No. 14-3858

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MELVIN A. MORRISS, III,

Plaintiff – Appellant

v.

BNSF RAILWAY COMPANY, A Delaware Corporation,

Defendant - Appellee

BRIEF OF APPELLANT

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SUMMARY OF THE CASE

Appellant Melvin A. Morriss, III ("Morriss") applied for the position of Mechanic-Diesel Engines ("Diesel Mechanic") with the Appellee BNSF Railway Company ("BNSF"). Morriss applied for the position, was granted an interview and passed BNSF's physical requirements. BNSF determined that Morriss was capable of meeting the essential functions of the job and provided him with a conditional offer of employment. After BNSF learned that Morriss had a body mass index ("BMI") of over 40, placing him in the morbidly/extreme/severe obese category, it withdrew its offer of employment. BNSF's conduct was discriminatory on the basis of disability in violation of the law.

Morriss appeals from the District Court's entry of summary judgment in favor of BNSF and denial of Morriss's motion for partial summary judgment and requests oral argument of twenty minutes per side.

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JURISDICTIONAL STATEMENT

Morriss filed a complaint alleging that BNSF discriminated against him by failing to hire him as a Diesel Mechanic in violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. ("ADA"), as amended by ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4 ("ADAAA"), and the Nebraska Fair Employment Practices Act, Neb. Rev. Stat. §§ 48-1101 et seq. ("NFEPA"). The District Court had federal question jurisdiction over Morriss's ADA claims pursuant to 28 U.S.C. § 1331 and diversity jurisdiction pursuant to 28 U.S.C. §1332(a). The District Court also had pendant jurisdiction over his NFEPA claim pursuant to 28 U.S.C. § 1367.

On November 20, 2014, the United States District Court for the District of Nebraska, Hon. Richard G. Kopf, issued an order of final judgment granting BNSF's Motion for Summary Judgment and denying Morriss's Motion for Partial Summary Judgment. The Clerk of Court entered judgment the same day. Morriss appeals from this final decision of the District Court, having timely filed his Notice of Appeal on December 18, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Did the District Court err by granting BNSF summary judgment and denying Morriss partial summary judgment on Morriss's regarded as disabled claim by holding Morriss's morbid obesity is not an actual impairment under the ADA?
    - *EEOC v. Res. for Human Dev., Inc.*, 2011 U.S. Dist. LEXIS 140678, *5 (E.D. La. 2011).
    - *Lowe v. Am. Eurocopter, LLC*, 2010 U.S. Dist. LEXIS 133343 (N.D. Miss. Dec. 16, 2010).
    - *BNSF Ry. Co. v. Feit*, 365 Mont. 359, 366 (Mont. 2012).
2. Did the District Court err by granting BNSF summary judgment and denying Morriss partial summary judgment on Morriss's regarded as disabled claim by holding that BNSF did not perceive Morriss as having an impairment?
    - *School Board of Nassau County, Florida, v. Arline*, 480 U.S. 273, 107 S. Ct. 1123 (1987).
    - *Mazzeo v. Color Resolutions Int'l, LLC*, 746 F.3d 1264, 1268, n.2 (11th Cir. Fla. 2014).

STATEMENT OF THE CASE

A. Nature of the Case

Morriss has a long history of battling obesity. Out of high school he weighed between 220-225 pounds. For a significant time period prior to the

actions giving rise to his Complaint, he weighed upward of 280 pounds to 300 pounds. (App 400, Deposition of Melvin Morriss ("Morriss Dep.") 9:14-20). Since 2005, due to his obesity, Morriss underwent medical treatment by three different physicians. (App 113, Morriss Dep. Exhibit 1). Morris was prescribed medications, like Phentermine, specifically to treat his morbid obesity. (App 401, Morris Dep. 10:21-13:10). None of Morriss's attempts to lose weight without medical treatment were successful, and Morriss only had success while receiving the assistance of a physician and prescribed medications. (App 426, Morriss Dep. 110:14-22).

In March 2011, Morriss's weight was as high as 282.8 pounds and his Body Mass Index ("BMI") was as high as 40.72. (App 1034, Deposition of Dr. Gerald Pees, Jr., M.D. ("Dr. Pees"), ("Pees Dep.") 31:5-33:23). Since 2009, Morriss weighed between 280-300 pounds, and on the day of his deposition, October 11, 2013, he weighed 285 pounds. (App 400, Morriss Dep. 9:1-10:14). Medical records from Dr. Pees's office on July 12, 2012, documented Morriss's weight as 289.7 (BMI: 41.72). (App 1670, Affidavit of Ari Riekes).

Dr. Pees diagnosed Morriss with obesity on February 3, 2011. (App 1022, Pees Dep. 22:10-18). Specifically, Dr. Pees found Morriss to be morbidly obese with a BMI to be 43.30. (App 1117, Pees Dep. Exhibit 3). Furthermore, Dr. Pees opined that since he started treating Morriss in 2011, until his deposition in 2014,

Morris had never had his weight under control. (App 1070, Pees Dep. 71:22-25). Dr. Pees considered morbid obesity to be a serious medical condition, and treated Morriss's condition by prescribing him medication to suppress his appetite. (App 1071, Pees Dep. 72:1-4; App 1025-1026, Pees Dep. 26:15-27:23). Dr. Pees also found that Morriss's obesity was causing him elevated blood pressure (i.e. affecting his cardiovascular system). (App 1034, Pees Dep. 35:6-18). Dr. Pees treated Morriss's elevated blood pressure with weight loss, and observed a cause and effect relationship between the two when Morriss lost weight and his blood pressure decreased. Id.

Any individual with a BMI of 30 or above is considered to be obese. A BMI of 30 to 34.9 is Class I Obesity. A BMI of 35 to 39.9 is Class II Obesity. A BMI of 40 or above is Class III Obesity. (App 1222, Deposition of Dr. Michael Jarrard, M.D. ("Dr. Jarrard") ("Jarrard Dep."), Exhibit 2). The American Medical Association ("AMA") and the National Heart, Lung and Blood Institute ("NHLBI") have all recognized obesity as a disease of the human body. (App 1211, Jarrard Dep. 85:3-15 [AMA]; App 1300, Jarrard Dep. Exhibit 3 [NHLBI]). NHLBI also endorses several medical treatments for obesity as a disease, including surgical intervention as well as the avenue pursed by Morriss's physicians, pharmacology. (App 1320, Jarrard Dep. Exhibit 3; App 1410, Jarrard Dep. Exhibit 4). Dr. Jarrard testified that in his position as Chief Medical Officer for BNSF, he

relied upon NHLBI's Practical Guide[1] and Evidence Report[2] because NHLBI's materials where authoritative on information on obesity and risk of disease. (App 1209, Jarrard Dep. 83:17-84:4).

Mali Voloshin-Kile ("Voloshin-Kile") was BNSF's Human Resource Manager when Morriss applied for the position of Diesel Mechanic, in March 2011. (App 559, Deposition of Mali Voloshin-Kile ("Voloshin-Kile Dep.") 11:18-22). The basic qualifications of the Diesel Mechanic position were advertised to external candidates in a BNSF Railway job posting. (App 564, Voloshin-Kile Dep. 16:15-25; App 566, Voloshin-Kile Dep 18:12-20; App 632, Voloshin-Kile Dep. Exhibit 20).

Morriss was a desirable candidate for the advertised position as he had a strong mechanical background including a vocational technology certificate in auto mechanics from Johnson County Vo Tech School and a certificate in motorcycle mechanics from Motorcycle Mechanics Institute in Phoenix, Arizona. (App 646, Voloshin-Kile Dep. Exhibit 25). Morriss possessed four (4) years of relevant work experience in several mechanical positions, including two (2) years of training and

[1] National Heart, Lung, and Blood Institute, *The Practical Guide: Identification, Evaluation and Treatment of Overweight and Obesity in Adults* (2000). A full copy of this publication can be found starting at Appendix 1286.
[2] National Heart, Lung, and Blood Institute , *Clinical Guidelines on the Identification, Evaluation, and Treatment of Overweight and Obesity in Adults: The Evidence Report* (1998). A full copy of this publication can be found starting at Appendix 1380.

experience working on General Electric locomotives as a Diesel Mechanic for AirMate in Council Bluffs, Iowa and South Morrill, Nebraska. (App 684, Voloshin-Kile Dep. Exhibit 25, BNSF00118-120). Moreover, while Morriss struggled with obesity, he had no limitations, related to his BMI or otherwise, placed on him by Dr. Pees in March 2011. (App 1056, Pees Dep. 57:7-14; 67:3-7).

