pacific's routine color-vision testing is not obviously consistent with the text of Union Pacific's Medical Rules. The court's analysis incorporated an implicit assumption that, to qualify as a "reportable health event," the required "vision change" must be a deterioration or other physical change in the employee's color vision. On closer inspection, the definition can also apply to an employee's failure of a vision test as a "recent event," which qualifies as a reportable health event whether or not the failure accompanies some deterioration or other physical change in the employee's vision.

First, limiting a reportable health event to a deterioration or other physical "change" in a listed condition is not consistent with the definition's inclusion "of any new diagnosis, recent events, and/or change," since that limit would render mere surplusage the categories of "new diagnosis" and "recent events." The listed condition relevant here, "[s]ignificant vision change in one or both eyes affecting . . . color vision," embeds an additional requirement that a change must have taken place. But reading the Reportable Health Events policy as a whole, it can indicate that Union Pacific seeks to obtain reports not only of physical changes in health conditions, but also of changes in a health care provider's or patient's *knowledge* and *awareness* of health conditions. This, after all, is the ordinary meaning of a "diagnosis," one of the three

categories of events Union Pacific requires its employees to report. Thus, the definition's requirement of a "[s]ignificant vision change" is better read to extend to health events that affect only an employee's or a medical provider's *awareness* of the employee's physical status, without requiring a concurrent physical change. Indeed, other "reportable health events" expressly enumerated by Union Pacific in its Medical Rules include "Diagnosis of epilepsy," "Treatment with anti-seizure medication," and "Diagnosis or treatment of severe obstructive sleep apnea." None of these "reportable health events" requires any deterioration or other physical change in a pre-existing condition. Change in the employee's knowledge or awareness of a condition is sufficient.

In addition, Union Pacific's inclusion of the category of "recent events" in its definition should be read to capture events that were neither a "new diagnosis" nor a "change" in one of the listed conditions. Common sense teaches that a safety-sensitive employee's failure of a color-vision test is the archetype of a "recent event" covered by this category of Union Pacific's definition. The purpose of Union Pacific's FRA-required color-vision testing protocol is to detect either previously unknown or unreported color blindness in employees holding safety-sensitive positions. Detection of a previously unknown or unreported medical condition is the ordinary meaning of a "diagnosis." Though Union Pacific's color-vision testing program does not itself result in a formal diagnosis of color-blindness from a private medical doctor, failure of these tests is an event sufficiently akin to a formal diagnosis that Union Pacific automatically routes anyone who fails this FRA-required testing into a fitness-for-duty examination and labels them as having a "Diagnosis" of "Color Vision Deficit." Failure of an Ishihara test is exactly

the sort of "recent event" that the company would want to know about under its "reportable health events" policy.

Suppose a Union Pacific conductor or engineer failed an Ishihara test at a routine private doctor's appointment unrelated to any required regulatory testing, and then failed to report this failure to Union Pacific. Suppose further that this employee's color-vision deficiency later resulted in a railroad accident. When it came to light that the employee in such a safety-sensitive position had failed an Ishihara test but failed to report it, Union Pacific would surely contend that the employee had violated its Reportable Health Events policy requiring him to report any "recent event" in the condition of a "Significant vision change . . . affecting . . . color vision." The failure of a test meant to detect color-blindness is the kind of health-related event that the railroad would want to know about. By trying to treat the failure of an Ishihara test undertaken through its own internal color-vision testing program as though it were not a "reportable health event" for purposes of invoking the statute of limitations here, Union Pacific seems to be trying to have its cake and eat it, too.

Finally, nothing in Union Pacific's definition excludes a discovery of a medical condition from being a "reportable health event" simply because the discovery is made internally by the company itself. The district court here addressed cases where a Union Pacific supervisor referred an employee for a fitness-for-duty evaluation because the supervisor observed behavior leading him or her to suspect that that the employee had an unknown or unreported medical condition. The district court said that an employee routed into the fitness-per-duty program based on a supervisor's request *would* fall within the narrowed class definition of having experienced a "reportable health event."

*DeFries*, 2023 WL 1777635, at *2 (distinguishing *Campbell v. Union Pacific Railroad Co.*, No. 4:18-cv-00522-BLW, 2021 WL 1341037, at *5 (D. Idaho Apr. 9, 2021) and *Munoz v. Union Pacific Railroad Co.*, 2022 WL 4348605, at *9 (D. Or. Aug. 9, 2022), *report and recommendation adopted*, 2022 WL 4329427 (D. Or. Sept. 16, 2022)). We are inclined to agree. But if a supervisor's suspicion that an employee suffers from unknown or undisclosed color-vision issues constitutes a "reportable health event," it is difficult to read the definition to exclude unknown or undisclosed color-vision conditions discovered (or suspected) based on failure of Union Pacific's internal color-vision testing, whether routine or triggered by a suspected problem.

For all of these reasons, we believe the better reading of the definition is that an employee's failure of Union Pacific's color-vision testing protocol is a "reportable health event." Under this interpretation of the text of the narrowed *Harris* class definition, color-vision plaintiffs like DeFries were included as members in the *Harris* class until it was decertified by the Eighth Circuit.

Still, we appreciate that the district courts in this case and in *Blankinship* and *Donahue* reached a different conclusion. We believe the disagreement reflects genuine ambiguity in the scope of the narrowed class definition as applied to the color-vision plaintiffs. Under our interpretation of *American Pipe*, that ambiguity requires reversal of summary judgment for Union Pacific. As we explained above, a bystander plaintiff like DeFries is entitled to continued *American Pipe* tolling until he is unambiguously excluded from the class. That happened here only when the Eighth Circuit reversed

class certification and issued its mandate. Measured from that event, DeFries' case is timely.[5]

In addition to the text of the revised definition, we may also consider records from the class litigation to the extent that they illuminate whether the parties and the certifying court understood the class definition in a way that would have unambiguously excluded a bystander plaintiff. In this case, the record includes the following documents from the *Harris* record: Union Pacific's Eighth Circuit opening brief, its petition to appeal from the order granting class certification, plaintiffs' motion for class certification, the declarations of 44 putative class members submitted in support of the motion for class certification, plaintiffs' reply in support of class certification, plaintiffs' First Amended Complaint, excerpts from the deposition testimony of Dr. Holland (Union Pacific's Chief Medical Officer) regarding the definition of "reportable health event," the 7,723-person "class list," and Union Pacific's response to interrogatories complaining that the class definition was overbroad. Together, these documents provide strong evidence that the revised definition was not understood by the *Harris* parties

[5] We reject Union Pacific's argument that DeFries waived his argument that the failure of Union Pacific's color-vision testing could itself be a "reportable health event" by failing to raise it in his opposition to summary judgment. In opposition to summary judgment, DeFries argued that Union Pacific had admitted that the narrowed *Harris* class still included "color-vision plaintiffs" like himself because they "were subject to a Fitness for Duty evaluation following a reportable health event." That event in his case would have been the failure of Union Pacific's color-vision testing requirements, and he made the statement in a section asserting: "The Term 'Reportable Health Event' Does not Require a Change in Health Condition."

or the Nebraska court to remove color-vision plaintiffs from the class.

We begin by considering the evidence regarding the Nebraska court's understanding of the class at the time of certification. When the Nebraska court adopted the narrower definition, it did not order any special notice to be sent to the putative class members who Union Pacific claims were dropped when plaintiffs filed their motion for class certification. *Harris*, 329 F.R.D. at 627, 628 (certifying class under narrowed definition, ordering notice to the class using 7,723-person class list including color-vision plaintiffs). The Nebraska court referred to and relied on that list, which included color-vision plaintiffs, and the court referred to the declaration of at least one color-vision plaintiff in its decision to certify the class. *Id.* at 624, 627 & n.3.[6]

The extratextual evidence also indicates that class counsel did not believe their revised class definition excluded color-vision plaintiffs from their narrowed class. Class counsel included Mr. Donahue's declaration as an

[6] Extratextual evidence shows that even Union Pacific itself understood the class definition to include color-vision plaintiffs. In arguing for decertification, Union Pacific's brief to the Eighth Circuit pointed to "7,000-plus absent class members," including those who "experienced vision deficiencies." It argued that the incoherence of the class was "illustrated" by the "personal stories" of 44 declarants, including some who "experienced vision deficiencies." The 44 declarants included six color-vision plaintiffs, including the plaintiff in another of our cases, Donahue. Though DeFries did not raise judicial estoppel expressly, "we are not bound to accept a party's waiver of a judicial estoppel argument and may consider the issue at our discretion." *Kaiser v. Bowlen*, 455 F.3d 1197, 1204 (10th Cir. 2006). Because we reverse on other grounds, we need not address potential judicial estoppel based on Union Pacific's successful arguments to the Eighth Circuit.

exhibit alongside their motion for class certification. Their motion for class certification referred to and relied on the 7,723-person "class list" that included color-vision plaintiffs. This means that the plaintiffs in *Blankinship* and *Donahue* would have received the class notice ordered by the district court. *Harris*, 329 F.R.D. at 628 (ordering class notice, though order was stayed upon appeal to the Eighth Circuit). DeFries was similarly situated. He was not on that "class list" only because he suffered adverse employment action after the list was produced in discovery.

