APPENDIX

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United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 12, 2024
Lyle W. Cayce
Clerk

No. 23-50194

ROBERT ANTHONY ZARAGOZA,

Plaintiff—Appellant,

versus

UNION PACIFIC RAILROAD COMPANY, *a Delaware Corporation*,

Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:21-CV-287

Before WILLETT, WILSON, and RAMIREZ, *Circuit Judges*.

CORY T. WILSON, *Circuit Judge*:

American Pipe tolling equitably freezes the statute of limitations for all putative or certified class members during the pendency of a class action. *American Pipe & Const. Co. v. Utah*, 414 U.S. 538 (1974). Plaintiff-Appellant Robert Zaragoza contends *American Pipe* salvages his otherwise untimely discrimination claims against Defendant-Appellee Union Pacific Railroad Company. Zaragoza asserts that his claims were tolled from 2016 to 2020 because he was a putative and certified class member in a separate class action against Union Pacific during that period. The district court rejected Zaragoza's argument and dismissed his claims at summary judgment, as

untimely. However, because the operative complaint and certification order in the class action both contained class definitions that included Zaragoza, his claims were tolled, and the district court erred by concluding otherwise. We reverse the district court's dismissal of Zaragoza's disability discrimination claims and remand for further proceedings.

I.

A.

Zaragoza worked as a brakeman and train conductor for Union Pacific from November 2006 to April 2016. Zaragoza's employment was terminated in July 2015 after he tested positive for cocaine; he was reinstated in September 2015. Throughout Zaragoza's tenure, including after his reinstatement, Union Pacific administered a fitness-for-duty program to comply with various internal and federal safety regulations. Union Pacific's Medical Rules establish the fitness-for-duty program, which applies to all employees and post-offer applicants. That program includes tests designed to assess employees' color vision acuity.

One such test, the Ishihara test, requires subjects to identify numbers and figures made up of multi-colored dots across fourteen plates. Zaragoza passed an Ishihara test when he began his employment in 2006, though he failed them in 2010, 2013, and 2016. When Zaragoza failed those Ishihara tests, he was given additional field tests to assess his color vision. In 2010 and 2013, Union Pacific's alternate field test required the subject to identify ten wayside signal configurations in a preset order. Zaragoza passed the field test in those years, and he was allowed to continue working as a conductor.

However, in 2014, Union Pacific amended its fitness-for-duty program. Some of the changes included suspension from duty without pay, further testing requirements, and, in some cases, termination from the company if an employee disclosed or Union Pacific discovered certain

medical or physical conditions. Applicable here, the updated policy also required those who failed the Ishihara test to complete a new field test using a light cannon. The light cannon was placed a quarter mile away from the examinee, and the examinee was shown twenty separate signal lights for three seconds each, which the examinee then had to identify. When Zaragoza failed the Ishihara test on April 8, 2016, he was removed from service. After he also failed the light cannon test on April 19, 2016, he was denied recertification as a train conductor on May 3, 2016.

Over the next few months, Zaragoza contested Union Pacific's determination that he had a color vision deficiency. Zaragoza submitted various reports from doctors attesting to his adequate color vision, though he wore special contact lenses to pass at least one of his doctor's tests. There is a question whether Zaragoza wore similar corrective lenses for the Union Pacific tests that he passed in 2006, 2010, and 2013. Regardless, Zaragoza was never reinstated as a conductor.

B.

As we will discuss *infra*, according to Zaragoza, the proceedings in *Harris v. Union Pacific Railroad Co.* tolled his eventual claims regarding the updated fitness-for-duty policy against Union Pacific. 329 F.R.D. 616 (D. Neb. 2019), *rev'd*, 953 F.3d 1030 (8th Cir. 2020). In February 2016—two months before Zaragoza failed Union Pacific's color vision tests in April 2016—Quinton Harris and five other named plaintiffs filed their first amended complaint in *Harris*, bringing disability discrimination claims against Union Pacific on behalf of current and former Union Pacific employees. This operative complaint defined the relevant 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 does not contest that Zaragoza fell within this class definition.

Over two years later, in August 2018, the *Harris* plaintiffs moved for class certification under a slightly revised class definition:

> 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 *Harris* plaintiffs supported their motion with forty-four declarations from prospective class members, including three declarations from workers who—like Zaragoza—had suspected or admitted color vision deficiencies. The *Harris* plaintiffs also supported their motion with a prospective class list—originally produced by Union Pacific—of 7,723 current or former Union Pacific employees, including Zaragoza.

In February 2019, the district court granted class certification using the exact language from the *Harris* plaintiffs' proposed revised class definition, while referencing the forty-four declarations as being from "class members." *Harris*, 329 F.R.D. at 624 & n.3. The district court also adopted the *Harris* plaintiffs' proposed class list and ordered that notices be sent to the listed individuals, which still included Zaragoza. *Id.* at 627–28.

Union Pacific appealed the class certification to the Eighth Circuit, asserting that the class presented too many individualized questions. In its arguments, Union Pacific referenced vision issues among class members and cited two of the declarations submitted by Union Pacific workers with alleged color vision deficiencies as examples of why the certified class was too unwieldy. The Eighth Circuit ultimately agreed with Union Pacific and

decertified the class in an opinion issued on March 24, 2020. *Harris v. Union Pac. R.R. Co.*, 953 F.3d 1030, 1039 (8th Cir. 2020).

C.