Morriss believed that he would be a good fit for BNSF in light of his prior experience as a mechanic and his prior experience working for AirMate. Morriss had performed the duties of a Diesel Mechanic before and saw no reason why he would need an accommodation to perform the same duties for the Diesel Mechanic position posted by BNSF. (App 410, Morriss Dep. 47:19-28:6; 91:21-93:9). As such, Morriss went on BNSF's website and electronically applied for several Diesel Mechanic positions at various locations, one of which was in Alliance, Nebraska. (App 410, Morriss Dep. 48:10-20). Eventually, Morriss was invited to interview in Alliance, Nebraska, in the Spring of 2011. (App 410, Morriss Dep. 49:24-50:4). When Morriss arrived in Alliance, he met with a BNSF representative and other candidates, and was informed that there were enough open diesel mechanic positions available for all the applicants to fill so long each candidate passed the necessary interview process and aptitude tests. (App 411, Morriss Dep. 50:12-51:1).

Morriss's performance during his panel interview in Alliance, Nebraska on April 29, 2011, was documented by Voloshin-Kile in BNSF's "Skilled Shop Panel Interview" notes. (App 724, Voloshin-Kile Dep. Exhibit 29). During the panel interview, Voloshin-Kile evaluated Morriss in six areas: Work Experience and Training, Work Ethic and Conscientiousness, Safety Behaviors and Beliefs, Working with Others, Troubleshooting and Problem Solving and Communication. Morriss received a score of 7 out of 9 in the areas of Work Experience and Training and Work Ethic and Conscientiousness, indicating that he was a "preferred candidate" for BNSF's position. Morriss received a score of 5 out of 9 or "an acceptable candidate" in all other categories. (App 727, Voloshin-Kile Dep. Exhibit 29, BNSF00161-166). Ultimately, Voloshin-Kile recommended that Morriss be extended a conditional offer of employment with BNSF for the job-related reason that Morriss had "Excellent relevant work experience working with locomotives." (App 570, Voloshin-Kile Dep. 22:12-23:1; App 735, Voloshin-Kile Dep. Exhibit 29, BNSF00169). In fact, the work experience Morriss had with AirMate would have been largely the same as what he would have done as a Diesel Mechanic for BNSF, including the maintenance and repair of locomotives. (App 410, Morriss Dep. 47:24-48:6) (App 570-71, Voloshin-Kile Dep. 22:21-23:1, 24:10-15; App 686, Voloshin-Kile Dep. Exhibit 25, BNSF00120-121). Voloshin-Kile recognized that if Morriss did not have the basic qualifications, he would have

not been invited to attend BNSF's hiring event in April 2011. (App 567, Voloshin-Kile Dep. 19:12-20:20). Morriss was also asked to participate in the panel interview because he had passed a written exam whereby he demonstrated his general mechanical knowledge and his ability to read and follow instructions. (App 588, Voloshin-Kile Dep. 40:23-42:5).

Soon after his interview in Alliance, on May 3, 2011 and again on May 5, 2011, Morriss received emails from BNSF extending him a conditional offer of employment as a Diesel Mechanic. (App 411, Morriss Dep. 51:2-11; Exhibit 3, PltDisc00014 and 00018). Upon receiving the conditional offer of employment, BNSF used Comprehensive Health Services, Inc. (CHS) to gather potential employees' health information. (App 1155, Jarrard Dep. 29:10-18). On May 3 and again on May 4, 2011, Morriss received electronic mail messages from CHS, asking him to complete a medical questionnaire. (App 476, Morriss Dep. Exhibit 3, PltDisc00016-17).

Thereafter, Morriss completed the medical questionnaire and indicated his belief that he may have been diagnosed as being "pre-diabetic." (App 411, Morriss Dep. 51:17-25). Also on May 5, 2012, Morriss received an electronic mail message from CHS seeking additional information regarding Morriss's history of possible diabetes. (App 475, Morriss Dep. Exhibit 3, PltDisc00015). In response,

Morriss had Dr. Pees send his then current medical records to the BNSF. (App 411, Morriss Dep. 51:17-25).

Eventually, Morriss traveled to Kansas City for a physical examination arranged by BNSF. (App 411, Morriss Dep. 51:17-52:20). As part of BNSF's post-offer qualification assessment, Morriss participated in a physical fitness for duty exam, that BNSF calls an "IPCS". Morriss passed his IPCS, and the test results indicated that he met the "minimum physical demands of the essential functions of Machinist." (App 588, Voloshin-Kile Dep. 40:23-42:5). The physical examination included being hooked up to a machine while performing repetitions involving leg lifts and arm lifts. In addition, Morriss took a hearing test, a vision test and his height and weight were also measured. (App 411, Morriss Dep. 51:17-52:20). Morriss finished the testing and was under the belief that he passed all the requirements. (App 411, Morriss Dep. 51:17-52:20).

However, on May 18, 2011, Morriss received an electronic mail informing him, that he was "Not currently qualified for the safety sensitive mechanist position due to significant health and safety risks associated with Class 3 obesity (Body Mass Index of 40 or greater)." (App 411, Morriss Dep. 52:25-54:7; App 528, Morriss Dep. Ex. 11). After Morriss had been notified that BNSF made the decision to revoke his conditional offer or employment, Morriss still believed that he was medically qualified to do the job. (App 422, Morriss Dep. 97:2-7). After

receiving BNSF's revocation by email, Morriss contacted Voloshin-Kile and asked her if she thought he was qualified for the Diesel Mechanic position. Voloshin-Kile told Morriss that if he wasn't qualified for the position, she wouldn't have offered it to him. (App 412, Morriss Dep. 57:18-24); (App 612, Voloshin-Kile Dep. 64:8-65:21).

Dr. Sharon Clark, D.O. ("Dr. Clark") was the BNSF Medical Officer who conducted Morriss's post-offer evaluation and made the decision, based on BNSF protocols, that Morriss was not medically qualified for the diesel mechanic position. (App 766, Deposition of Dr. Clark ("Clark Dep.") 31:23-32:17, 34:11-35:1). The BNSF medical officers who are responsible for making determinations as to whether a candidate is medically qualified base their decisions on verbal company protocols, not written policies or procedures. (App 777, Clark Dep. 42:17-43:6). Dr. Clark's refusal to medically clear Morriss was because Morriss had a BMI above 40. (App 789, Clark Dep. 54:21-55:9).

At the time Dr. Clark made the decision to medically disqualify Morriss, she was filling in for another medical officer, Dr. Jarrard, currently BNSF's Chief Medical Officer. Under normal circumstances, Dr. Jarrard would have been the individual responsible for conducting Morriss's post-offer evaluation. (App 766, Clark Dep. 31:23-32:17). Dr. Clark never met Morriss and thus did not perform a personal examination of him. (App 786, Clark Dep. 51:21-52:13). Because

Morriss was deemed not medically qualified, BNSF ceased considering Morriss for employment. (App 934, Deposition of John Kowalkowski ("Kowalkowski") ("Kowalkowski Dep.") 52:22-53:9).

The main risk factors that BNSF associates with Class III obesity primarily include the increased risk of having or developing sleep apnea, cardiovascular disease, hypertension, stroke, coronary artery disease, heart attacks, diabetes and joint pain or degeneration, decreased aerobic capacity, and physical restrictions. (App 829, Clark Dep. 94:3-20) (App 905, Kowalkowski Dep. 23:11-25). Dr. Jarrard similarly testified that the primary health risks associated with Class III Obesity include: heart disease, diabetes, stroke risks, sleep apnea, and excessive daytime sleepiness. (App 1157, Jarrard Dep. 31:11-33:7). BNSF makes a distinction between being qualified to hold a safety sensitive position and being medically qualified to hold said position. (App 769, Clark Dep. 34:11-35:1; 35:25-36:25, 37:14-38:9). Dr. Clark, based on BNSF protocols, deemed having a BMI of 40 or above to be a "condition" that medically disqualified candidates from holding safety sensitive positions at BNSF. (App 782, Clark Dep. 47:13-18).