Accordingly, the extratextual evidence from the *Harris* record shows that neither the Nebraska court, nor class counsel, nor even Union Pacific understood the *Harris* class definition to exclude color-vision plaintiffs. This extratextual evidence reinforces our conclusion from the text of the class definition that color-vision plaintiffs were not unambiguously removed from the *Harris* class prior to decertification.[7]

Union Pacific argues that we should affirm the district court's grant of summary judgment on alternate, merits-based grounds that the district court did not reach. We can affirm on any ground supported by the record so long as the issue was raised and the non-moving party had a fair opportunity to contest the issue in the district court. See *Mansourian v. Regents of Univ. of California*, 602 F.3d 957,

[7] In addressing evidence beyond the text of the relevant class definitions here, we do not mean to imply that a class-action *defendant* may rely on such evidence to resolve ambiguities in the scope of a class definition and thereby defeat *American Pipe* tolling. The focus of *American Pipe* tolling is on the choices confronting a bystander plaintiff. We do not mean to imply here that a defendant could show that such a bystander plaintiff's decision not to file a separate lawsuit turned out to have been wrong based on evidence that would not have been readily available to that bystander at the relevant time.

974 (9th Cir. 2010) ("Our discretion to affirm on grounds other than those relied on by the district court extends to issues raised in a manner providing the district court an opportunity to rule on it."); see also *Dachauer v. NBTY, Inc.*, 913 F.3d 844, 847 (9th Cir. 2019) ("Although the district court did not reach [an] issue . . . , we may affirm on that ground because Defendants raised the issue below . . . ."). Union Pacific's asserted grounds, which it raised in the district court, are that DeFries' ADA claims fail as a matter of law because (1) DeFries was not a "qualified individual" due to his color-vision deficiencies, (2) he offers no evidence that the fitness-for-duty program was a pretext for discrimination, and (3) Union Pacific acted under the direction of binding federal regulations.

This court is one of "review, not first view." *Belaustegui v. Int'l Longshore & Warehouse Union*, 36 F.4th 919, 930 (9th Cir. 2022), quoting *Shirk v. United States ex rel. Dep't of Interior*, 773 F.3d 999, 1007 (9th Cir. 2014). The other issues here require close parsing of a voluminous summary-judgment record. "In general, an appellate court does not decide issues that the trial court did not decide," particularly where the issue is not a "purely legal one." *Dep't of Fish & Game v. Federal Subsistence Board*, 62 F.4th 1177, 1183 (9th Cir. 2023) (citations omitted). Union Pacific's alternate grounds for summary judgment are deeply fact-bound, and we do not have the benefit of robust briefing on these issues on appeal. The district court should consider these arguments in the first instance.

The judgment of the district court is REVERSED and REMANDED for further proceedings consistent with this opinion.

**NOT FOR PUBLICATION**

FILED

JUN 14 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| JUSTIN DONAHUE, et al.,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>UNION PACIFIC RAILROAD COMPANY,<br><br>Defendant-Appellee. | No. 22-16847<br><br>D.C. No. 3:21-cv-00448-MMC<br><br>MEMORANDUM* |

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Argued and Submitted February 14, 2024
San Francisco, California

Before: S.R. THOMAS, HAMILTON,** and CHRISTEN, Circuit Judges.

This appeal is controlled by our opinion issued today in *DeFries v. Union Pacific Railroad Co.*, __F.4th __, No. 23-35119 (9th Cir. June 14, 2024). Like plaintiff DeFries, plaintiffs-appellants Justin Donahue, Jason Campbell, and Jacob Goss worked as railroad conductors or locomotive engineers for defendant-appellee

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable David F. Hamilton, United States Circuit Judge for the U.S. Court of Appeals for the Seventh Circuit, sitting by designation.

Union Pacific Railroad Company. After failing Union Pacific's routine color-vision testing, each plaintiff was routed into Union Pacific's employee health screening system, the fitness-for-duty program. While undergoing fitness-for-duty evaluations, the plaintiffs failed Union Pacific's follow-up color-vision field test and were diagnosed by Union Pacific's Chief Medical Officer with a "Color Vision Deficit" that the company deemed could not "be accommodated." As a result, they were removed from their positions, and Union Pacific imposed permanent work restrictions that barred them from working any position that required the identification of traffic signals. The plaintiffs attempted to find other positions within the company but were unsuccessful, and Union Pacific's permanent work restrictions have remained in place.

In *DeFries*, we detailed the history of the *Harris v. Union Pacific Railroad Co.* class action, alleging violations of the Americans with Disabilities Act. In *Harris*, the plaintiffs' operative complaint alleged a class that all parties agree included color-vision plaintiffs like Donahue, Campbell, and Goss, but later in the litigation, class counsel moved for class certification on a narrower definition. The district court certified a class based on that narrower definition, but that certification was later reversed by the Eighth Circuit. *Harris v. Union Pacific Railroad Co.*, 329 F.R.D. 616, 628 (D. Neb. 2019), rev'd, 953 F.3d 1030, 1032 (8th Cir. 2020). The plaintiffs in this case are situated identically to DeFries, except that they suffered

adverse employment actions earlier than DeFries, before the certification of the *Harris* class. As in *DeFries*, their individual claims were timely if *American Pipe* tolling extended for them until the Eighth Circuit reversed the class certification. See generally *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 552–54 (1974); *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 354 (1983).

This case, *DeFries*, and *Blankinship v. Union Pacific Railroad Co.*, No. 22–16849, were all argued to this panel on February 14, 2024. In all aspects relevant to this appeal, these plaintiffs are situated identically to the plaintiff in *DeFries*. Under our decision in *DeFries*, plaintiffs Donahue, Campbell, and Goss were entitled to rely on *American Pipe* tolling until the Eighth Circuit issued its mandate decertifying the *Harris* class. We REVERSE summary judgment in favor of Union Pacific and REMAND for further proceedings consistent with this order, without reaching the alternative grounds for summary judgment that the district court did not reach.

**NOT FOR PUBLICATION**

FILED

JUN 14 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| JAMES BLANKINSHIP,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>UNION PACIFIC RAILROAD COMPANY, a Delaware Corporation,<br><br>Defendant-Appellee. | No. 22-16849<br><br>D.C. No. 4:21-cv-00072-RM<br><br>MEMORANDUM* |

Appeal from the United States District Court
for the District of Arizona
Rosemary Márquez, District Judge, Presiding

Argued and Submitted February 14, 2024
San Francisco, California

Before: S.R. THOMAS, HAMILTON,** and CHRISTEN, Circuit Judges.

This appeal is controlled by our opinion issued today in *DeFries v. Union Pacific Railroad Co.*, __F.4th __, No. 23-35119 (9th Cir. June 14, 2024). Like plaintiff DeFries, plaintiff-appellant James Blankinship worked as a conductor for

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable David F. Hamilton, United States Circuit Judge for the U.S. Court of Appeals for the Seventh Circuit, sitting by designation.

defendant-appellee Union Pacific Railroad Company. After failing Union Pacific's routine color-vision testing, Blankinship was routed into Union Pacific's employee health screening system, the fitness-for-duty program. While undergoing a fitness-for-duty evaluation, Blankinship failed Union Pacific's follow-up color-vision field test and was diagnosed by Union Pacific's Chief Medical Officer with a "Color Vision Deficit" that the company deemed "unable to be accommodated." As a result, he was removed from his position, and Union Pacific imposed permanent work restrictions that barred him from working any position that required the identification of traffic signals. Blankinship attempted to find other positions within the company but was unsuccessful, and Union Pacific's permanent work restrictions have remained in place.