Zaragoza filed his disability discrimination charge with the EEOC on March 8, 2020, just before the Eighth Circuit decertified the *Harris* class. After the EEOC completed its review of his case in October 2021, Zaragoza filed this action in November 2021, bringing claims for disparate treatment, disparate impact, and failure to accommodate. The district court dismissed Zaragoza's failure to accommodate claim at the motion to dismiss stage as time-barred, and that decision has not been appealed. The district court then dismissed Zaragoza's remaining claims via summary judgment as untimely, finding that the *Harris* district court's February 2019 certification order ended tolling for his claims and that the applicable 300-day statute of limitations expired before March 2020. The district court did not reach the merits of the parties' other arguments. Zaragoza appealed the district court's summary judgment in favor of Union Pacific.

II.

We review "summary judgment[s] *de novo*, applying the same standard as the district court." *Moss v. BMC Software, Inc.*, 610 F.3d 917, 922 (5th Cir. 2010) (emphasis added). Summary judgment is warranted "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). A material fact is one that "might affect the outcome of the suit under the governing law," and a genuine dispute exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "When considering a motion for summary judgment, the court views all facts and evidence in the light most favorable to the non-moving party." *Howell v. Town of Ball*, 827 F.3d

515, 522 (5th Cir. 2016) (quoting *Moss*, 610 F.3d at 922). The equitable underpinnings of *American Pipe* tolling do not affect our standard of review. *See Odle v. Wal-Mart Stores, Inc.*, 747 F.3d 315, 319 (5th Cir. 2014); *Taylor v. United Parcel Serv., Inc.*, 554 F.3d 510, 516 (5th Cir. 2008).

III.

Zaragoza contends that his discrimination claims against Union Pacific should benefit from *American Pipe* tolling and are timely. We agree. (A) Surveying the applicable law, a putative class is defined by the plaintiffs' operative complaint, at least until that class is certified, when the district court's certification order supplants the definition as pled. Applying these principles, (B) we determine that Zaragoza's claims were tolled by his inclusion in both the putative and certified class definitions in the *Harris* class action. Thus disposing of the main issue on appeal, (C) we decline to engage Union Pacific's contention that the district court's dismissal of Zaragoza's claims should be upheld on alternate grounds.

A.

Under *American Pipe*, "the 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. In *Crown, Cork & Seal Co. v. Parker*, the Supreme Court reiterated *American Pipe*'s holding, articulating that "[o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action." 462 U.S. 345, 354 (1983). This rule guards against "protective motions to intervene" or individual suits from every involved party wary that their rights may be in jeopardy. *American Pipe*, 414 U.S. at 553. It necessarily sweeps broadly to cover even "asserted class members

who were unaware of the proceedings brought in their interest or who demonstrably did not rely on the institution of those proceedings." *Id.* at 552.

A class is initially defined by the plaintiffs via their complaint. *Cf. id.* at 554 (emphasizing that "asserted members of the class" benefit from tolling). Plaintiffs have the prerogative to define the scope of claims that they bring and notify 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." *Id.* at 555. As class actions progress, plaintiffs may expand, narrow, or otherwise refine their action by filing amended pleadings. These amended class definitions supersede prior ones for tolling purposes. *See Odle*, 747 F.3d at 316–19 (analyzing a plaintiff's entitlement to tolling based in part on a prior class action's amended pleading).

However, plaintiffs' prerogative to redefine a class does not extend beyond amending their pleadings. From there, the onus falls to the district court to "define, redefine, subclass, and decertify as appropriate in response to the progression of the case from assertion to facts." *Salazar-Calderon v. Presidio Valley Farmers Ass'n (Calderon I)*, 765 F.2d 1334, 1350 (5th Cir. 1985) (quoting *Richardson v. Byrd*, 709 F.2d 1016, 1019 (5th Cir.), *cert. denied*, 464 U.S. 1009 (1983)). Accordingly, class definitions are not affected by intervening motions in a class action—even motions to certify a class. This practice of placing the class definition exclusively in the hands of the district judge after the pleading stage promotes "efficiency and economy of litigation," which is one of the chief goals of the equitable tolling doctrine. *American Pipe*, 414 U.S. at 553. Relevant here:

> When a class is certified . . . the district court has necessarily determined that all of the Rule 23 factors are met. From that point forward, unless the district court later decertifies the class for failure to satisfy the Rule 23 factors, members of the

> certified class may continue to rely on the class representative to protect their interests throughout the entire prosecution of the suit, including appeal.

Taylor, 554 F.3d at 520–21. Thus, when a district court certifies a class, that certified class becomes the pertinent class definition.[1] Further, the class definition persists through appeal.[2] A subsequent decertification of that class, either by the district court or the appellate court, ends tolling going forward but does not affect the earlier class certification for tolling purposes.

To summarize: Prior to class certification, the pertinent class definition in a class action is drawn from the plaintiffs' operative complaint(s). That class definition is not disturbed by precertification motions practice during the life cycle of a class action. And at the point a district court certifies a class, the certified class definition supersedes any previously articulated ones. That certified class persists—even through appeal—until the class is decertified or the case is otherwise resolved.

B.

Today's task is to determine whether Zaragoza was part of the *Harris* class, and if so, how long he was included in the class. Relevantly, Zaragoza's claims accrued in April 2016 when he was removed from service,

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[1] Here, the pertinent class was actually a subclass within the *Harris* class action. But as Federal Rule of Civil Procedure 23(c)(5) explains, "a class may be divided into subclasses that are each treated as a class." FED. R. CIV. P. 23(c)(5).