BNSF's protocol of medically disqualifying candidates for safety sensitive positions whose sole condition is having a BMI of 40 or above, is due to the possibility that said candidate could have or in the future develop a health impairment. (App 824, Clark Dep. 89:8-17). Dr. Clark is not aware of any

medical documentation that led her to believe that Morriss could not perform the essential functions of the diesel mechanic position, and she agreed that Morriss's body size would not prevent him from physically performing the job. (App 811, Clark Dep. 76:9-77:19; 80:6-14; 83:16-84:25; 85:8-12). In fact, Dr. Jarrard testified that Morriss could physically perform the tasks associated with the diesel mechanic position. (App 1174, Jarrard Dep. 48:17-22).

When Dr. Clark medically disqualified Morriss, she had no evidence that Morriss, at that time, had: sleep apnea, coronary disease, diabetes, issues with having strokes, or excessive daytime sleepiness. (App 825, Clark Dep. 90:4-12) (App 1164, Jarrard Dep. 38:5-39:18). BNSF's stated reason for denying Morriss employment as a Diesel Mechanic was because BNSF believed that Morriss's morbid obesity made him imminently at risk of developing such health risks. (App 826, Clark Dep. 91:21-92:1).

NHLBI's Practical Guide states that Class 3 Obesity is "Extreme obesity." (App 1296, Jarrard Dep. Exhibit 3). On March 3, 2011, Morriss weighed 282.8 pounds and his height was 70 inches. (App 1030, Jarrard Dep. 31:5-12, 117). NHLBI's Practical Guide tables show that normal weight of an individual whom is 70 inches in height is between 132 pounds and 174 pounds. (App 1341). Consequently, twice the norm of that individual's body weight would be between 264 and 348. (App 1341). According to NHLBI's Practical Guide tables, on May

10, 2011, Morriss's weight was in the range of being twice the norm of a normal body weight for a person of his size. (App 1030, Jarrard Dep. 31:5-12, 117); App 1341)

On January 9, 2012, Morriss filed a Charge of Discrimination with the Nebraska Equal Opportunity Commission and the United States Equal Opportunity Commission. On January 15, 2013, Morriss initiated his lawsuit alleging disability discrimination in violation of the ADA, as amended by the ADAAA, and the NFEPA with the United States District Court of the District of Nebraska. After discovery was completed, the parties cross motioned for summary judgment.

B. Issues Tried to the Court

On August 5, 2014, Morriss filed his Motion for Partial Summary Judgment on claims I and II of his Complaint alleging that he was unlawfully regarded as being disabled in violation of the ADA, as amended by the ADAAA, and the NFEPA. On the same date, BNSF filed its Motion for Summary Judgment on claims I through IV of Morriss's Complaint.

C. How the Issues were Decided

The District Court of Nebraska ruled in favor of BNSF and dismissed all of Morriss's claims by finding that Morriss did not suffer from an actual disability nor was he regarded as having a disability. The District Court determined that Morriss's obesity was not caused by a physiological disorder and therefore

concluded that Morriss did not suffer from an impairment. The District Court further determined that because Morriss's obesity was not caused by a physiological disorder, BNSF did not regard Morriss as having an impairment. The District Court also decided that it is not discriminatory to deny employment of an individual to whom an employer believes has a predisposition to illness or disease.

SUMMARY OF THE ARGUMENT

The ADA covers employees who are not actually disabled if the employees are nevertheless "regarded as" disabled. To be regarded as disabled, Morriss need only prove that he either (1) had an actual physical or mental impairment or that (2) BNSF perceived him to have a physical or mental impairment. In support of his Motion for Partial Summary Judgment and in opposition to BNSF's Motion for Summary Judgment, Morriss showed that he had an actual ADA-recognized impairment-morbid obesity- and that BNSF perceived him to have a physical impairment-morbid obesity.

In granting summary judgment in favor of BNSF, the District Court erred in its finding that Morriss presented no evidence that he had an actual physical impairment. Evidence presented by both Morriss and BNSF established that Morriss's morbid obesity, in and of itself, was a physiological disorder or condition affecting one or more body systems. The District Court misconstrued the

ADA's statutes and implementing regulations to require Morriss prove that his impairment (morbid obesity) was caused by physiological condition. There is no statutory basis for the District Court's application of such a standard of proof, and there is no regulatory support for the District Court's interpretation that Morriss must provide a cause of his impairment. The District Court also improperly relied on pre-ADAAA cases to support its position, while ignoring decisions made after passage of the ADAAA that recognize that morbid obesity can constitute an actual impairment.

It seems that the District Court's interpretation of the statutes and regulations to require proof of a physiological cause of Morriss's impairment stems from its misapplication of EEOC regulations concerning "physical characteristics." Weight is only a "physical characteristic" and unprotected by the ADAAA when (1) such weight is within a normal range ***and*** (2) such weight is not caused by a physiological condition. With respect to Morriss, the uncontroverted facts show that his body weight was outside the normal range. BNSF's own medical evidence supports a finding that Morriss' obesity would be considered morbid, extreme and clinically severe. Based on Morriss's extreme obesity, BNSF deemed Morriss medically unqualified for the diesel mechanic position. Consequently, due to Morriss's extreme obesity and/or BNSF's fear that Morriss either had other health

conditions or would imminently suffer from other health conditions, BNSF regarded Morriss as being impaired and acted pursuant to that perception.

The District Court also erred by failing to consider whether BNSF perceived Morriss as having an impairment. BNSF perceived Morriss as being impaired as evidenced by its decision that Morriss was a health risk and thus not medically qualified to be employed. However, the District Court never considered whether BNSF perceived Morriss as having an impairment because the District Court concluded that so long as Morriss's morbid obesity was not the result of a physiological disorder, BNSF could not have perceived Morriss as having a physiological disorder. The District Court's rationale is unjustifiably circular and inconsistent with the ADAAA.

In addition, BNSF's recognition that Morriss's morbid obesity would likely cause other serious health conditions is clear evidence that it perceived him to have an impairment. BNSF did not base its disqualification of Morriss solely due to his weight, but rather, it attributed to him a medical condition beyond having a mere physical characteristic. Moreover, it is clear that BNSF viewed Morriss's obesity as physiological in nature.

The District Court misconstrued the federal regulations by concluding that future impairments are not covered under the ADA. Specifically, the District Court improperly applied the E.E.O.C Interpretive Guidance, 29 C.F.R. § Pt. 1630,

App, given that Morriss's morbid obesity was not a physical characteristic, or any other characteristic, excluded from coverage because his weight was outside the normal range. Thus, BNSF could not have appropriately turned Morriss away due to a characteristic pre-disposition to illness.

The ADA was passed, in part, so people would not be discriminated against simply because such individual had a predisposition to illness, either because of carrying a gene, being exposed to HIV, or being susceptible or predisposed to a future reoccurrence of a disease that was in remission, like cancer. To hold that discriminating against an employee based on a belief that said worker will suffer from a disability in the future is in violation of the ADA is also consistent with ADA's intent of not basing employment decisions on myth, fears and stereotypes. Such is the very conduct the ADA is meant to prohibit. In addition to labeling Morriss as medically unqualified and acknowledging the physiological affects obesity has on the human body system, BNSF, primarily out of fear of future impairments, denied Morriss employment.

ARGUMENT

STANDARD OF REVIEW

Because the District Court granted summary judgment in favor of BNSF, this Court's standard of review on appeal is de novo. *Tramp v. Associated Underwriters, Inc.*, 768 F.3d 793, 798 (8th Cir. 2014). In conducting its review on

appeal, the Court applies the same summary judgment standard as the district court. *Id*. A court shall grant a motion for summary judgment if the moving party shows that "there is no genuine dispute as to any material fact and that the movant is entitled to a judgment as a matter of law." *Cowden v. BNSF Ry. Co.*, 975 F. Supp. 2d 1005, 1010 (E.D. Mo. 2013) (citing Fed. R. Civ. P. 56(a)) (referencing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). This Court owes no deference to the District Court's ruling, and should give Morriss the benefit of every reasonable inference from the evidence presented without resorting to speculation. *Sprenger v. Fed. Home Loan Bank of Des Moines*, 253 F.3d 1106, 1110 (8th Cir. 2001)

I. THE DISTRICT COURT ERRED BY GRANTING BNSF SUMMARY JUDGMENT AND DENYING MORRISS PARTIAL SUMMARY JUDGMENT ON MORRISS'S "REGARDED AS" DISABLED CLAIM BY HOLDING MORRISS'S MORBID OBESITY IS NOT AN ACTUAL IMPAIRMENT UNDER THE ADAAA AND NFEPA.