In *DeFries*, we detailed the history of the *Harris v. Union Pacific Railroad Co.* class action, alleging violations of the Americans with Disabilities Act. In *Harris*, the plaintiffs' operative complaint alleged a class that all parties agree included color-vision plaintiffs like Blankinship, but later in the litigation, class counsel moved for class certification on a narrower definition. The district court certified a class based on that narrower definition, but that certification was later reversed by the Eighth Circuit. *Harris v. Union Pacific Railroad Co.*, 329 F.R.D. 616, 628 (D. Neb. 2019), rev'd, 953 F.3d 1030, 1032 (8th Cir. 2020). Plaintiff Blankinship is situated identically to DeFries, except that he suffered adverse

employment actions earlier than DeFries, before the certification of the *Harris* class. As in *DeFries*, Blankinship's individual claims were timely if *American Pipe* tolling extended for him until the Eighth Circuit reversed the class certification. See generally *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 552–54 (1974); *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 354 (1983).

This case, *DeFries*, and *Donahue v. Union Pacific Railroad Co.*, No. 22-16847, were all argued to this panel on February 14, 2024. In all aspects relevant to this appeal, Blankinship and the plaintiffs in *Donahue* are situated identically to the plaintiff in *DeFries*. Under our decision in *DeFries*, plaintiff Blankinship was entitled to rely on *American Pipe* tolling until the Eighth Circuit issued its mandate decertifying the *Harris* class. We REVERSE summary judgment in favor of Union Pacific and REMAND for further proceedings consistent with this order, without reaching the alternative grounds for summary judgment that the district court did not reach.

FILED

JUL 23 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| NICHOLAS DeFRIES,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>UNION PACIFIC RAILROAD COMPANY, a Delaware corporation,<br><br>Defendant-Appellee. | No. 23-35119<br><br>D.C. No. 3:21-cv-00205-SB<br>District of Oregon<br><br>ORDER |

Before: S.R. THOMAS, HAMILTON,* and CHRISTEN, Circuit Judges.

The panel unanimously votes to deny the petition for panel rehearing. Judge Christen votes to deny the petition for rehearing en banc, and Judge Thomas and Judge Hamilton so recommend.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. P. 35.

Defendant-Appellee's petition for panel rehearing and petition for rehearing en banc, Dkt. No. 50, filed on June 28, 2024, are DENIED.

* The Honorable David F. Hamilton, United States Circuit Judge for the Seventh Circuit Court of Appeals, sitting by designation.

FILED

JUL 23 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| JUSTIN DONAHUE, et al.,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>UNION PACIFIC RAILROAD COMPANY, a Delaware corporation,<br><br>Defendant-Appellee. | No. 22-16847<br><br>D.C. No. 3:21-cv-00448-MMC<br>Northern District of California<br><br>ORDER |

Before: S.R. THOMAS, HAMILTON,* and CHRISTEN, Circuit Judges.

The panel unanimously votes to deny the petition for panel rehearing. Judge Christen votes to deny the petition for rehearing en banc, and Judge Thomas and Judge Hamilton so recommend.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. P. 35.

Defendant-Appellee's petition for panel rehearing and petition for rehearing en banc, Dkt. No. 55, filed on June 28, 2024, are DENIED.

* The Honorable David F. Hamilton, United States Circuit Judge for the Seventh Circuit Court of Appeals, sitting by designation.

FILED

JUL 23 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| JAMES BLANKINSHIP,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>UNION PACIFIC RAILROAD COMPANY, a Delaware corporation,<br><br>Defendant-Appellee. | No. 22-16849<br><br>D.C. No. 4:21-cv-00072-RM<br>District of Arizona<br><br>ORDER |

Before: S.R. THOMAS, HAMILTON,* and CHRISTEN, Circuit Judges.

The panel unanimously votes to deny the petition for panel rehearing. Judge Christen votes to deny the petition for rehearing en banc, and Judge Thomas and Judge Hamilton so recommend.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. P. 35.

Defendant-Appellee's petition for panel rehearing and petition for rehearing en banc, Dkt. No. 56, filed on June 28, 2024, are DENIED.

* The Honorable David F. Hamilton, United States Circuit Judge for the Seventh Circuit Court of Appeals, sitting by designation.

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF OREGON**

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| **NICHOLAS DEFRIES**,<br><br>Plaintiff,<br><br>v.<br><br>**UNION PACIFIC RAILROAD COMPANY**,<br><br>Defendant. | Case No. 3:21-cv-205-SB<br><br>**ORDER** |

**Michael H. Simon, District Judge.**

Nicholas DeFries (DeFries) asserts claims of disparate treatment and disparate impact under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112, against Union Pacific Railroad Company (Union Pacific). Union Pacific has moved for summary judgment against all claims. United States Magistrate Judge Stacie F. Beckerman issued Findings and Recommendation on November 23, 2022, recommending that the Court grant Union Pacific's motion for summary judgment because DeFries's claims are time-barred. Judge Beckerman did not reach Union Pacific's other arguments.

Under the Federal Magistrates Act (Act), the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C.

§ 636(b)(1). If a party objects to a magistrate judge's findings and recommendations, "the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.*; Fed. R. Civ. P. 72(b)(3). For those portions of a magistrate judge's findings and recommendations to which neither party has objected, the Act does not prescribe any standard of review. *See Thomas v. Arn*, 474 U.S. 140, 152 (1985) ("There is no indication that Congress, in enacting [the Act], intended to require a district judge to review a magistrate's report to which no objections are filed."); *United States. v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (holding that the court must review *de novo* magistrate judge's findings and recommendations if objection is made, "but not otherwise"). Although in the absence of objections no review is required, the Act "does not preclude further review by the district judge[] *sua sponte* . . . under a *de novo* or any other standard." *Thomas*, 474 U.S. at 154. Indeed, the Advisory Committee Notes to Fed. R. Civ. P. 72(b) recommend that "[w]hen no timely objection is filed," the Court review the magistrate judge's recommendations for "clear error on the face of the record."

DeFries objected and Union Pacific responded. DeFries argues that his claims are timely because the applicable statute of limitations was tolled.[1] The parties agree that DeFries's claims were tolled while he was a putative class member of a class action lawsuit alleging some of the same claims against Union Pacific. *See Harris v. Union Pac. R.R. Co.*, 329 F.R.D. 616 (D. Neb. 2019). The parties dispute whether the named plaintiffs in *Harris* narrowed the scope of the

[1] DeFries also contends that the doctrine of equitable estoppel precludes Union Pacific from making certain arguments in support of summary judgment. This contention is raised for the first time at this stage, lacks merit, and is not an objection to the F&R. Accordingly, the Court does not consider it further.

putative class when they moved to certify, thereby removing DeFries from the class and ending the tolling of his claims.

DeFries argues that he was included as a class member in the *Harris* class certification order, not excluded as Union Pacific responds and the F&R concludes. Thus, DeFries contends that his claims were tolled until the Eighth Circuit reversed the district court's class certification order. *See Harris v. Union Pac. R.R. Co.*, 953 F.3d 1030, 1039 (8th Cir. 2020) (reversing the district court's decision to certify the *Harris* class). Union Pacific responds that the *Harris* class action plaintiffs excluded DeFries when they limited the class to employees referred for a "fitness-for-duty" evaluation because of a "reportable health event." *Harris*, 329 F.R.D. at 621. Union Pacific contends that DeFries underwent a fitness evaluation because he failed an examination required by railroad regulations, not due to any reportable health event. According to Union Pacific, DeFries was excluded from the putative *Harris* class well before the Eighth Circuit reversed the District of Nebraska's class certification order. If Union Pacific is correct, this would render DeFries' claims untimely.

DeFries's objection reiterates arguments on these points that he made in his response to Union Pacific's motion for summary judgment, in his sur-reply to Union Pacific's motion for summary judgment, and at oral argument before Judge Beckerman. Union Pacific does likewise in its filings. Judge Beckerman analyzed these arguments at length in recommending that the Court grant summary judgment in favor of Union Pacific.