[2] By comparison, when a district court denies class certification, tolling immediately ends for putative class members. *Hall v. Variable Annuity Life Ins. Co.*, 727 F.3d 372, 375 (5th Cir. 2013). Even if the district court is reversed on appeal and subsequently certifies the class it previously denied, the statute of limitations for the claimants would have resumed and possibly expired during the intervening period. *Calderon v. Presidio Valley Farmers Ass'n (Calderon II)*, 863 F.2d 384, 390 (5th Cir. 1989); *see also Odle*, 747 F.3d at 321 (discussing *Calderon I* and *Calderon II*).

approximately two months after the operative complaint in *Harris* had been filed.[3] And Zaragoza filed his own charge of discrimination in March 2020 shortly before the Eighth Circuit decertified the *Harris* class. This timeline narrows our inquiry to two key points. First, looking to the then-operative pleading, was Zaragoza included in the class definition of the February 2016 complaint in *Harris*? Second, was Zaragoza included in the *Harris* district court's certified class? We answer both questions affirmatively, such that Zaragoza was consistently a member of the *Harris* class for tolling purposes.

1.

The operative complaint in *Harris* was an amended complaint filed on February 19, 2016. That complaint defined the relevant proposed class as follows:

> 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.

The district court in this case did not address whether this class definition encompassed Zaragoza, and Union Pacific does not argue that Zaragoza was excluded from it.

The lack of attention on this point underscores its relative simplicity. After all, Zaragoza failed a color vision test administered through Union Pacific's fitness-for-duty program that resulted in the loss of his job over his objection. These circumstances easily place Zaragoza within the class

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[3] Arguably, Zaragoza's claims accrued in May 2016 when he was denied recertification, but the parties do not address this detail, and it does not bear on our analysis.

definition alleged in the operative February 2016 *Harris* complaint. In practical terms, this means the limitations period on Zaragoza's claims against Union Pacific was tolled from the moment his claims accrued—as the operative complaint in *Harris* was already on file at that time.[4] The tolling effect of this class definition persisted at least until the district court certified the *Harris* class and adopted a revised class definition.

2.

The *Harris* class was certified under a revised definition on February 5, 2019. Zaragoza initiated his EEOC proceedings on March 8, 2020. Accordingly, allowing that Zaragoza was a member of *Harris*'s February 2016 proposed class definition, he must also have been a member of the revised definition; otherwise, the statute of limitations for his claims would have started to run on February 5, 2019, and expired before March 8, 2020. *See, e.g.*, *Ramirez v. City of San Antonio*, 312 F.3d 178, 181 (5th Cir. 2002) (describing the 300-day statute of limitations for discrimination claims under the Americans with Disabilities Act).

As highlighted above, the *Harris* district court certified a class of plaintiffs including "[a]ll individuals who ha[d] been or w[ould] 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 [*Harris*]." 329 F.R.D. at 628. In its order, the court referenced "declarations from 44 *class members* who have experienced the discrimination alleged herein." *Id.* at 624 (emphasis added). Those included several employees with admitted or alleged color vision deficiencies. The *Harris* district court also directed that

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[4] *American Pipe* explains that tolling a statute of limitations simply pauses the clock; it does not reset it. 414 U.S. at 560–61. In other words, if certain claims are tolled eleven days before the statute of limitations expires—as was the case in *American Pipe*—then the plaintiff only has eleven days to act once tolling ceases. *Id.* at 561.

notice of the class claims be sent to a "class list," which included Zaragoza, though there is no indication those notices were distributed. *Id.* at 627–28.

Union Pacific consistently objected that this class definition was overbroad, and the Eighth Circuit ultimately agreed on appeal. *Harris*, 953 F.3d at 1039. But Union Pacific's position and its success on appeal only support the conclusion that the class as certified was expansive for tolling purposes. The upshot seems plain: The *Harris* district court's certified class included Zaragoza as a member, and the court as well as those parties so treated him. That alone could, and perhaps should, end the inquiry. *See Calderon I*, 765 F.2d at 1350 (recognizing "that these complex cases cannot be run from the tower of the appellate court given its distinct institutional role and that it has before it printed words rather than people" (quoting *Richardson*, 709 F.2d at 1019)). However, in this action, Union Pacific nonetheless contends that Zaragoza falls outside of the certified class based on the class definition.[5]

But even considering the matter afresh, we conclude that Zaragoza fell within *Harris*'s certified class definition, as revised from the one proposed in February 2016. To review, he failed an Ishihara color vision test in 2016. This result indicated that an aspect of Zaragoza's health, namely his color vision, had deteriorated since his last recertification and warranted further review. Under Union Pacific's fitness-for-duty program, this "reportable health event" triggered a follow up test using the light cannon. When Zaragoza also failed the light cannon test, he suffered an adverse employment action—the loss of his job. Therefore, Zaragoza is an "individual[] who ha[d] been . . . subject to a fitness-for-duty examination as a result of a reportable

[5] Union Pacific may well be estopped from discarding its previous representations of the *Harris* class's overbreadth to argue here that same class was narrow enough to have excluded Zaragoza. Zaragoza does not press this possibility, so we do not explore it either.

health event" during the class period encompassed by the certified class definition. *Harris*, 329 F.R.D. at 628.

Of course, this conclusion hinges on whether Zaragoza's failed Ishihara test in 2016 was a "reportable health event"—a conclusion that Union Pacific vigorously contests. A "reportable health event," as used in the certified class definition, is a term of art drawn from Union Pacific's Medical Rules, meaning "a new diagnosis, recent event, or change in a prior stable condition." A "[s]ignificant vision change in one or both eyes affecting . . . color vision" is specifically enumerated in Appendix B of the Medical Rules as a "reportable health event." Noting Zaragoza's repeated failures of the Ishihara test in 2010, 2013, and 2016, his passing the prior alternate test in 2010 and 2013, and his failing the new light cannon test in 2016, Union Pacific argues that "[t]hese results suggest a change in testing methods, rather than a change in Zaragoza's vision." This may prove to be true, but it is far from undisputed. Indeed, the alleged impropriety of the light cannon test and adequacy of Zaragoza's color vision are core aspects of his disability discrimination claims against Union Pacific. And "construing all facts and reasonable inferences in favor of the nonmoving party," *Lillie v. Off. of Fin. Institutions State of Louisiana*, 997 F.3d 577, 582 (5th Cir. 2021), as we must at this stage, Zaragoza's failed Ishihara test in 2016 at least suggested that his previously certified color vision acuity may have no longer been passable, such that it met the definition of a "reportable health event."