In order to make a claim under the Americans with Disabilities Act of 1990, 42 U.S.C.S. §§ 12101 et seq. (the "ADA"), as amended by ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4 (the "ADAAA"), and Nebraska Fair Employment Practices Act, Neb. Rev. Stat. §§ 48-1101 et seq. (the NFEPA)[3],

[3] See *Helvering v. Union Pac. R.R.*, 13 Neb. App. 818, 830 (Neb. Ct. App. 2005) (finding that NFEPA is patterned after federal legislation and thus "it is appropriate to look to federal court decisions construing similar and parent federal legislation.").

Morriss carries the burden of establishing a prima facie case of discrimination. *Osborn v. BNSF Railway Co*., 2011 WL 13605532, No. 4:10-cv-3142 *7 (D. Neb. April 11, 2011). If [Morriss] meets this burden, then [Defendant] has the burden to articulate a legitimate, nondiscriminatory reason for [its refusal to hire him.] If the [D]efendant meets this burden, [Morriss] must then show that [D]efendant's proffered reason was a pretext for discrimination. *Rickert v. Midland Lutheran College*, 2009 U.S. Dist. LEXIS 78886, 26-27 (D. Neb. Sept. 2, 2009) (referencing *Dovenmuehler v. St. Cloud Hosp*., 509 F.3d 435 (8th Cir. 2007)).

A prima facie case of discrimination requires that Morriss demonstrate "a disability within the meaning of the ADA; qualifications to perform the essential functions of the job, with or without reasonable accommodation; and an adverse employment action due to disability." *Osborn*, 2011 WL 1360553 at *7. Consequently, to meet the first element, Morriss must establish that he has a disability. This Court has found, "[a] 'disability within the meaning of the ADA' is defined as '(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.'" *Id*. at *11 (quoting *Kozisek v. County of Seward, Neb*., 539 F.3d 930, 934 (8th Cir. 2008)).

With respect, to the "regarded as" prong, Congress passed the ADAAA to broaden the definition of "disabled" individual to protect potential employees like

Morriss after courts narrowed said definition when applying the ADA. As the *Rickert* court noted:

> Under the pre-amendment version of the ADA, to prove [plaintiff] was "regarded as" disabled, the plaintiff had to show [h]e was perceived as having an impairment that substantially limited a major life activity such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, and learning, (*Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 195, 122 S. Ct. 681, 151 L. Ed. 2d 615 (2002); 28 C.F.R. § 36.104)), or working in a substantial class or broad range of jobs. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999). However, under the Americans with Disabilities Amendments Act of 2008:
>
> An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an **actual *or* perceived physical or mental impairment** whether or not the impairment limits or is perceived to limit a major life activity. 42 U.S.C. § 12102(3). The express intent of the 2008 amendments was to expand the scope of the ADA by enacting legislation that effectively overruled the holdings in *Sutton* and *Toyota Motor*, and reinstated the broad view of "regarded as" disabled set forth in *School Board of Nassau County v. Arline*, 480 U.S. 273, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987). Pub.L. No. 110-325, § (2)(b)(3).

Rickert, 2009 U.S. Dist. LEXIS 78886 at **28-29. See *Hamilton v. Ortho Clinical Diagnostics*, 2014 WL 2968497, No. 4:12-cv-00670, *5 (E.D. Ark. July 2, 2014) (stating, "a person who is terminated because he has a physical impairment has a claim for intentional discrimination under the ADA even if his impairment does not substantially limit a major life activity.")(emphasis added). Thus, to be disabled under the "regarded as" prong, Morris need only prove that he either (1)

had an actual physical or mental impairment ***or*** that (2) BNSF perceived him to have a physical or mental impairment.

A. Morriss's Morbid Obesity Was An Actual Impairment.

The district court erred in its finding that Morris presented "no evidence that [he] had a physical impairment." (Addendum 5-6). Neither the original ADA, nor the ADAAA, provides for a statutory definition of the terms "physical or mental impairment." However, the legislative history of the ADAAA indicates that upon enactment of the Amendments, Congress expected that the current regulatory definition of impairment, as promulgated by agencies such as the EEOC, the Department of Justice (DOJ) and the Department of Education Office of Civil Rights (DOE OCR) would not change. Senate Statement of the Managers to Accompany S. 3406 at 6. The EEOC's implementing regulations define a physical impairment as "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems" (such as neurological, musculoskeletal, cardiovascular, digestive, genitourinary and endocrine systems). 29 C.F.R. §1630.2(h)(1). Therefore, before the District Court on summary judgement, Morriss was only charged with having to show that his morbid obesity was a physiological disorder or condition, and not that his morbid obesity was caused by or resulting from a physiological disorder.

Both Morriss and BNSF's evidence before the District Court on summary judgment established that Morriss's morbid obesity, in and of itself, was a physiological disorder or condition affecting one or more body systems. There is no statutory or regulatory definition of "physiological disorder or condition." In this case, Morriss's morbid obesity constitutes a physiological condition because it was a medically diagnosed disease of the body for which he received medical treatment from a physician, including prescriptions for medication to induce weight loss and alleviate effects of the morbid obesity on several of Morriss's body systems.

Since 2005, Morriss struggled with morbid obesity, and underwent medical treatment by three different physicians. (App 113, Morriss Dep. Exhibit 1). During that time, Morriss's weight fluctuated, but he generally weighed between 280-300 pounds. (App 400, Morriss Dep. 9:9-10:16). Morris was prescribed medications, like Phentermine, specifically to treat his morbid obesity. (App 401, Morris Dep. 10:21-13:10). None of Morriss's attempts to lose weight without medical treatment were successful, and Morriss only had success while receiving the assistance of a physician and prescribed medications. (App 426, Morriss Dep. 110:14-22).

Morriss's family physician, Dr. Pees, diagnosed Morriss with obesity on February 3, 2011. (App.1022, Pees Dep. 22:10-18). Specifically, Dr. Pees found

Morriss to be morbidly obese with a BMI to be 43.30. (App 1117, Pees Dep. Exhibit 3). Furthermore, Dr. Pees opined that since he started treating Morriss in 2011 until his deposition in 2014, Morris had never had his weight under control. (App 1070, Pees Dep. 71:22-25). Dr. Pees considered morbid obesity to be a serious medical condition, and treated Morriss' condition by prescribing him medication to suppress his appetite. (App 1071, Pees Dep. 72:1-4; App 1025-1026, Pees Dep. 26:15-27:23). Dr. Pees also found that Morriss's obesity was causing him elevated blood pressure (i.e. affecting his cardiovascular system). (App 1034, Pees Dep. 35:6-18). Dr. Pees treated Morriss's elevated blood pressure with weight loss, and observed a cause and effect relationship between the two when Morriss lost weight and his blood pressure decreased. *Id*.

Even the testimony by BNSF's expert witness, Dr. Jarrard, supports the finding that Morriss's morbid obesity was a physiological condition because it is generally accepted in the medical community that morbid obesity is a disease of the body affecting one or more body systems. Specifically, the American Medical Association ("AMA") and the National Heart, Lung and Blood Institute ("NHLBI") have all recognized obesity as a disease of the human body. (App 1211, Jarrard Dep. 85:3-15 [AMA]; App 1300, Jarrard Dep. Exhibit 3 [NHLBI]). NHLBI also endorses several medical treatments for obesity as a disease, including surgical intervention as well as the avenue pursed by Morriss's physicians,

pharmacology. (App 1320, Jarrard Dep. Exhibit 3; App 1410, Jarrard Dep. Exhibit 4). Dr. Jarrard testified that in his position as Chief Medical Officer for BNSF, he relied upon NHLBI's Practical Guide and Evidence Report because NHLBI's materials where authoritative on information on obesity and risk of disease. (App 1209, Jarrard Dep. 83:17-84:4).