In his reply in support of his objection to the F&R, DeFries cites two opinions by other district courts in the Ninth Circuit that rejected the same argument that DeFries advances here, under nearly identical fact patterns. *See Donahue v. Union Pac. R.R. Co.*, 2022 WL 4292963, at *4-5 (N.D. Cal. Sept. 16, 2022) (finding that the plaintiffs were not members of the putative

*Harris* class because they "were subject to examinations as a result of the FRA's [Federal Railroad Administration] periodic certification requirements," not reportable health events, and thus the tolling of their ADA claims ceased well before the Eighth Circuit's reversal of *Harris*); *Blankinship v. Union Pac. R.R. Co.*, 2022 WL 4079425, at *5 (D. Ariz. Sept. 6, 2022) (finding that the plaintiff "was subjected to Defendant's color-vision testing procedures not as a result of a reportable health event but, rather, as part of the FRA recertification process" and so "there is no genuine dispute that Blankinship was not included in the class definition set forth in the *Harris* plaintiffs' motion for class certification," and therefore his ADA claims were not tolled beyond the ruling on the class certification motion). In his reply, DeFries cites opinions from two district courts in the Ninth Circuit that he argues conclude the opposite and that he contends are persuasive.

The cases cited by DeFries are not new. The Court will consider them but find them distinguishable. In the first case, *Campbell v. Union Pac. R.R. Co.*, the district court rejected a motion *in limine* by Union Pacific because the court was "not persuaded that Campbell is not a putative class member" due to the purported absence of a reportable health event. 2021 WL 1341037, at *5 (D. Idaho Apr. 9, 2021). The district court explains that it was uncertain because the plaintiff, Campbell, was required to participate in a fitness-for-duty evaluation due to a supervisor's request. *Id.* Campbell's supervisor requested that evaluation "based on credible information which raises a concern about the employee's ability to safely perform his/her job duties," as allowed by Union Pacific's policies, which the district court considered may constitute a reportable health event. *See id.* Thus, Campbell's circumstances differ from DeFries's, who underwent a fitness-for-duty evaluation solely because he failed the visual acuity test required by the Federal Railroad Administration recertification process.

The second case also is distinguishable and for the same reason. In *Munoz v. Union Pac. R.R. Co.*, U.S. Magistrate Judge Andrew Hallman recommended denying the defendant's motion for summary judgment and explained that the plaintiff's supervisor referred the plaintiff for a fitness-for-duty evaluation "due to a combination of reports from others and his own observations." 2022 WL 4348605, at *9 (D. Or. Aug. 9, 2022), *report and recommendation adopted*, 2022 WL 4329427 (D. Or. Sept. 16, 2022). Indeed, in an earlier opinion, the court in *Munoz* quoted *Campbell* at length and described that case as having a "close factual similarity" to the claims asserted in *Munoz*. *Munoz*, 2021 WL 3622074, at *2 (D. Or. Aug. 16, 2021).

The Court has reviewed *de novo* those portions of Judge Beckerman's Findings and Recommendation to which DeFries has objected, as well as DeFries's objection, Union Pacific's response, DeFries's reply, the transcript of oral argument on Union Pacific's summary judgment motion, and the underlying materials filed before Judge Beckerman. The Court agrees with Judge Beckerman's reasoning regarding the untimeliness of DeFries's claims and adopts those portions of the Findings and Recommendation. For those portions of Judge Beckerman's Findings and Recommendation to which neither party has objected, this Court follows the recommendation of the Advisory Committee and reviews those matters for clear error on the face of the record. No such error is apparent.

The Court ADOPTS Judge Beckerman's Findings and Recommendation, ECF 64, as supplemented. The Court GRANTS Union Pacific's motion for summary judgment, ECF 49.

**IT IS SO ORDERED**.

DATED this 6th day of February, 2023.

/s/ *Michael H. Simon*
Michael H. Simon
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JUSTIN DONAHUE, et al.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

Case No. 21-cv-00448-MMC

**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Before the Court is defendant Union Pacific Railroad Company's ("Union Pacific") Motion for Summary Judgment, filed August 5, 2022. Plaintiffs Justin Donahue ("Donahue"), Jason Campbell ("Campbell"), and Jacob Goss ("Goss") have filed opposition, to which Union Pacific has replied. Having read and considered the papers filed in support of and in opposition to the motion, the Court rules as follows.[1]

**BACKGROUND**

Plaintiffs allege each said plaintiff formerly worked as a conductor for Union Pacific (see Compl. ¶¶ 29, 43, 55), a position that required him to "read[ ] and interpret multicolored railroad traffic signal lights on signal masts" (see Compl. ¶¶ 30, 44, 57).[2] Plaintiffs further allege that each said plaintiff was "responsible for train movement" and, consequently, was required to be "certified by the Federal Railroad Administration

[1] By order filed September 6, 2022, the Court took the matter under submission.

[2] Donahue also worked as a Remote-Control Operator (see Compl. ¶ 29) and Goss also worked as a locomotive engineer (see Compl. ¶ 56), positions that, like the position of conductor, required the ability to read and interpret "multicolored railroad traffic signal lights on signal masts" (see Compl. ¶¶ 30, 44, 57).

['FRA']," which agency "allows railroads to certify employees through . . . color-vision examinations." (See Compl. ¶ 2.) According to plaintiffs, because they were required to be certified, they were required, under Union Pacific's "Fitness-for-Duty program," to undergo "color-vision testing" on a "periodic" basis. (See Compl. ¶¶ 3, 25.)

Plaintiffs allege that, prior to April 2016, Union Pacific's color-vision testing protocol required employees responsible for train movement to pass "the 14-Plate Ishihara test" ("Ishihara test") and, if they failed such test, to pass an "alternative" test that "used existing train signal masts." (See Compl. ¶¶ 3, 26.) Plaintiffs further allege that, under such testing protocol, each time they were required to periodically undergo color-vision testing, they were able to pass either the Ishihara test or the alternative test. (See Compl. ¶¶ 32, 46, 60.) According to plaintiffs, Union Pacific, in April 2016, changed its testing protocol to require that, if an employee did not pass the Ishihara test, he/she would be required to pass a new alternative test known as "the Light Cannon test" (see Compl. ¶¶ 3, 26), which test, plaintiffs assert, "does not assess the employee's ability to recognize and distinguish between colors of railroad signals" (see Compl. ¶ 27).

Plaintiffs allege that when each said plaintiff was required to submit to a periodic color-vision test under the new protocol, each failed both the Ishihara test and the Light Cannon test and, consequently, Union Pacific imposed on each said plaintiff "permanent work restrictions" prohibiting him from working in a position that required him to identify colored signals, i.e., the position he held with Union Pacific. (See Compl. ¶¶ 33-34, 37 (Donahue), 47, 49, 51 (Campbell), 61-63 (Goss).)

Based on the above allegations, plaintiffs assert two claims under the Americans With Disabilities Act, specifically, Count I, titled "Disability Discrimination - Disparate Treatment" (see Compl. at 13:5-6), and Count II, titled "Disability Discrimination – Disparate Impact" (see Compl. at 15:5-6).[3]

[3] A third claim asserted in the Complaint, specifically, Count III, titled "Failure to Accommodate" was dismissed by order filed June 16, 2022

## LEGAL STANDARD

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, a "court shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." See Fed. R. Civ. P. 56(a).

The Supreme Court's 1986 "trilogy" of Celotex Corp. v. Catrett, 477 U.S. 317 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), requires that a party seeking summary judgment show the absence of a genuine issue of material fact. Once the moving party has done so, the nonmoving party must "go beyond the pleadings and by [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." See Celotex, 477 U.S. at 324 (internal quotation and citation omitted). "When the moving party has carried its burden under Rule 56[ ], its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. "If the [opposing party's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Liberty Lobby, 477 U.S. at 249-50 (citations omitted). "[I]nferences to be drawn from the underlying facts," however, "must be viewed in the light most favorable to the party opposing the motion." See Matsushita, 475 U.S. at 587 (internal quotation and citation omitted).

## DISCUSSION

Union Pacific seeks summary judgment on the ground that plaintiffs' claims are barred by the applicable 300-day statute of limitations.