As a final point, the district court in this case cited two out-of-circuit cases, *Smith v. Pennington*, 352 F.3d 884 (4th Cir. 2003), and *Sawtell v. E.I. du Pont de Nemours & Co.*, 22 F.3d 248 (10th Cir. 1994), for the proposition that "once a court adopts a class definition that unambiguously excludes certain plaintiffs, their individual limitations periods begin to run." The Ninth Circuit recently reached the same conclusion in a companion case to the one before us. *DeFries v. Union Pac. R.R. Co.*, 104 F.4th 1091 (9th Cir.

2024). We agree, but because we think the class definition does not unambiguously exclude Zaragoza, this principle supports Zaragoza's position, not Union Pacific's.[6]

"Ending *American Pipe* tolling with anything short of unambiguous narrowing would undermine the balance contemplated by the Supreme Court" by "encourag[ing] putative or certified class members to rush to intervene as individuals or to file individual actions." *DeFries*, 104 F.4th at 1099. Indeed, "the class action mechanism would not succeed in its goal of reducing repetitious and unnecessary filings if members of a putative class were required to file individual suits to prevent their claims from expiring." *Hall v. Variable Annuity Life Ins. Co.*, 727 F.3d 372, 375 (5th Cir. 2013). Based on our assessment of Zaragoza's claims, the class definition certified by the *Harris* district court included him. At least, given the record before us, Zaragoza was not "*unambiguously excluded*" from the *Harris* certified class. *DeFries*, 104 F.4th at 1105 (emphasis added). Thus, Zaragoza's claims were tolled during the pendency of the *Harris* certified class.

* * *

Zaragoza was included in the class definition of the operative February 2016 complaint in *Harris*. His claims were also included within the *Harris* district court's certified class definition. Thus, Zaragoza's claims were tolled from the moment they accrued until the Eighth Circuit issued its mandate decertifying the *Harris* class, which effectively ended tolling for all putative

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[6] These precedents also confirm our consultation of Union Pacific's Medical Rules for the definition of "reportable health event." Two of these circuits explicitly considered materials outside of the complaints and motions for certification in delineating class membership. *See DeFries*, 104 F.4th at 1107–09; *Pennington*, 352 F.3d at 894–95. The other did not have record evidence outside of the complaint and motion for certification before it but was open to considering such evidence. *See Sawtell*, 22 F.3d at 253 & n.11.

Harris class members. *Harris*, 953 F.3d at 1039; *see also Hall*, 727 F.3d at 374 ("[T]he statute of repose ceased to be tolled when the class certification order was vacated."). But by the time the Eighth Circuit rendered its decision, Zaragoza had initiated EEOC proceedings for his claims. Therefore, those claims were timely asserted.

C.

Union Pacific raises several alternate grounds upon which we might affirm the district court's grant of summary judgment. Particularly, Union Pacific contends that Zaragoza's claims fail under the *McDonnell Douglas* framework and that Zaragoza was not a qualified employee due to his purported color vision deficiency. Zaragoza responds to these arguments in his reply, but the district court did not reach any of them in its decision.

"[A] court of appeals sits as a court of review, not of first view." *Montano v. Texas*, 867 F.3d 540, 546 (5th Cir. 2017) (citation omitted). This cautionary refrain has especial force when a potential alternate ground for affirmance involves a "fact intensive" summary judgment record, as it does here. *See, e.g.*, *Flores v. FS Blinds, L.L.C.*, 73 F.4th 356, 366 (5th Cir. 2023) (quoting *Hathcock v. Acme Truck Lines, Inc.*, 262 F.3d 522, 527 (5th Cir. 2001)) (reversing and remanding instead of reaching a fact intensive summary judgment argument in the first instance). In such a case, "[g]iven that the district court did not reach [the issues], the normal course would be to remand for the district court to do so." *Montano*, 867 F.3d at 546. Accordingly, we decline Union Pacific's invitation to affirm the district court on heretofore unexplored grounds; that court may consider the parties' remaining summary judgment arguments on remand. We forecast no opinion on the relative merits of the parties' assertions on these issues.

IV.

Zaragoza was included in the *Harris* class, as pled in February 2016 and as initially certified in February 2019. Therefore, his disability discrimination claims were tolled from the time they accrued until he asserted them, as an individual claimant, with the EEOC in March 2020. The district court's summary judgment dismissing Zaragoza's claims as untimely was therefore in error. We decline to consider the parties' remaining summary judgment arguments in the first instance.

REVERSED and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

ROBERT ANTHONY ZARAGOZA,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CAUSE NO. EP-21-CV-287-KC**
	§	
UNION PACIFIC RAILROAD COMPANY,	§	
	§	
	§	
Defendant.	§	

ORDER

On this day, the Court considered Defendant Union Pacific Railroad Company's ("Union Pacific") Motion for Summary Judgment ("Motion"), ECF No. 43. For the reasons set forth below, the Motion is **GRANTED**.

I. BACKGROUND

The following facts are undisputed unless otherwise noted.