In addition to its position that obesity is a disease, NHLBI's Practical Guide and Evidence Report outlines clinically empirical support of the physiological ways that obesity affects one or more body systems. (See generally, App 1425-1432, Jarrard Dep. Exhibit 4). NHLBI reports that obesity can substantially increase the risk of morbidity due to hypertension (circulatory), dyslipidemia (circulatory), type-2 diabetes (endocrine), coronary artery disease (cardiovascular), stroke (circulatory), gallbladder disease (digestive), osteoarthritis (musculoskeletal) and sleep apnea (neurological and respiratory). (App 1300). The reason obesity increases the risk of these medical conditions is because obesity affects all of the particular body systems outlined above. For example, in obese individuals, the pathophysiology underlying their development of hypertension includes sodium retention and associated increases in vascular resistance, blood volume and cardiac output related to their obesity. (App 1426). These cardiac abnormalities that are associated with obesity effect one's circulatory system (hypertension) and cardiovascular system (cardiovascular disease). Id. It is

logically impossible for BNSF to maintain that there is a cause and effect relationship between Morriss's morbid obesity and his propensity to develop other serious health conditions, yet deny that he had a physiological condition affecting one or more body systems.

Moreover, there have been several courts that have recognized that morbid obesity is a physical impairment under the ADA and Amendments. Prior to the ADAAA, courts have recognized that severe obesity, regardless of the existence of a physiological condition, may constitute an impairment. See *Cook v. State of Rhode Island, Dep't of Mental Health, Retardation, and Hospitals*, 10 F.3d 17, 24 (1st Cir. 1993) (finding that obesity could be a perceived disability if the employer based its decision on the belief that an employee's ability substantially limited the employees ability to work); *EEOC v. Texas Bus Lines*, 923 F. Supp. 965, 979 (S.D. Tex. 1996) (finding summary judgment in favor of an employee on her regarded as impaired claim due to her severe obesity without introducing evidence of any physiological condition).

There also have been cases decided after the passage of the ADAAA that have recognized that morbid obesity can be an impairment, regardless of the cause of the condition. *EEOC v. Res. for Human Dev., Inc*. 827 F. Supp. 2d 688, 694 (E.D. La. 2011)(severe obesity is a disability under the ADA and does not require proof of a physiological basis and the requirement for a physiological cause is only

required when the charging party's weight is within normal range); *Lowe v. Am. Eurocopter, LLC*, 2010 U.S. Dist. LEXIS 133343 (N.D. Miss. Dec. 16, 2010) holding under the ADAAA's expansive definitions of "substantially limits" and "major life activities," obesity could constitute an impairment under the Act, even if not causally linked to a disorder; *BNSF Ry. Co. v. Feit*, 365 Mont. 359, 366 (Mont. 2012)(Obesity that is not the symptom of a physiological disorder or condition may constitute a "physical or mental impairment" if the individual's weight is outside "normal range" and affects "one or more body systems as defined in 29 C.F.R § 1630.2(h)(1)).

B. The ADAAA Does Not Require Proof of the Cause of an Impairment.

The District Court misconstrued the statutes and regulations to require Morriss prove that his impairment (morbid obesity) was caused by physiological condition. The ADA and Amendments do not require proof of causation for a disorder or condition to be recognized as an impairment. As such, there is no statutory basis for the District Court's application of such a standard of proof during summary judgment. There is no regulatory support for the District Court's interpretation that Morriss must provide a cause of his impairment. As discussed above, the EEOC's regulations define physical impairment as "a physiological disorder, or condition . . . ." 29 C.F.R. § 1630.2(h)(1). This regulatory definition

does not require a known cause, but rather only a physical condition or physiological disorder.

The EEOC's implementing regulations on this issue were modeled from the regulations promulgated by the Department of Education implementing Section 504 of the Rehabilitation Act that also explicitly state that causation is irrelevant. 29 C.F.R. pt. 1630 app. § 1630.2(h). The appendix to these Department of Education regulations specifically provides that an impairment includes "any condition which is mental or physical but whose precise nature is not at present known." 34 C.F.R. pt. 104 app. A.

Moreover, the EEOC's Compliance Manual also provides that "The cause of a condition has no effect on whether that condition is an impairment." EEOC Compl. Man. §902.2(e), 2009 WL 4782107 (November 21, 2009). In further explanation, the manual states:

> Voluntariness is irrelevant when determining whether a condition constitutes an impairment. For example, an individual who develops lung cancer as a result of smoking has an impairment, notwithstanding the fact that some apparently volitional act of the individual may have caused the impairment.

Id. (citations omitted). The Sixth Circuit has further noted that the ADA:

> [C]ontains no language suggesting that its protection is linked to how an individual became impaired, or whether an individual contributed to his or her impairment. On the contrary, the Act indisputably applies to numerous conditions that may be caused or exacerbated by voluntary conduct, such as alcoholism, AIDS, diabetes, cancer

> resulting from cigarette smoking, heart disease resulting from excess of various types, and the like.

Andrews v. Ohio, 104 F.3d 803, 809 (6th Cir. 1997) (quoting *Cook v. State of Rhode Island, Dep't of Mental Health, Retardation, and Hospitals*, 10 F.3d 17, 24 (1st Cir. 1993)).

Furthermore, the District Court's reliance on the decisions in *EEOC v. Watkins Motor Lines, Inc.*, 436 F.3d 436 (6th Cir. 2006) and *Francis v. City of Meriden*, 129 F. 3d 281 (2d Cir. 1997) to support its position that morbid obesity is not an impairment without proving a physiological cause is misplaced. Most importantly, both cases were decided before the passage of the ADAAA and its abrogation of *Sutton v. United Airlines, Inc*., 527 U.S. 471 (1999). The Montana Supreme Court specifically suggested that these decisions were superseded by the statutory changes of the ADAAA in that said decisions interpreted the ADA too restrictively and contrary to the expressed intent of the ADAAA that the determination of disability not demand extensive analysis. *Feit*, 365 Mont.at 364. Furthermore, said decisions ignore the plain language of the EEOC's Interpretive Guidance requiring that for obesity to be considered a physical characteristic, the charging party's weight must be within normal range and not caused by a physiological cause, as discussed more fully below.

C. Morriss's Morbid Obesity Is Not A Physical Characteristic.

The District Court's misinterpretation of the statutes and regulations to require proof of a physiological cause of Morriss's impairment stems from its misapplication of EEOC interpretive regulations concerning "physical characteristics." The EEOC's interpretive regulations distinguish between conditions that are "impairments" from those physical, psychological, environmental, cultural, and economic characteristics that are not impairments:

> The definition of the term "impairment" does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight, or muscle tone *that are within "normal" range and are not the result of a physiological disorder*. The definition, likewise, does not include characteristic predisposition to illness or disease.

29 C.F.R. § Pt. 1630, App. (emphasis added).

Weight is therefore only a "physical characteristic" and unprotected by the ADAAA when (1) such weight is within a normal range ***and*** (2) such weight is not caused by a physiological condition. The physiological disorder component applies only when the person's weight is within normal range, as established by use of the conjunctive "and." It logically follows that weight is not a physical characteristic, and thus qualifies as an impairment, when: (1) one's weight is not within a normal range, **or** (2) when one's normal weight is tied to a physiological disorder.

As the court noted in *Res. for Human Dev., Inc*. 827 F. Supp. 2d 688, 694 (E.D. La. 2011):

> A careful reading of the EEOC[‘s] [Interpretive G]uidelines and the ADA reveals that the requirement for a physiological cause is only required when a charging party's weight is within the normal range. 29 C.F.R. § 1630.2(h). However, if a charging party's weight is outside the normal range-that is, if the charging party is severely obese-there is no explicit requirement that obesity be based on a physiological impairment.

Id. at 694. Moreover, the Supreme Court of Montana, applying Montana state law based on decisions from federal courts, similarly concluded that a physiological condition is unnecessary when weight is outside the “normal range.” *BNSF Ry. Co. v. Feit*, 365 Mont. 359, 366 (Mont. 2012).