"An individual plaintiff must first file a timely EEOC [Equal Employment Opportunity Commission] complaint against the allegedly discriminatory party before bringing an ADA suit in federal court." Josephs v. Pacific Bell, 443 F.3d 1050, 1061 (9th Cir. 2006). "[T]he [EEOC] claim must be filed within 300 days of the claimed event of discrimination." Id.; see also Santa Maria v. Pacific Bell, 202 F.3d 1170, 1176 (9th Cir. 2000) (referring to

300-day period as "statute of limitations").

Here, it is undisputed that each plaintiff submitted a claim to the EEOC more than 300 days after the asserted discriminatory act, namely, the date on which Union Pacific imposed permanent restrictions that precluded him from performing his job. In particular, Donahue filed an EEOC claim on April 24, 2020, a date more than 300 days after May 24, 2017, the date Union Pacific imposed permanent restrictions on him (see Rhoten Decl. Ex. Y; Compl. ¶ 18), Campbell filed an EEOC claim on April 10, 2020, a date more than 300 days after May 22, 2018, the date Union Pacific imposed permanent restrictions on him (see Rhoten Decl. Ex. EE; Compl. ¶ 19), and Goss filed an EEOC claim on December 10, 2020, a date more than 300 days after Union Pacific imposed permanent restrictions on him (see Rhoten Decl. Ex. R; Compl. ¶ 20). Accordingly, in the absence of an applicable exception, plaintiffs' claims are time-barred. See Vaughn v. Teledyne, Inc., 628 F.2d 1214, 1218 (9th Cir. 1980) (holding, where complaint is filed after expiration of limitations period, "the plaintiff has the burden of proving facts that would toll the statute").

In that regard, plaintiffs rely on the equitable tolling doctrine set forth in American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974) and Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983), under which "the filing of a class action tolls the statute of limitations as to all asserted members of the class." See Crown, Cork & Seal, 462 U.S. at 350 (internal quotation and citation omitted).

In Harris v. Union Pacific Railroad Co., Case No. 16-cv-381-JFB-SMB, the class action on which plaintiffs rely, the plaintiffs therein asserted in their First Amended Complaint ("Harris FAC"),[4] filed February 19, 2016, ADA disparate treatment and disparate impact claims on behalf on a putative class of Union Pacific employees, defined in the FAC as "[i]ndividuals who were removed from service over their objection, and/or suffered another adverse employment action, during their employment with Union Pacific

[4] The initial complaint filed in Harris did not include any claim brought on behalf of a class. (See Rhoten Decl. Ex. KK at 4.)

for reasons related to a Fitness-for-Duty evaluation at any time from 300 days before the earliest date that a named Plaintiff filed an administrative charge of discrimination to the resolution of [the] action." (See Rhoten Decl. Ex. II ¶ 116.)[5]

As noted, each plaintiff in the instant action asserts ADA disparate treatment and disparate impact claims based on his having allegedly suffered an adverse employment action during his employment with Union Pacific as a result of his inability to pass color-vision tests imposed by Union Pacific as part of a periodic Fitness-for Duty evaluation.

Union Pacific, for purposes of the instant motion, does not dispute that plaintiffs were members of the class alleged in the Harris FAC. Union Pacific argues the tolling period ended, however, on August 17, 2018, the date the Harris plaintiffs, in conformity with a Progression Order issued by the District of Nebraska, filed a motion for class certification.[6] (See Rhoten Decl. Ex. JJ.) In that motion, the Harris plaintiffs, with respect to their disparate treatment claim, expressly sought certification on behalf of a class narrower than had been asserted in the Harris FAC (see id. Ex. KK at 22), which narrowed class, Union Pacific argues, did not include Donahue, Campbell, or Goss. Further, the Harris plaintiffs did not seek class certification as to their disparate impact claim.

For purposes of tolling under American Pipe, where individuals are members of the putative class alleged in the complaint, but the named plaintiff narrows the proposed class when later moving for class certification, tolling ceases for individuals who are not

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[5] In the FAC, the Harris plaintiffs alleged what appear to be three non-exclusive examples of individuals who, under Union Pacific's Fitness-for-Duty program, were subject to evaluation, specifically, (1) individuals who had "Reportable Health Events" as defined in the FAC (see Harris FAC second ¶ 2), (2) individuals who Union Pacific "learns . . . had, or has had in the past, certain health conditions" (see Harris FAC second ¶ 6), and (3) individuals who transfer from "an existing Union Pacific job assignment" to specified different assignments (see Harris FAC second ¶ 5).

[6] A progression order is a scheduling order in which a district judge sets, inter alia, deadlines to file motions. See Fed. R. Civ. P. 16(b)(3); see, e.g., Sabata v. Nebraska Department of Correctional Services, 2018 WL 11309925, at *1, *3 (D. Neb. May 21, 2018) (amending Initial Progression Order to include deadline to file motion for class certification).

members of the proposed, narrowed class. See Smith v. Pennington, 352 F.3d 884, 894-96 (4th Cir. 2003) (citing "rule" that, "where plaintiffs move for class certification by unambiguously asserting a class definition more narrow than that required by their complaint, their asserted class for tolling purposes is that more narrow definition"); Sawtell v. E.I. du Pont de Nemours and Co., 22 F.3d 248, 253-54 and n.11 (10th Cir. 1994) (holding, where plaintiff moved to certify class limited to individuals in Minnesota, tolling was unavailable to individuals in other states, even though class alleged in complaint was without geographic limitation). Put another way, individuals who were members of the putative class alleged in a complaint but are not members of the narrowed class identified in a motion for class certification are "placed on legal notice" at the time the named plaintiff files such motion that "they [cannot] look to the pending [class] action [ ] to protect their interests and that they [will] therefore have to go it alone by bringing their own lawsuits." See Ganousis v. E.I. du Pont de Nemours & Co., 803 F. Supp. 149, 154-56 (N.D. Ill. 1992).

In this instance, the Harris plaintiffs, acknowledging they were seeking to certify a class that "ha[d] been narrowed from the Amended Complaint" (see id. Rhoten Decl. Ex. KK at 22 n.5), limited the proposed class to Union Pacific employees (1) who had disparate treatment claims and (2) "who ha[d] been or [would] be subject to a fitness-for-duty examination as a result of a reportable health event" (see id. Ex. KK at 22). By way of further explanation, the term "reportable health event," as used by the Harris plaintiffs, meant "any new diagnosis, recent events, and/or change" in a number of specified "conditions," such as "[h]eart attack or invasive cardiovascular procedures," a "seizure of any kind," and "[s]ignificant vision change in one or both eyes affecting . . . color vision or peripheral visions (including vision field loss from retinal disease or treatment)." (See FAC second ¶ 2.)

As Union Pacific points out, however, plaintiffs do not assert they were subject to a fitness-for-duty examination "as a result of a reportable health event" (see Rhoten Decl. Ex. KK at 22), but, rather, that they were subject to a fitness-for-duty examination on a

"periodic" basis, including the examinations that culminated in the adverse employment actions taken here, as a result of the FRA's requirement that conductors periodically be "certified" by their employer as having the "visual acuity" necessary to perform the work of a conductor (see Compl. ¶¶ 2, 3, 25); see also 49 C.F.R. §§ 242.117(b), (h) (providing railroads, "prior to initially certifying or recertifying any person as a conductor," must determine such person has "visual acuity," including "[t]he ability to recognize and distinguish between the colors of railroad signals"); 49 C.F.R. § 242.201(c) (prohibiting railroad from "[c]ertify[ing] a person as a conductor for an interval of more than 36 months").