A. Plaintiff's Employment Dispute

This case involves the implementation of Union Pacific's internal Fitness-for-Duty ("FFD") policies, and how those policies affected employees—like Zaragoza—with color-vision deficiency. *See* Compl. ¶¶ 1–5, ECF No. 1. The Federal Railroad Administration ("FRA") requires companies like Union Pacific to periodically assess the color vision of certain employees. *See* 49 C.F.R. § 242.117(b), (h)(3); Def.'s Proposed Undisputed Facts ("PUF") ¶¶ 10–11, ECF No. 43-1. FRA regulations provide for two levels of color-vision testing. *See* 49 C.F.R. pt. 242 app. D. First, a railroad employee must take one of several "acceptable" tests listed by the FRA to "determin[e] whether [the employee] has the ability to recognize and distinguish among the colors used as signals in the railroad industry." *Id.* app. D(2). Then, if the

employee fails the initial test, they "may be further evaluated as determined by the railroad's medical examiner," using, among other things, "field testing." *Id.* app. D(4).

Zaragoza has color-vision deficiency, which he disclosed to Union Pacific during his preemployment medical evaluation. PUF ¶ 49. During his FRA examinations in 2010 and 2013, Zaragoza took and failed the Ishihara Test, Union Pacific's initial color-vision test. *See* PUF ¶¶ 52, 56; Pl.'s Separate Statement Facts ("PUF Resp.") ¶ 46, ECF No. 49-1. But in both examinations, Zaragoza took and passed Union Pacific's follow-up test. PUF ¶¶ 55–56. Zaragoza was cleared for work after both examinations because he passed these follow-ups. PUF Resp. ¶ 46.

Then, in 2016, Union Pacific began using a new follow-up examination: the "Light Cannon" test. PUF ¶ 35. In the same year, Zaragoza underwent vision screening for FRA recertification. PUF ¶ 57. As he did in 2010 and 2013, Zaragoza failed the initial Ishihara test. PUF ¶ 57. But during this examination, he also failed the new Light Cannon follow-up. PUF ¶ 58. Based on these test results, Union Pacific suspended Zaragoza's employment. PUF ¶ 66; PUF Resp. ¶ 53.

Zaragoza alleges that despite his test results, he remains "capable of performing the essential functions of his job." Compl. ¶ 35. He further alleges that Union Pacific's Light Cannon test "does not simulate real world conditions" and has resulted in many employees "who have never had a problem performing the essential functions of their jobs [being] removed from work." *Id.* ¶¶ 22–23. Based on these allegations, Zaragoza raises disparate treatment and

disparate impact claims under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, challenging Union Pacific's use of the Light Cannon test.[1] Compl. ¶¶ 41–58.

B. The *Harris* Class Action

Zaragoza's claims put him within the scope of an early iteration of the putative class in *Harris v. Union Pac. R.R. Co.*, 953 F.3d 1030, 1033 (8th Cir. 2020). *See* PUF ¶ 69. In the suit's operative pleading, the plaintiffs described the proposed 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.

Def. Ex. II ("*Harris* Compl."), at ¶ 116, ECF No. 43-5.

However, in their motion for class certification, the *Harris* plaintiffs defined the proposed class more narrowly, as "[a]ll 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." Def. Ex. JJ ("*Harris* Class Mot."), at 1, ECF No. 43-5 (emphasis added); *see also* Def. Ex. KK ("*Harris* Class Br."), at 22, ECF No. 43-5. A "reportable health event," in turn, was defined by Union Pacific's medical rules as "any new diagnosis, recent event[], and/or change in" certain conditions, including color vision. PUF ¶¶ 74–76 (alteration in original); *Harris* Compl. 43. The *Harris* plaintiffs acknowledged that the class definition in their certification motion had "been narrowed from the Amended Complaint." *Harris* Class Br. 22 n.5.

On February 5, 2019, the district court certified the proposed class. *Harris v. Union Pac. R.R. Co.*, 329 F.R.D. 616, 628 (D. Neb. 2019), *rev'd*, 953 F.3d at 1039. The district court used

[1] Zaragoza also brought a failure to accommodate claim. Compl. ¶¶ 59–64. The Court dismissed this claim on timeliness grounds. *Zaragoza v. Union Pac. R.R. Co.*, --- F. Supp. 3d ----, 2022 WL 2145556, at *6 (W.D. Tex. June 10, 2022).

the narrowed class definition provided in the plaintiffs' certification motion. *Compare id.*, *with Harris* Class Mot. 1. The court also ordered that notice be sent to "7,723 current and former [Union Pacific] employees" included on a potential class list created by Union Pacific. *Harris*, 329 F.R.D. at 627. That list included Zaragoza. PUF Resp. ¶ 71.

On March 8, 2020, Zaragoza filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). PUF ¶ 79. A few weeks later, the Eighth Circuit decertified the class approved by the district court in *Harris*. PUF ¶ 80; *Harris*, 953 F.3d at 1039. On November 23, 2021, Zaragoza filed this lawsuit. *See* Compl.

II. DISCUSSION

A. Standard

A court must enter 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 Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Weaver v. CCA Indus., Inc.*, 529 F.3d 335, 339 (5th Cir. 2008). "A fact is 'material' if its resolution in favor of one party might affect the outcome of the lawsuit under governing law." *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 326 (5th Cir. 2009) (quoting *Hamilton v. Segue Software, Inc.*, 232 F.3d 473, 477 (5th Cir. 2000) (per curiam)). A dispute about a material fact is genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 189 (5th Cir. 1996).

"[The] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*,

477 U.S. at 323; *Wallace v. Tex. Tech. Univ.*, 80 F.3d 1042, 1046–47 (5th Cir. 1996). To show the existence of a genuine dispute, the nonmoving party must support its position with citations to "particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials[,]" or show "that the materials cited [by the movant] do not establish the absence . . . of a genuine dispute, or that [the moving party] cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c).