Further undermining BNSF’s position and reliance on the EEOC regulations is a significant change in the Interpretive Guidelines. 29 C.F.R. pt. 1630 app. § 1630.2(j) (2008) of the EEOC’s Interpretive Guidelines previously stated, “except in rare circumstances, obesity is not considered a disabling impairment.” *Whittaker v. America's Car-Mart, Inc., 2014 U.S. Dist. LEXIS 56919 *5 (E.D. Mo. Apr. 24, 2014)*. However, as the *Whittaker* court noted, since enactment of the ADAAA, said language has been omitted from the EEOC’s Interpretive Guidelines. *Id*. Consequently, the logical inference that can be made from this change is that that the EEOC regulations should not be construed to restrict

protections under the ADA where morbid obesity is the alleged impairment – especially with respect to regarded as impaired claims.

In reaching its conclusion that a physiological condition is not an absolute requirement in finding obesity as an impairment, the court further noted in *Res. for Human Dev., Inc*., that the EEOC's Compliance Manual which interpreted the EEOC's regulations as well as the Interpretive Guidelines, stated "[b]eing overweight, in and of itself, is not generally an impairment . . . **On the other hand, severe obesity, which has been defined as body weight more than 100% over the norm, is clearly an impairment**." 827 F. Supp. 2d at 694 (emphasis added). See also *Feit*, 365 Mont. at 364 (recognizing that as of June 28, 2012, the EEOC Compliance Manual stated, "'[N]ormal deviations in height, weight, or strength that are not the result of a physiological disorder are not impairments. . . . . At extremes, however, such deviations may constitute impairments.'")[4].

With respect to Morriss, the uncontroverted facts show that his body weight was more than 100% of the norm. On March 3, 2011, Morriss weighed 282.8

[4] After this ruling the *Feit* case was remanded to the Montana Department of Labor and said department ultimately decided that the employee was not disabled. See *Feit v. BNSF Ry. Co*., HRB Case No. 0091013577 (MT Dep't of Labor and Indus., Jan. 24, 2014). The court found there was no evidence that the employee was severely obese. However, this case is distinguishable. First, *Feit* involved a plaintiff and who was Class II Obese, as opposed to Melvin who is extremely obese (Class III Obese). Second, the *Feit* case provided no evidence that the plaintiff's weight was 100% over the norm. As discussed infra, Melvin's weight places him in the range of his weight being over 100% above the norm for his height.

pounds and was 70 inches in height. (App 1030, Pees Dep. 31:5-12; App 1116, Pees Dep. Exhibit 3). NHLBI's Practical Guide tables show that normal weight of an individual whom is 70 inches in height is between 132 pounds and 174 pounds. (App 1341). Consequently, twice the norm of that individual's body weight would be between 264 and 348. (App 1341). Also, the NHLBI's Practical Guide and Evidence Report, relied upon by BNSF, characterizes a BMI greater than 40 as "clinically severe obesity" and Class III Obesity as "extreme obesity." (App 1333; App 1395). The facts in this case show that since Morriss had a BMI over 40, his obesity was "severe" and warranted protection under the ADAAA.

Obviously, Morriss's weight was not in "normal range" as he was morbidly obese and in the highest recognized class of obesity. Had Morriss's weight been within a "normal range", he would have been employed by BNSF. However, Morriss's BMI placed him in the highest obesity class, Class III Obesity. Based on Morriss's extreme obesity, BNSF deemed Morriss medically unqualified for the diesel mechanic position. Consequently, due to Morriss's extreme obesity and/or BNSF's fear that Morriss either had other health conditions or would imminently suffer from other health conditions, BNSF regarded Morriss as being impaired and acted pursuant to that perception.

II. THE DISTRICT COURT ERRED BY HOLDING THAT BNSF DID NOT PERCEIVE MORRISS AS HAVING AN IMPAIRMENT.

The District Court also erred by failing to consider whether BNSF perceived Morriss as having an impairment. BNSF perceived Morriss as being impaired as evidenced by its decision that Morriss was a health risk and thus not medically qualified to be employed. In addition, BNSF's recognition that Morriss's morbid obesity would likely cause other serious health conditions is also clear evidence that it perceived him to have an impairment. Moreover, the District Court misconstrued the federal regulations by concluding that future impairments are not covered under the ADA.

A. BNSF's Medical Disqualification of Morriss Was Based on a Perception That Morriss Was Impaired.

Not only is Morriss's obesity, in and of itself, an actual impairment under the ADAAA, but the District Court's determination that BNSF did not perceive Morriss as having an impairment was erroneous. Specifically, after determining that Morriss did not have a physiological disorder which caused his obesity, the District Court disposed of Morriss's regarded as claim as follows:

> [t]here is no evidence to support Morriss's claim that BNSF regarded him as having an impairment. It is undisputed that Morriss "was denied employment . . . not because of any then current health risk identified by BNSF . . ., but because BNSF believed by having a BMI of 40, [Morriss] would or could develop such health risks in the future." (Plaintiff's supporting brief (filing 100) at 11.) As stated

> above, the definition of impairment "does not include characteristic predisposition to illness or disease." 29 C.F.R. Pt 1630, App. (EEOC Interpretive Guidance n Title I of the Americans with Disabilities Act).

(Addendum 5-6).

Again, with respect to the "regarded as" prong, Congress passed the ADAAA to broaden the definition of "disabled" individual under the ADA after the courts wrongfully narrowed said definition. As discussed above:

> The express intent of the 2008 amendments was to expand the scope of the ADA by enacting legislation that effectively overruled the holdings in *Sutton* and *Toyota Motor*, and reinstated the broad view of "regarded as" disabled set forth in *School Board of Nassau County v. Arline*, 480 U.S. 273, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987). Pub.L. No. 110-325, § (2)(b)(3).

Rickert v. Midland Lutheran College, 2009 U.S. Dist. LEXIS 78886, 28-29 (D. Neb. Sept. 2, 2009). The federal regulations define when one is regarded as having an impairment as follows:

> . . . . The following principles apply under the "regarded as" prong of the definition of disability . . . :
>
> (1) Except as provided in § 1630.15(f), an individual is "regarded as having such an impairment" if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity. Prohibited actions include but are not limited to refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment[.]
>
> (2) Except as provided in § 1630.15(f), an individual is "regarded as having such an impairment" any time a covered

> entity takes a prohibited action against the individual because of an actual or perceived impairment, even if the entity asserts, or may or does ultimately establish, a defense to such action.
> (3) Establishing that an individual is "regarded as having such an impairment" does not, by itself, establish liability. Liability is established under title I of the ADA only when an individual proves that a covered entity discriminated on the basis of disability within the meaning of section 102 of the ADA, 42 U.S.C. 12112.

29 C.F.R. 1630.2. See also *Rickert*, 2009 U.S. Dist. LEXIS 78886 at *29 ("An individual meets the requirement of 'being regarded as having an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical . . . impairment . . .")

As discussed above, the District Court erred in finding that morbid obesity is not an actual impairment. Moreover, the District Court never considered whether BNSF perceived Morriss as having an impairment. Rather, the District Court essentially concluded that so long as Morriss's morbid obesity was not the result of a physiological disorder, BNSF could not have perceived Morriss as having a physiological disorder. The District Court's rationale is unjustifiably circular. In addition, its rationale is inconsistent with the ADAAA.

The District Court altogether ignored BNSF's conduct of having associated Morriss's morbid obesity to his overall health. Consequently, the District Court left Morriss with only two options. Either Morriss had to offer a direct admission from BNSF that it subjectively believed him to have a physiological disorder

which was the cause of his obesity, or Morriss had to prove he suffered from an actual impairment. Other than BNSF's conduct, no other evidence could speak to BNSF's subjective beliefs as to whether Morriss suffered from a physiological disorder. Said requirement imposed by the District Court directly contravenes the purpose of the ADAAA. See *Summers v. Altarum Inst., Corp*., 740 F.3d 325, 329 (4th Cir. Va. 2014) (quoting 42 U.S.C. § 12102(4)(A)) ("abrogating *Toyota*, the [ADAAA] provides that the definition of disability 'shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by [its] terms.'"). "Congress intended 'that the establishment of coverage under the ADA should not be overly complex nor difficult, and expect[ed] that the [ADAAA] will lessen the standard of establishing whether an individual has a disability for purposes of coverage under the ADA.'" H.R. Rep. No. 110-730, at 9 (2008). *Mazzeo v. Color Resolutions Int'l, LLC*, 746 F.3d 1264, 1268, n.2 (11th Cir. Fla. 2014).