In response, plaintiffs, noting the Harris plaintiffs, in their motion for class certification, stated they had retained an expert who would opine that Union Pacific's color-vision testing was "unvalidated" (see Barney Decl. Ex. 23 at 14), argue Union Pacific employees with "claims arising out of color vision testing" remained within the narrower class proposed by the Harris plaintiffs (see Pls.' Opp. at 10:2-10). As Union Pacific points out, however, the employees who failed Union Pacific's color-vision testing and remained members of the narrowed class were those employees who were subject to a fitness-for-duty examination as a result of a reportable health event, e.g., as noted above, a heart attack, a seizure of any kind, or a significant vision change, whereas plaintiffs in the instant case, as also noted, were subject to examinations as a result of FRA's periodic certification requirements.[7]

Accordingly, as plaintiffs were not included in the narrowed class definition set forth in the Harris plaintiffs' motion for class certification, they are not entitled to tolling beyond August 17, 2018, the date on which the Harris plaintiffs filed their motion for class

[7] Although plaintiffs also rely on a discovery order issued in Harris, by which order the district court found evidence regarding Union Pacific's color-vision testing was relevant to the Harris plaintiffs' claims, the cited order was issued prior to the district court's ruling on the motion for class certification, and its finding of relevance was based solely on the definition of the putative class as alleged in the FAC, not on the narrower class definition set forth in the Harris plaintiffs' motion for class certification. (See Barney Decl. Ex. 24 at 6-8.)

certification. See Blankinship v. Union Pacific Railroad Co., 2022 WL 4079425, at *5 (D. Ariz. September 6, 2022) (holding Union Pacific employee who was subject to color-vision testing "as part of the FRA recertification process" and not because of "a change in his color vision," was "not included in the class definition set forth in the Harris plaintiffs' motion for class certification" and, consequently, was not entitled to tolling beyond date Harris plaintiffs filed said motion);[8] Carrillo v. Union Pacific Railroad Co., 2021 WL 3023407, at *5 (W.D. Tex. July 16, 2021) (holding "tolling ended for [p]laintiff's disparate impact claim when the Harris class voluntarily abandoned [it]" by not seeking class certification as to said claim).

In sum, as it is undisputed that each plaintiff filed his EEOC complaint more than 300 days after the date on which the Harris plaintiffs' motion for class certification was filed, their ADA claims are time-barred.

**CONCLUSION**

For the reasons stated above, Union Pacific's motion for summary judgment is hereby GRANTED.

**IT IS SO ORDERED.**

Dated: September 16, 2022

MAXINE M. CHESNEY
United States District Judge

[8] On September 7, 2022, following the completion of briefing on the instant motion, Union Pacific filed a Statement of Recent Decision to bring the ruling in Blankinship to the Court's attention. Thereafter, on September 9, 2022, plaintiffs filed a Request for Leave to File Supplemental Evidence, wherein plaintiffs assert "[t]he Blankinship decision is in error" (see Pls.' Request at 1:27), and cite to various parts of the record in Harris. Even assuming the Court can consider such filing (see Civil L.R. 7-3(d)(2)) (providing Statement of Recent Decision "shall contain a citation to and provide a copy of the new opinion without argument"), the Court is not persuaded the above-referenced documents support the conclusions plaintiffs seek to draw therefrom.

**WO**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF ARIZONA**

James Blankinship,

Plaintiff,

v.

Union Pacific Railroad Company,

Defendant.

No. CV-21-00072-TUC-RM

**ORDER**

Pending before the Court is Defendant Union Pacific Railroad Company's ("Defendant" or "Union Pacific") Motion for Summary Judgment. (Doc. 66.) Plaintiff James Blankinship ("Plaintiff" or "Blankinship") responded in opposition (Doc. 71), and Defendant replied (Doc. 76). For the following reasons, Defendant's Motion will be granted.

## I. Facts[1]

The Federal Railroad Administration ("FRA") issues regulations governing railroad conductors for the purpose of reducing accidents and improving railroad safety. (Doc. 68 at 2 ¶ 7; Doc. 72 at 2 ¶ 7.)[2] Defendant is required to comply with FRA regulations. (Doc. 68 at 2 ¶ 8; Doc. 72 at 2 ¶ 8.) FRA regulations require all railroad conductors to pass a vision acuity examination that tests an individual's ability to recognize and distinguish between the colors of railroad signals. (Doc. 68 at 2 ¶ 9; Doc.

[1] Unless otherwise stated, there is no genuine dispute concerning the facts recited herein.
[2] All record citations refer to the docket and page numbers generated by this Court's electronic filing system.

72 at 2 ¶ 9); *see also* 49 C.F.R. § 242.117(h)(3). Railroads are required to determine that an individual meets FRA standards for visual acuity prior to certifying or recertifying the individual as a conductor. 49 C.F.R. § 242.117(b). The FRA has found that railroad employees with defective color vision have a higher relative error risk. (Doc. 68 at 5 ¶ 26; Doc. 72 at 4 ¶ 26; *see also* Doc. 68-18 at 8.)[3]

FRA regulations identify the Ishihara (14 plate) test as an acceptable testing method for determining whether a person can recognize and distinguish between the colors of railroad signals. (Doc. 68 at 2 ¶ 10; Doc. 72 at 2 ¶ 10; *see also* Doc. 68-15 at 51 (49 C.F.R. Pt. 242, App'x D(2)).) If an individual does not successfully complete the Ishihara test or one of the other acceptable initial tests set forth in 49 C.F.R. Pt. 242, App'x D, the railroad must, on request, subject the individual to "further medical evaluation by [the] railroad's medical examiner to determine that person's ability to safely perform as a conductor." 49 C.F.R. § 242.117(j). The further medical evaluation may include ophthalmologic referral or secondary testing using "another approved scientific screening test or a field test." (Doc. 68-15 at 51 (49 C.F.R. Pt. 242, App'x D(4)).)[4]

In 1999, Defendant implemented a Color Vision Field Test ("CVFT") that presented examinees with ten wayside signal configurations and measured the accuracy and speed of examinees' identification of the signals. (Doc. 68 at 3 ¶ 17; Doc. 72 at 3 ¶ 17.) Defendant hired Plaintiff as a railroad conductor in 2007. (Doc. 68 at 1 ¶ 1; Doc. 72 at 2 ¶ 1.) Meeting FRA color vision standards was an essential part of Plaintiff's conductor job. (Doc. 68 at 2 ¶ 5; Doc. 72 at 2 ¶ 5.) Prior to 2017, Plaintiff underwent

[3] The Court grants Defendant's request (Doc. 70) to take judicial notice of the existence of the FRA's March 2015 final report entitled "Railroad Signal Color and Orientation: Effects of Color Blindness and Criteria for Color Vision Field Tests." *See* Fed. R. Evid. 201; *Lee v. City of L.A.*, 250 F.3d 668, 689-90 (9th Cir. 2001). It also appears the report could be presented at trial in admissible form under Federal Rule of Evidence 803(8).

[4] A field test "is a test performed outdoors under test conditions that reasonably match actual operating or working conditions." 80 Fed. Reg. 73122-01, 73124 (Nov. 24, 2015). "A scientific vision test is a test instrument that, based on the results of a rigorous scientific study published in a peer-reviewed scientific or medical journal or other publication, is a valid, reliable, and comparable test for assessing whether a person has sufficient . . . color vision, which, for purposes o[f] railroad operations, allows the person to safely perform as a locomotive engineer or conductor." *Id.*

Defendant's color-vision testing for FRA certification on three occasions: in 2007, 2011, and 2013. (Doc. 68 at 7 ¶ 38; Doc. 72 at 6 ¶ 38.) In 2011, Plaintiff failed the Ishihara (14 plate) test but passed Defendant's then-current version of the CVFT. (Doc. 68 at 7 ¶ 38; Doc. 72 at 6 ¶ 38.)

In June 2012, two Union Pacific freight trains collided in Goodwell, Oklahoma, killing three people and causing approximately $14.8 million in damage. (Doc. 68 at 3-4 ¶¶ 18-19; Doc. 72 at 3 ¶¶ 18-19.) The National Transportation Safety Board ("NTSB") concluded that one of the probable causes of the collision was the inability of one of the train engineers to see and correctly interpret wayside signals. (Doc. 68 at 4 ¶ 20; Doc. 72 at 3-4 ¶ 20; *see also* Doc. 68-17 at 52-53.)[5] The NTSB recommended that Defendant replace its CVFT "with a test that has established and acceptable levels of validity, reliability, and comparability to ensure that certified employees in safety-sensitive positions have sufficient color discrimination to perform safely." (Doc. 68-17 at 30; *see also* Doc. 68 at 4 ¶¶ 22-23; Doc. 72 at 4 ¶¶ 22-23.)