The court resolves factual controversies in favor of the nonmoving party, but factual controversies require more than "conclusory allegations," "unsubstantiated assertions," or "a 'scintilla' of evidence." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). Further, when reviewing the evidence, the court must draw all reasonable inferences in favor of the nonmoving party, and may not make credibility determinations or weigh evidence. *Man Roland, Inc. v. Kreitz Motor Express, Inc.*, 438 F.3d 476, 478–79 (5th Cir. 2006) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000)). Thus, the ultimate inquiry in a summary judgment motion is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251–52.

B. Analysis

To file suit under the ADA, a plaintiff must first exhaust his administrative remedies by filing a charge of discrimination with the EEOC. *Melgar v. T.B. Butler Publ'g Co.*, 931 F.3d 375, 378–79 (5th Cir. 2019) (per curiam) (collecting cases). A plaintiff must file this charge

"within three hundred days after the alleged unlawful employment practice occurred."[2] *Id.* at 379 (citing 42 U.S.C. § 2000e-5(e)(1)). But this limitations period "is subject to equitable doctrines such as tolling or estoppel." *Id.* at 380 (first citing *Manning v. Chevron Chem. Co.*, 332 F.3d 874, 880 (5th Cir. 2003); and then citing 29 C.F.R. § 1614.604(c)).

As relevant here, "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class." *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974). The Supreme Court reasoned that the class action would "notif[y] 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," thereby satisfying the same purposes as a statute of limitations. *See id.* at 554–55.

But a class action only provides a defendant with notice of the substantive claims and identity of potential plaintiffs "if the plaintiff's desired class was, in fact, certified." *Smith v. Pennington*, 352 F.3d 884, 893 (4th Cir. 2003) (citing *Davis v. Bethlehem Steel Corp.*, 769 F.2d 210, 212 (4th Cir. 1985)); *see also Hall v. Variable Annuity Life Ins. Co.*, 727 F.3d 372, 376 (5th Cir. 2013) ("[A denial of class certification] serves as notice to the once-putative class members that they are 'no longer parties to the suit and . . . [a]re obliged to file individual suits or intervene.'" (quoting *Taylor v. United Parcel Serv., Inc.*, 554 F.3d 510, 520 (5th Cir. 2008)) (second alteration in *Hall*)). Therefore, once a court adopts a class definition that unambiguously

[2] The *Harris* plaintiffs and Union Pacific agreed to extend this deadline by sixty days after the Eighth Circuit decertified the *Harris* class. *See* Pl. Ex. 57, at 2, ECF No. 49-15. But this agreement was limited to the members of the class certified by the district court in *Harris*. *See id.* at 1. Because Zaragoza was not a member of the certified class—as the Court concludes below—this agreement did not affect his rights.

excludes certain plaintiffs, their individual limitations periods begin to run. *See Smith*, 352 F.3d at 884; *Sawtell v. E.I. du Pont de Nemours & Co.*, 22 F.3d 248, 253–54 (10th Cir. 1994).[3]

The timeliness of this action thus turns on whether the class definition certified by the *Harris* district court included Zaragoza. If so, then his limitations period was tolled until the Eighth Circuit decertified the class, and his EEOC charge was timely. But if the class definition excluded Zaragoza, then his limitations period began running when the district court certified the narrowed class, and his EEOC charge was untimely.[4]

The *Harris* class only included plaintiffs who were subject to an FFD examination "as a result of a reportable health event," 329 F.R.D. at 628, and a reportable health event requires some "new diagnosis, recent event[], and/or change" in a health condition, PUF ¶¶ 74–76 (alteration in original). Zaragoza, however, did not experience any change in his vision that prompted a new FFD examination. Rather, he underwent an FFD examination in 2016 as part of his periodic FRA recertification process. *See* PUF Resp. ¶ 47. It follows that Zaragoza's FFD examination was not conducted "as a result of a reportable health event," excluding him from the plain terms of the certified class in *Harris*. *See* 329 F.R.D. at 628.

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[3] Both *Smith* and *Sawtell* suggest that an excluded plaintiff's limitations period begins to run once the class representatives move to certify a class that excludes them, rather than when the district court certifies the narrowed class. *See Smith*, 352 F.3d at 894; *Sawtell*, 22 F.3d at 253. This Court previously noted that the date of class certification seems to be the better date from which to calculate the limitations period. *See Zaragoza*, 2022 WL 2145556, at *3 n.2. But here, the analysis remains the same regardless of the date used. Zaragoza filed his EEOC charge on March 8, 2020, more than 300 days after the district court certified the *Harris* class on February 5, 2019, let alone when the *Harris* plaintiffs moved to certify the narrowed class on August 17, 2018.

[4] The Court previously considered the issue of timeliness and class-action tolling when it addressed Union Pacific's motion to dismiss. *See Zaragoza*, 2022 WL 2145556, at *2–5. There, the Court held that the similarity between Zaragoza's disparate treatment and disparate impact claims allowed both to proceed, even though the *Harris* plaintiffs abandoned their disparate impact claim before seeking class certification. *Id.* at *4–5. But the Court did not address the question presented in the current motion: whether Zaragoza remained a member of the *Harris* class after the district court's class certification order. Neither party argues that the Court's previous order settles the issues presented by Union Pacific's summary judgment Motion, or that Union Pacific has waived or forfeited this argument.

Zaragoza raises three arguments for why his claims are not time barred. First, he argues that the class certification motion in *Harris* did not actually narrow the proposed class. Resp. Def.'s Mot. Summ. J. ("Resp.") 9–11 & n.5, ECF No. 49. Any references to narrowing in the motion, Zaragoza contends, merely referred to claims that the plaintiffs abandoned at that stage. *See id.* at 9 n.5.