As argued above, it is clear that BNSF did not base its disqualification of Morriss solely due to his weight, but rather, it attributed to him a medical condition beyond having a mere physical characteristic. While BNSF may not have come out and stated the magic words that it believed Morriss had a physiological disorder, its conduct demonstrates otherwise.

It is interesting to note, at no time did BNSF state that Morriss was cosmetically disqualified for the position. Rather, BNSF ascribed to Morriss's obesity a medical, not cosmetic, condition. Dr. Clark, the BNSF employee who made the decision to disqualify Morriss for the Diesel Mechanic position was sure to point out that the decision was medical in nature:

> Q. I'm curious. Counsel and you make this distinction between something being medically qualified and just qualified. Why are you making that distinction?
>
> A. Well, because the person could, from an educational standard or a training standard, be qualified to perform the job duties, in other words, have the knowledge requisite for performing whatever, engineering, mechanical duties.
>
> But from a – and the – the final determination as to whether the person is really hired or not came from the human resource department. But there were protocols set up for medical qualification or disqualification. So the role – especially in Mr. Morriss's case, my role was in that medical qualification or disqualification role.
>
> I don't know physically and/or from an educational background or training background if he was qualified to become a mechanic or do mechanic job. That would be, normally was, the role of the supervisor.

(App 769, Clark Dep. 34:11-35:1; 35:25-36:25, 37:14-38:9). Dr. Clark further testified:

> Q. Okay. Were you the particular BNSF medical review officer that made the determination that Mr. Morriss was not currently qualified for the safety sensitive position of machinist?
>
> A. I made the determination that he wasn't medically qualified for the position, yes.
>
> Q. And that was your determination using that he wasn't medically qualified, isn't that right?

MS. BOGEN: I'll object to the form of the question.

A. Well, I – I reviewed the documents. And I made the decision, based on BNSF protocol, that he was not medically qualified.

Q. Okay. So you would use the term "qualified," isn't that right?

A. Medically qualified.

(App 769, Clark Dep. 34:11-35:1; 35:25-36:25, 37:14-38:9).

***

Q. Would you consider what we talked about today, a BMI of 40 or more, to be a condition that would medically disqualify somebody from a safety sensitive position at Burlington Northern Santa Fe?

A. Yes, according to the protocols given me, that's correct.

(App 782, Clark Dep. 47:13-18).

In fact, when BNSF informed Morriss that he was not medically qualified for employment, the word "weight" or his physical appearance was never mentioned. Rather, the decision was medical and based on tying Morriss's severe obesity to his overall health. The BNSF correspondence to him stated: "[Morriss is] [n]ot currently qualified for the safety sensitive Machinist position **due to a significant health and safety risks associated with Class 3 obesity** (Body Mass Index of 40 or greater)." (App 411, Morris Dep. 52:25-54:7; Ex. 11). (emphasis added).

Even in post-ADAAA case where a district court found that a plaintiff's claim of discrimination did not rise to the level of a disability, the court was clear that such bar is not a difficult threshold to meet - even where weight is at issue.

For example, in *Powell v. Gentiva Health Serv*. 2014 U.S. Dist. LEXIS 17709 (S.D. Ala. Feb. 12, 2014), the trial court illustrates that to be regarded as being impaired on the basis of weight, is not burdensome. The court stated:

> Of course, weight can be a physical impairment or, more precisely, an employer may perceive an employee's overweight status to constitute a physical impairment. For example, suppose an employer believes that an overweight job applicant cannot climb a ladder, or walk across a parking lot, or climb flights of stairs, and therefore does not hire the overweight individual for a job that requires such activities. That might give rise to "regarded-as" status for an ADA claim in the post-ADAAA world. But that is not what we have here.

Powell, 2014 U.S. Dist. LEXIS 17709 at *31. However, unlike in this matter, the plaintiff in *Powell* failed to prove a regarded as claim because the plaintiff did not produce any evidence which a court could infer that the employee's weight was a factor in the employer's decision to terminate her employment. In fact, the *Powell* court specifically states that there was no evidence that the employee was in fact morbidly obese. 2014 U.S. Dist. LEXIS 17709 *17n8. Of course, a lack of such evidence is not at issue in these proceedings. The Court need only look to Morriss's disqualification letter in which BNSF states that it based its decision due Morriss's extreme obesity, and believed that said obesity prevented him from being able to perform his job due to the health risks associated with severe obesity.

In light of the broad coverage afforded under the ADAAA, BNSF's conduct demonstrates that it regarded Morriss as having an impairment. Consequently, the

District Court erred in granting BNSF summary judgment on such grounds and erred in denying Morriss's Motion for Partial Summary Judgment.

B. BNSF's Linkage of Morriss's Morbid Obesity To Other Health Risks Was Based on a Perception of an Impairment.

Moreover, not only did BNSF treat Morriss's obesity as an impairment by categorizing his obesity as a medical condition, but it is clear that it viewed Morriss's obesity as physiological in nature. As discussed above, the regulations define a physical impairment as: "Any physiological disorder or condition . . . affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine . . ." 29 C.F.R. § 1630.2(h).

BNSF perceived Morriss's obesity as a medical condition, and subsequently determined said medical condition affected one or more of his body systems. BNSF in no way hides from its belief that the medical condition which prevented Morriss from being employed, his morbid obesity, has the physiological effect of causing diabetes, cardiovascular disease, hypertension, sleep apnea, etc. Whether or not Morriss's obesity actually caused Morriss to suffer said conditions is irrelevant. Rather, it is BNSF's belief, or perception, that Morriss's obesity was a

physiological disorder negatively impacting his body systems is what is germane to these proceedings.

Dr. Clark stated:

> Q. So what about Mr. Morriss's BMI would make him unable to perform safely – you know, tasks safely, in that type of manner that you have described?
>
> A. Well, he – he could have some risk factor, some health risk factor, that would – could impact his ability to perform his job safely and/or could increase his risk of developing a health risk factor that could affect his ability to perform his job safely.

(App 829, Clark Dep, 94:3-20).

Similarly, John Kowalkowski, Defendant's Director of Medical Support Services, stated:

> Q. Please tell me what your knowledge of significant safety risks associated with morbid obesity, the extent of that knowledge that you have?
>
> A. Obesity is measured BMI 40 and above. There are significant safety and health risks associated with high body mass index, not limited to my understanding of diabetes, sleep apnea, heart disease, high blood pressure.
>
> Q. Anything else?
>
> A. No
>
> Q. And we can agree that those are health risks associated with obesity or body mass index of 40 or above, correct?
>
> A. They're health and safety risks for sure, yes.

(App 905, Kowalkowski Dep. 23:11-25).

Dr. Jarrard, BNSF's Chief Medical Officer, similarly testified that the primary health risks associated with Class III Obesity include: heart disease,

diabetes, stroke risks, sleep apnea, and excessive daytime sleepiness. (App 1157, Jarrard Dep. 31:11-33:7). In fact, according to Dr. Jarrard, the effect of Morriss's obesity in causing such diseases was so great, and so immediate, it refused to employ Morriss on that basis. He testified as follows:

> Q. Okay. You already – I think you talked about it to some degree, but why do the - - these health conditions preclude you from medical – medically qualifying someone with a BMI of 40?
>
> A. . . . But it's because the risk has gotten to the point – when – Again, all these conditions, to be clear, are prevalent in the full population. These – Heart disease happens in BMIs 25 to whatever, so does diabetes, so does sleep apnea. The difference is once you get above a BMI of 30, which is the first classification for obesity class one, the risk starts to go up very fast. Class two is much higher risk than class one. Class three much, much higher. And to use the words in that '98 or 2000 NHLBI, they talk about risk and extreme risk, once you get to class three obesity, extremely risky. . . .

(App 1162, Jarrard Dep. 36:8-37:7).

As discussed under the first assignment of error above, the very same literature in which Dr. Jarrard uses to support his claims that Morriss was at extreme risk for developing other physical impairments, recognizes morbid obesity as a disease and that it affects one or more body systems. (App 1211, Jarrard Dep. 85:3-15 [AMA]; App 1300, Jarrard Dep. Exhibit 3 [NHLBI]; App 1425-1432).