Partially in response to the Goodwell collision, the FRA published in the Federal Register an interim interpretation entitled "Best Practices for Designing Vision Field Tests for Locomotive Engineers or Conductors." (Doc. 68 at 5 ¶¶ 27-28; Doc. 72 at 4 ¶¶ 27-28); *see also* 80 Fed. Reg. 73122-01. The FRA's Best Practices interpretation notes that railroads have discretion in selecting secondary test protocols but that "the test offered by a railroad must be a valid, reliable, and comparable test for assessing whether a person who fails an initial vision test can safely perform as a locomotive engineer or conductor." 80 Fed. Reg. at 73124. "Validity means the degree to which a test actually measures what the test is intended to measure[,] . . . [r]eliability means the degree of reproducibility of the test results," and "[c]omparability means the testing procedures are fairly administered and the test results are uniformly recorded." *Id.* at 73125. The Best Practices interpretation also sets forth "broadly drafted" industry best practices for

[5] The Court grants Defendant's request (Doc. 70) to take judicial notice of the existence of the NTSB's report regarding the Goodwell collision. *See* Fed. R. Evid. 201; *Lee*, 250 F.3d at 689-90. It also appears the report could be presented at trial in admissible form under Federal Rule of Evidence 803(8).

conducting color vision field testing. *Id.* at 73126-73128.

After the NTSB investigation of the Goodwell collision and the FRA's issuance of the Best Practices interpretation, Defendant implemented a revised CVFT known as the Light Cannon test. (Doc. 68 at 5-6 ¶¶ 30-31, 33; Doc. 72 at 4-5 ¶¶ 30-31, 33.) The parties dispute whether the FRA has determined that the Light Cannon test satisfies FRA requirements as a valid, reliable, and comparable test. (Doc. 68 at 6 ¶¶ 34-36; Doc. 72 at 5 ¶¶ 33-36; *see also* Doc. 72 at 11-14 ¶¶ 20-35.)

On January 3, 2017, Plaintiff failed the Ishihara (14 plate) test administered as part of the process for FRA recertification as a conductor. (Doc. 68 at 7 ¶ 39; Doc. 72 at 6 ¶ 39.) On January 12, 2017, Plaintiff failed Defendant's Light Cannon test. (Doc. 68 at 7 ¶ 41; Doc. 72 at 6 ¶ 41.) Defendant's chief medical officer reviewed the results of Plaintiff's failed Ishihara and Light Cannon tests, concluded that Plaintiff did not meet FRA certification requirements for his conductor position and, on January 19, 2017, issued Plaintiff a Notification of FRA Certification Denial. (Doc. 68 at 7 ¶ 42; Doc. 72 at 6 ¶ 42.) Defendant issued Plaintiff permanent work restrictions prohibiting him from working in any position requiring accurate identification of colored railroad wayside signals. (Doc. 68 at 8 ¶ 44; Doc. 72 at 6 ¶ 44.) On February 16, 2017, at the request of Plaintiff's union representative, Defendant administered to Plaintiff a second Light Cannon test. (Doc. 68 at 8 ¶¶ 45-46; Doc. 72 at 6 ¶¶ 45-46.) Plaintiff failed the second Light Cannon test. (Doc. 68 at 8 ¶ 46; Doc. 72 at 8 ¶ 46.) On March 9, 2017, Defendant's chief medical officer again issued Plaintiff a Notification of FRA Certification Denial. (Doc. 68 at 8-9 ¶ 47; Doc. 72 at 6 ¶ 47.) Plaintiff did not appeal or contest the second Light Cannon test or the results thereof. (Doc. 68 at 9 ¶ 49; Doc. 72 at 6 ¶ 49.) Plaintiff has not been certified as a conductor under FRA standards since his removal from service in January 2017. (Doc. 68 at 9 ¶ 50; Doc. 72 at 6 ¶ 50.)

As this Court has previously recognized, Plaintiff was a putative ADA class member in *Harris v. Union Pacific Railroad Company*, No. 8:16-cv-381 (D. Neb.), a class action commenced in February 2016 by Union Pacific employees alleging disability

discrimination. (Doc. 31 at 2; *see also* Doc. 13 at 3-4 ¶¶ 4-5, 11-12; Doc. 67 at 3.) The complaint in *Harris* raised class claims for disparate treatment, disparate impact, and unlawful medical inquiry under the Americans with Disabilities Act ("ADA"). (Doc. 68 at 9 ¶ 51; Doc. 72 at 6 ¶ 51; *see also* Doc. 68-26 at 21-24.)[6] On August 17, 2018, the *Harris* plaintiffs moved for class certification on the disparate treatment claim only, stating the operative class definition as: "All individuals who have been or will be subject to a fitness-for-duty examination as a result of a reportable health event at any time from September 18, 2014 until the final resolution of this action." (Doc. 68 at 9 ¶¶ 52-53; Doc. 72 at 6-7 ¶¶ 52-53; *see also* Doc. 68-27 at 2; Doc. 73-15 at 22.) On February 5, 2019, the *Harris* court certified the class as defined in the motion for class certification. *Harris v. Union Pac. R.R. Co.*, 329 F.R.D. 616, 628 (D. Neb. Feb. 5, 2019).[7] Defendant's Medical Rules—incorporated by reference into the *Harris* complaint—define a "reportable health event" in relevant part as "a new diagnosis, recent event, or change in a prior stable condition for . . . [s]ignificant vision change in one or both eyes affecting . . . color vision." (Doc. 68 at 10 ¶¶ 54-55; Doc. 72 at 7 ¶¶ 54-55; *see also* Doc. 68-26 at 4-5, 44.) Blankinship did not experience an event of significant vision change in one or both eyes affecting color vision at any time during his Union Pacific employment. (Doc. 68 at 10 ¶ 57; Doc. 72 at 7 ¶ 57.)

On April 10, 2020, Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). (Doc. 68 at 10 ¶ 59; Doc. 72 at 7 ¶ 59.) Plaintiff initiated this action on February 10, 2021 (Doc. 1) and, on March 24, 2021, filed a three-count First Amended Complaint ("FAC") alleging ADA violations (Doc. 13). On August 2, 2021, the Court dismissed as time-barred the failure-to-accommodate claim alleged in Count Three of the FAC. (Doc. 31.) The remaining claims in this action are Count One of the FAC, alleging disparate treatment in violation of 42 U.S.C. §

[6] The Court grants the requests of Defendant (Doc. 70) and Plaintiff (Doc. 74) to take judicial notice of relevant filings in the *Harris* case. *See* Fed. R. Evid. 201; *Lee*, 250 F.3d at 689-90.

[7] On March 24, 2020, the Eighth Circuit Court of Appeals reversed the district court's class certification. *Harris v. Union Pac. R.R. Co.*, 953 F.3d 1030 (8th Cir. 2020).

12112(a), and Count Two alleging disparate impact in violation of 42 U.S.C. § 12112(b)(3) and (b)(6). (Doc. 13 at 7-10.)

## II. Summary Judgment Standard

A court must grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The movant bears the initial responsibility of presenting the basis for its motion and identifying those portions of the record, together with affidavits, if any, that it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. If the movant fails to carry its initial burden of production, the nonmovant need not produce anything. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102-03 (9th Cir. 2000). But if the movant meets its initial responsibility, the burden shifts to the nonmovant to demonstrate the existence of a factual dispute and to show (1) that the fact in contention is material, i.e., a fact "that might affect the outcome of the suit under the governing law," and (2) that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986); *see also Triton Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995).

At summary judgment, the judge's function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. In evaluating a motion for summary judgment, the court must "draw all reasonable inferences from the evidence" in favor of the non-movant. *O'Connor v. Boeing N. Am., Inc.*, 311 F.3d 1139, 1150 (9th Cir. 2002). If "the evidence yields conflicting inferences, summary judgment is improper, and the action must proceed to trial." *Id.* "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3).

## III. Discussion

In its Motion for Summary Judgment, Defendant argues that Plaintiff's remaining

claims are time-barred and that they fail on the merits. (Doc. 67.) For the following reasons, the Court finds that Plaintiff's claims are time-barred. The Court therefore declines to address the parties' arguments concerning the merits of the claims.