Zaragoza's reading is facially implausible. The motion expressly states that "the *class definition* has been narrowed from the Amended Complaint." *Harris* Class Br. 22 n.5 (emphasis added). And reading the second, certified *Harris* class definition in the same way as the first, proposed *Harris* class definition would render all the changes between the two superfluous. *Cf. United States v. Palomares*, 52 F.4th 640, 644–45 (5th Cir. 2022) (discussing how "courts prefer interpretations that give independent [ ] effect to every word and clause in a statute") (collecting cases). The plain language of the class certification motion and order limited the class to those who underwent testing "as a result of a reportable health event." *Harris*, 329 F.R.D. at 628; *Harris* Class Mot. 1. Because Zaragoza offers only implausible, unsubstantiated assertions to the contrary, his argument is unavailing. *See Little*, 37 F.3d at 1075.

Second, Zaragoza argues that even if the *Harris* class definition was narrowed at certification, the new definition still included him. *See* Resp. 6–9, 11–14. He argues that Union Pacific employs a broader definition of "reportable health event" in practice, which does not require a change in health status. *See* Resp. 11–14. In support of this argument, Zaragoza cites statements from a Union Pacific employee saying that reportable health events "may be identified during a supervisor-initiated request for FFD evaluation," or "during required regulatory examination of an employee, such as an FRA examination." Pl. Ex. 54, at ¶¶ 18–19, ECF No. 49-14.

But even if these statements suggest a broader definition of the *Harris* class, they still do not suggest a definition that includes Zaragoza. Nothing in the record shows that Zaragoza was referred for an FFD evaluation by a supervisor. Nor is there any evidence that Zaragoza failed his FRA recertification examination because of a change in his vision. Indeed, Zaragoza's 2016 recertification results essentially resemble his 2010 and 2013 results: he failed the initial Ishihara test, then took Union Pacific's follow-up test. *See* PUF ¶¶ 52–57. The only noticeable difference between Zaragoza's 2016 results and his previous results is that the 2016 examination involved a Light Cannon test (which Zaragoza failed), while the previous examinations involved a different follow-up test (which Zaragoza passed). *See* PUF Resp. ¶¶ 46–48. These results suggest a change in testing methods, rather than a change in Zaragoza's vision.

Moreover, even if there were evidence that Zaragoza's FFD had *uncovered* a reportable health event, it does not follow that the FFD occurred *as a result of* a reportable health event. Therefore, Zaragoza was not a member of the *Harris* class even assuming his failed Light Cannon test qualified as a reportable health event on its own. *See* Resp. 12. Because the certified class only included individuals who were "subject to [an FFD] examination as a result of a reportable health event," *Harris*, 329 F.R.D. at 628, the perception of those reportable health events must have necessarily preceded the FFD examinations. No known or perceived change in Zaragoza's health prompted his FFD examination, so even if the Light Cannon test results revealed a change in Zaragoza's color vision, he would still be excluded from the certified class in *Harris*.[5]

[5] For similar reasons, Zaragoza cannot show that the *Harris* class included him by showing that it included many "color vision plaintiffs." *See, e.g.*, Resp. 11. The *Harris* class certainly may have included plaintiffs who had their employment suspended based on their color-vision deficiency. But those plaintiffs would still need to show that they were subject to an FFD examination as a result of a reportable health event. Thus, the *Harris* class may have included some color-vision plaintiffs and

Finally, Zaragoza argues that two references made by the district judge within the class certification order itself show that the narrowed *Harris* class included plaintiffs like Zaragoza. *See* Resp. 6–9. First, the class certification order cited to "declarations from 44 class members who have experienced the discrimination alleged herein." *Harris*, 329 F.R.D. at 624 & n.3. These included nine declarations from plaintiffs with color-vision deficiencies, and at least one declaration from a plaintiff who faced employment restrictions because he failed color-vision tests during FRA recertification. *See* PUF Resp. ¶ 87; Pl. Ex. 49, ECF No. 49-11. Second, notice of the class certification order was sent everyone on a list of "7,723 current and former [Union Pacific] employees" that Union Pacific produced during discovery. *Harris*, 329 F.R.D. at 627. Zaragoza himself was included in this list. PUF Resp. ¶ 71

But these observations do not establish that Zaragoza was a member of the certified class. First, the district court in *Harris* only mentioned the forty-four declarations in one sentence while considering the adequacy of the class representatives and their counsel. *See* 329 F.R.D. at 624. "The adequacy inquiry . . . serves to uncover conflicts of interest between named parties and the class they seek to represent." *In re Deepwater Horizon*, 785 F.3d 1003, 1015 (5th Cir. 2015) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997)) (alteration in *Deepwater*). In context, then, the *Harris* court appears to use the forty-four declarations merely to show that the class representatives had no conflicts of interest with the putative class members. *See* 329 F.R.D. at 624 ("Plaintiffs have declarations from 44 class members who have experienced the discrimination alleged herein. There is no indication . . . that plaintiffs' interests are divergent or opposed."). Tellingly, the *Harris* court did not discuss the declarations when considering the commonality or typicality of the class representatives' claims. *See generally id.* at 623–24. And

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excluded others. And because Zaragoza's FFD examination did not result from a reportable health event, the *Harris* class excluded him.

in any case, the *Harris* court never expressly considered or stated whether the declarants fell within the certified class. *See generally id.* at 624. To be sure, the *Harris* court's description of the declarants as "class members" appears to imply that the declarants were members of the certified class when read in isolation. *See id.* at 624. But this implication conflicts with the plain terms of the class definition. It would be absurd to read the court's passing reference to the declarations as tacitly expanding the class beyond the explicit definition adopted later in the same order. *Cf. Donahue v. Union Pac. R.R. Co.*, No. 21-cv-448-MMC, 2022 WL 4292963, at *5 (N.D. Cal. Sept. 16, 2022) (finding that one of the forty-four declarants cited in the certification order was not a member of the *Harris* certified class).