A plaintiff must timely exhaust his administrative remedies before filing an ADA suit by first filing an EEOC charge of discrimination. *See* 42 U.S.C. § 2000e-5(e)(1); 42 U.S.C. § 12117(a) (establishing that the procedures set forth in 42 U.S.C. § 2000e-5 apply to charges under the ADA). Absent tolling, the EEOC charge of discrimination must be filed within 300 days from the employer's alleged discrete employment act. 42 U.S.C. § 2000e-5(e)(1); 42 U.S.C. § 12117(a); *Rush-Shaw v. USF Reddaway, Inc.*, No. CV 12–0941–PHX–JAT, 2013 WL 3455723, at *3 (D. Ariz. July 9, 2013). However, "the commencement of [an] original class suit tolls the running of the statute [of limitations] for all purported members of the class" until class certification is denied. *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974); *Crown, Cork & Seal, Co. v. Parker*, 462 U.S. 345, 354 (1983). Class action tolling satisfies the policies underlying statutory limitation periods—namely, "ensuring essential fairness to defendants and . . . barring a plaintiff who has slept on his rights"—because the commencement of the class suit notifies the defendants, within the limitation period, of not only "the substantive claims being brought against them" but also "the number and generic identities of the potential plaintiffs who may participate in the judgment." *Am. Pipe*, 414 U.S. at 554-55 (internal quotation marks omitted). Because the defendant is alerted within the limitations period "of the need to preserve evidence and witnesses respecting the claims of all the members of the class," tolling "creates no potential for unfair surprise." *Crown, Cork & Seal*, 462 U.S. at 353.

Defendant does not dispute, for purposes of summary judgment, that the statute of limitations on Plaintiff's remaining ADA claims was tolled until the *Harris* plaintiffs moved for class certification. (Doc. 67 at 3.) However, Defendant argues that *American Pipe* tolling ceased on August 17, 2018, when the *Harris* plaintiffs moved for class certification on the disparate treatment claim only and proffered a class definition that

excluded Plaintiff. (*Id.* at 3-10.) In response, Plaintiff argues that both of his remaining ADA claims are subject to *American Pipe* tolling because the *Harris* complaint asserted disparate treatment and disparate impact claims under the ADA and the *Harris* class included individuals removed from service for color vision deficiency following a failed Light Cannon test. (Doc. 71 at 4-11.)

The Tenth Circuit Court of Appeals has held that when plaintiffs assert in a motion for class certification a definition of the class that is narrower than required by their complaint, the narrower definition controls for purposes of *American Pipe* tolling. *Sawtell v. E.I. du Pont de Nemours & Co.*, 22 F.3d 248, 253-54 (10th Cir. 1994). The Fourth Circuit Court of Appeals has similarly held "that when a plaintiff moves for class certification by asserting an unambiguous definition of his desired class that is more narrow than is arguably dictated by his complaint, his asserted class for tolling purposes may be limited to that more narrow definition," and *American Pipe* tolling will be unavailable for parties outside the asserted class. *Smith v. Pennington*, 352 F.3d 884, 894 (4th Cir. 2003). The Ninth Circuit has cited *Sawtell* favorably, *see In re Syntax Corp. Sec. Litig.*, 95 F.3d 922, 936 (9th Cir. 1996), but has not addressed the precise issue of whether a motion for class certification may narrow a class for purposes of *American Pipe* tolling.

The *Harris* complaint focused on fitness-for-duty evaluations triggered by reportable health events. (*See* Doc. 68-26 at 4-8.) The complaint alleged a class consisting of individuals who were removed from service and/or suffered another adverse employment action for reasons related to a fitness-for-duty evaluation. (*Id.* at 17.) Arguably, that putative class was broad enough to encompass Blankinship, despite the complaint's focus on fitness-for-duty evaluations triggered by reportable health events. However, the *Harris* plaintiffs' August 17, 2018 motion for class certification made clear that the intended class consisted only of those individuals "subject to a fitness-for-duty examination as a result of a reportable health event." (Doc. 68 at 9 ¶ 53; Doc. 72 at 6-7 ¶ 53; *see also* Doc. 68-27 at 2; Doc. 73-15 at 22.) Blankinship did not experience a change

in his color vision that would fall under the definition of a "reportable health event." (Doc. 68 at 10 ¶¶ 54-55, 57; Doc. 72 at 7 ¶¶ 54-55, 57.) He was subjected to Defendant's color-vision testing procedures not as a result of a reportable health event but, rather, as part of the FRA recertification process. (Doc. 68 at 7 ¶ 39; Doc. 72 at 6 ¶ 39.)[8] Accordingly, there is no genuine dispute that Blankinship was not included in the class definition set forth in the *Harris* plaintiffs' motion for class certification. Accordingly, under the reasoning of *Sawtell* and *Smith*, tolling ended upon the filing of the motion for class certification on August 17, 2018. After that date, Plaintiff had no reason to assume his rights were being protected by the *Harris* class action, and Defendant had no reason to believe that plaintiffs who were not subject to fitness-for-duty evaluations as a result of reportable health events might participate in the *Harris* judgment. Plaintiff did not file an EEOC charge of discrimination within 300 days of the filing of the motion for class certification in *Harris*. Accordingly, his ADA claims are time-barred.[9]

The Court also finds that *American Pipe* tolling ceased with respect to Plaintiff's disparate impact claim when the *Harris* plaintiffs voluntarily abandoned that claim in their August 17, 2018 motion for class certification. *See Smithson v. Union Pac. R.R. Co.*, __ F. Supp. 3d __, 2022 WL 1506288, at *3 (W.D. Tex. May 11, 2022) ("Once the

[8] As Plaintiff notes (Doc. 71 at 7), the *Harris* court issued an Order on February 1, 2019 allowing discovery related to Defendant's color vision testing procedures, finding that the allegations of the plaintiffs' complaint encompassed vision testing (Doc. 73-16 at 3-8). But Defendant does not dispute that the *Harris* class included individuals who were subjected to vision-related fitness-for-duty examinations. (*See* Doc. 76 at 3.) The issue is whether the class included individuals, like Blankinship, who were subjected to Defendant's color vision testing procedures as part of an FRA recertification process rather than as a result of a reportable health event.

[9] The Southern District of New York has found that a motion for class certification cannot trigger the end of *American Pipe* tolling, reasoning based on case law from the Second Circuit Court of Appeals that tolling continues until members of the asserted class opt out or a certification decision excludes them. *Choquette v. Cty. of N.Y.*, 839 F. Supp. 2d 692, 699-702 (S.D.N.Y. 2012) (citing *In re Worldcom Sec. Litig.*, 496 F.3d 245, 255 (2d Cir. 2007)). Even assuming that the Ninth Circuit would reject *Sawtell* and *Smith* and instead hold, consistent with *Choquette*, that the actions of class counsel cannot trigger the end of *American Pipe* tolling, the *Harris* court certified the class as defined in the plaintiffs' motion for class certification—thereby issuing a class certification decision that unambiguously excluded Blankinship—on February 5, 2019. *Harris*, 329 F.R.D. at 628. Therefore, as of February 5, 2019 at the latest, Blankinship had no reason to believe his rights were being protected by the *Harris* class action. Blankinship did not file an EEOC charge of discrimination within 300 days of the *Harris* court's February 5, 2019 class certification decision.

*Harris* Plaintiffs moved only to certify the disparate-treatment claim, the putative class members . . . had no reason to assume that their rights were being protected as to any other ADA-related claim."); *Carrillo v. Union Pac. R.R. Co.*, No. EP-21-CV-00026-FM, 2021 WL 3023407, at *4-6 (W.D. Tex. July 16, 2021) (finding tolling ended on putative class members' individual disparate impact claims when *Harris* plaintiffs moved to certify only the disparate treatment claim); *Fulbright v. Union Pac. R.R. Co.*, No. 3:20-CV-2392-BK, 2022 WL 625082, at *6 (N.D. Tex. Mar. 2, 2022) (finding ADA "unlawful medical inquiry claim was no longer tolled under the *Harris* class action once the named plaintiffs in that suit voluntarily abandoned" that claim "before moving to certify the class").

Accordingly,

**IT IS ORDERED** that Defendant's Motion for Summary Judgment (Doc. 66) is **granted**. The remaining claims in this action—Plaintiff's ADA disparate treatment and disparate impact claims asserted in Counts One and Two of the First Amended Complaint—are **dismissed with prejudice as time-barred**. The Clerk of Court is directed to enter judgment in favor of Defendant and close this case.

Dated this 2nd day of September, 2022.

Honorable Rosemary Márquez
United States District Judge