Further, while the *Harris* court did rely on Union Pacific's list of 7,723 employees to provide notice to potential class members, Union Pacific consistently denied that the list accurately represented the size and scope of the class. *See* Def. Ex. SS, at 2, ECF No. 54-2 ("[W]e believe the list is over-inclusive even under the class definition we have been operating under.").[6] Nor did the court's use of Union Pacific's list represent a finding that all employees on the list were class members. In fact, the notice sent to the employees on the list stated only that the suit "*may* affect your rights," while repeating the class definition used in the district court's order. *See* Pl. Ex. 97, at 2, *Harris v. Union Pac. R.R. Co.*, No. 8:16-cv-381-JFB-SMB

[6] This fact also defeats Zaragoza's estoppel arguments. *See* Resp. 4–6. Judicial estoppel applies only when "a party's later position [is] 'clearly inconsistent' with its earlier position." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (collecting cases). But Union Pacific never represented—let alone clearly indicated—that plaintiffs like Zaragoza were members of the *Harris* class during its litigation of that case. *See* Def. Ex. SS, at 2; Pl. Ex. 32, at 5–6 & nn.1–3, ECF No. 49-5. Accordingly, Union Pacific is not estopped from denying Zaragoza's membership in the *Harris* class at this stage. *See Owen v. Union Pac. R.R. Co.*, No. 8:19-cv-462, 2020 WL 6684504, at *5 n.2 (D. Neb. Nov. 12, 2020) (rejecting similar estoppel and reliance arguments).

(D. Neb. Aug. 17, 2018), ECF No. 248-35 (emphasis added).[7] Far from evincing that each recipient was included in the certified class, the notice informed plaintiffs like Zaragoza that they were excluded from it.

Finding Zaragoza was not a member of the *Harris* class is consistent with other courts' treatment of similarly situated plaintiffs. At least three district courts have addressed the same question presented here: whether a Union Pacific employee who failed their color-vision testing during the FRA recertification process was included in the *Harris* court's certified class. *See DeFries v. Union Pac. R.R. Co.*, No. 3:21-cv-205-SB, slip op. at 9 (D. Or. Nov. 23, 2022), ECF No. 64 (Magistrate's Findings & Recommendation), *adopted*, 2023 WL 1777635 (D. Or. Feb. 6, 2023); *Donahue*, 2022 WL 4292963, at *3–4; *Blankinship v. Union Pac. R.R. Co.*, No. CV-21-72-TUC-RM, 2022 WL 4079425, at *4 (D. Ariz. Sept. 6, 2022). In each case, the court granted summary judgment for Union Pacific, finding that the employees were excluded from the *Harris* class because they did not receive an FFD examination as a result of a reportable health event. *See DeFries*, 2023 WL 1777635, at *3; *Donahue*, 2022 WL 4292963, at *4–5; *Blankinship*, 2022 WL 4079425, at *5–6.

Zaragoza cites two district court opinions that initially appear to adopt a more expansive definition of the *Harris* class. *See* Resp. 15–16 (first citing *Munoz v. Union Pac. R.R. Co.*, No. 2:21-cv-186-SU, 2021 WL 3622074, at *2 (D. Or. Aug. 16, 2021); and then *Campbell v. Union Pac. R.R. Co.*, No. 4:18-cv-522-BLW, 2021 WL 1341037, at *5 (D. Idaho Apr. 9, 2021)). But in each of these cases, a Union Pacific supervisor referred the plaintiff for an FFD examination based on their observations about the plaintiff's condition. *See Munoz v. Union*

[7] While the parties did not include this document in the summary judgment record, the Court may take judicial notice of the existence of filings in other court proceedings. *See Taylor v. Charter Med. Corp.*, 162 F.3d 827, 829–30 (5th Cir. 1998) (collecting cases).

Pac. R.R. Co., No. 2:21-cv-186-HL, 2022 WL 4348605, at *2 (D. Or. Aug. 9, 2022); *Campbell*, 2021 WL 1341037, at *5. These observations uncovered a reportable health event—either real or perceived—that gave rise to the FFD examination, putting the *Campbell* and *Munoz* plaintiffs squarely within the *Harris* class. *See Campbell*, 2021 WL 1341037, at *5; Pl. Ex. 54, at ¶ 18. But as discussed, no supervisor referred Zaragoza for an FFD examination; he merely underwent his regularly scheduled color-vision re-testing because federal regulations required him to do so. *See* PUF Resp. ¶ 47. Thus, the very reasons that put the *Campbell* and *Munoz* plaintiffs within the certified *Harris* class exclude Zaragoza from it. *See DeFries*, 2023 WL 1777635, at *2 (distinguishing *Campbell* and *Munoz* on similar grounds).

In short, Zaragoza was not a member of the certified class in *Harris*. The tolling of Zaragoza's limitations period, therefore, stopped on February 5, 2019, when the district court issued its class certification order. More than three hundred days elapsed between that date and Zaragoza's filing of a discrimination charge with the EEOC, making his filing untimely. As a result, Zaragoza failed to timely exhaust his administrative remedies, and his case cannot proceed.[8] *See Melgar*, 931 F.3d at 378–79.

III. CONCLUSION

For the foregoing reasons, Union Pacific's Motion, ECF No. 43, is **GRANTED**.

[8] Because it resolves Union Pacific's Motion on timeliness grounds, the Court does not consider Union Pacific's other arguments about preclusion under the Federal Railroad Safety Act or the merits of Zaragoza's ADA claims. *See* Mot. 8–21.

SO ORDERED.

SIGNED this 17th day of February, 2023.

KATHLEEN CARDONE
UNITED STATES DISTRICT JUDGE