BNSF's conduct and explanations contravene the purpose of the ADAAA. As the court in *Rico v. Xcel Energy, Inc.*, 893 F. Supp. 2d 1165, 1168 (D.N.M. 2012) (quoting Pub. L. No. 110-325, § 2(b)(5), 122 Stat. at 3554) points out,

“Congress declared that ‘the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations’ . . , and that ‘the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis.’”

On that basis, BNSF should not be allowed to take both sides of the same coin by arguing that Morriss’s obesity would inevitably cause him to develop other serious health conditions, and at the same time deny that it ever regarded Morriss’s morbid obesity to affect his body systems (e.g. hypertension with respect to Morriss’s circulatory and cardiovascular systems, diabetes with respect to Morriss’s endocrine system, sleep apnea with respect to Morriss’s neurological and respiratory systems, etc.). Consequently, BNSF perceived Morriss’s obesity to be a physiological disorder and thus the District Court erred in granting BNSF summary judgment and by denying Morriss’s motion for partial summary judgment.

C. BNSF Regarded Morriss As Having A Disability By Considering Future Impairments.

Not only did the District Court err in finding that BNSF did not perceive Morriss as having an impairment, but the District Court also erred by ruling that BNSF’s consideration of future impairments did not violate the ADA. The District

Court appears to have based its decision by misapplying 29 C.F.R. Pt. 1630, App., stating:

> There also is no evidence to support Morriss's claim that BNSF regarded him as having an impairment. . . As stated above, the definition of impairment "does not include characteristic predisposition to illness or disease."

(Addendum 5-6) (quoting 29 C.F.R. Pt 1630, App. (EEOC Interpretive Guidance on Title I of the ADA)).

The District Court's interpretation of the EEOC Interpretive Guidance is erroneous. As discussed above, the Interpretive Guidance draws a distinction "between conditions which are impairments, and physical, psychological, environmental, cultural and economic characteristics that are not impairments." 29 C.F.R. Pt 1630, App. Immediately thereafter, the Interpretive Guidance specifically addresses physical characteristics which are not impairments. As discussed above, Morriss's morbid obesity is not a physical characteristic, or any other characteristic, excluded from coverage because his weight was outside the normal range. Only after discussing which "normal" physical characteristics are not covered, the Interpretive Guidance states that "[t]he definition, likewise, does not include characteristic predisposition to illness or disease." In light of the preceding sentence, non-coverage for predisposition to illness or disease is meant to address those characteristics that are "normal." Morriss's weight was not normal.

Also, it can be argued, that the sentence concerning predisposition to illness or disease has nothing to do with physical characteristics, but concerns only the other characteristics listed in the Interpretive Guidance. A reading of the EEOC Compliance Manual, makes clear that the language in the Interpretive Guidance concerning characteristic predisposition to illness or disease is in reference only to psychological, environmental, cultural and economic characteristics. The EEOC Compliance manual explains:

> Further, a characteristic predisposition to illness is not an impairment. 29 C.F.R. pt. 1630 app. § 1630.2(h). A person may be predisposed to developing an illness or a disease because of factors such as environmental, economic, cultural, or social conditions. This predisposition does not amount to an impairment.

§902.2(c)(2), 2009 WL 4782107 (November 21, 2009). Thus, when discussing predisposition to future illness, the Compliance Manual specifically omits any reference to physical characteristics. Any other interpretation of the Interpretive Guidance would be antithetical to the purpose and intent of the ADA.

After all, the purpose of the ADA, and how Congress intended the ADA to be applied toward individuals regarded as having a disability was captured in *School Board of Nassau County, Florida, v. Arline*, 480 U.S. 273, 107 S. Ct. 1123 (1987). With respect to similar legislation concerning discrimination against people with disabilities, the United States Supreme Court found that Congress was concerned with "expand[ing] the definition of 'handicapped individual' so as to

preclude discrimination against '[a] person who . . . is regarded as having, an impairment [but who] may at present have no actual incapacity at all.'" *Arline*, 480 U.S. at 279, 107 S. Ct. at 1126-27 (*quoting Southeastern Community College v. Davis*, 442 U.S. 397, 405-406, n. 6, 99 S.Ct. 2361, 2366-2367, n. 6, 60 L.Ed.2d 980 (1979).

In *Arline*, a school board employee was dismissed from her employment solely because she had the medical condition of tuberculosis. *Id*. at 278, 107 S.Ct at 1125. The school board argued that it did not terminate her because of any diminished physical capabilities, but rather because the tuberculosis **could** relapse in the future and thus posed a health threat to others. *Id*. at 281, 107 S.Ct. at 1128. The Supreme Court rejected this approach to making employment decisions.

> Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as the physical limitations that flow from actual impairment. . . The Act is carefully structured to replace such reflexive reactions to actual or perceived handicap with actions based on reasoned and medically sound judgments: the definition of "handicapped individual" is broad, but only those individuals who are both handicapped *and* otherwise qualified are eligible for relief. The fact that *some* persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from coverage of the Act all persons with actual or perceived contagious diseases. Such exclusion would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were "otherwise qualified." Rather, they would be vulnerable to discrimination on the basis of mythology-precisely the type of injury Congress sought to prevent.

Id. at 284-85, 107 S.Ct. 1129-30 (emphasis in original).

Indeed, the very concerns articulated by the Supreme Court in *Arline*, were considered by Congress in passing the ADA. The ADA was passed, in part, so people would not be discriminated against simply because such individual had a predisposition to illness, either because of carrying a gene, being exposed to HIV, or being susceptible or predisposed to a future reoccurrence of a disease that was in remission, like cancer.

In the Conference Report on S. 933, Americans with Disabilities Act of 1990 (House of Representatives – July 12, 1990), Congressman Owens pointed out that a purpose of the ADA was to prohibit discrimination based upon theoretical threats. For example passage of the ADA was, in part, to protect employees who were HIV positive, but whose condition was asymptomatic. Congressman Owens stated: "Thus an employer could not use as an excuse for not hiring a person with HIV disease the claim that the employer was simply protecting the individual from **opportunistic diseases to which the individual might be exposed**." 101 Cong. Rec. H4622 (daily ed. Jul. 12, 1990) (statement of Rep. Owens) (THOMAS-Library of Cong.) (emphasis added). Moreover, the ADA was also designed to protect employees who may be carriers of a disease-associated gene, but who may never suffer therefrom. Congressman Owens further stated:

> These protections of the ADA will also benefit individuals, who are identified through genetic tests as being carriers of a disease-

> associated gene. There is a record of genetic discrimination against such individuals, most recently during sickle cell screening programs in the 1970's. With the advent of new forms of genetic testing, it is even more critical that the protections of the ADA be in place. **Under the ADA, such individuals may not be discriminated against simply because they may not be qualified for a job sometime in the future. The determination as to whether an individual is qualified must take place at the time of the employment decision, and may not be based on speculation regarding the future**.

Id. (emphasis added).

Similarly, Congressman Edwards, in Conference Report on S. 933, AMERICANS WITH DISABILITIES ACT OF 1990 (House of Representatives – July 12, 1990) stated:

> Under the ADA, such individuals [employees or potential employees who may be genetically predisposed to certain disabilities] may not be discriminated against because of fears of increased health care costs that they or their children might incur. **Moreover, such individuals may not be discriminated against based on the assumption that they will become sick in the future and will not be qualified to do their jobs**."

101 Cong. Rec. H4624 (daily ed. Jul. 12, 1990) (statement of Rep. Edwards) (THOMAS- Library of Cong.) (emphasis added).

Furthermore, the EEOC Compliance Manual reinforces the same point. The EEOC Compliance Manual uses genetic testing as an example of how an employer may regard an employee as disabled in violation of the ADA. EEOC Compl. Man. §902.8, 2009 WL 4782107 (November 21, 2009). The Compliance Manual illustrates that if an employer had information that a potential employee's genetic makeup made said candidate more susceptible to colon cancer, despite the

candidate being asymptomatic, the employer's withdrawal of its offer would be discriminatory and in violation of the ADA. Id. The Compliance Manual states:

> This part of definition of "disability" applies to individuals who are subjected to discrimination on the basis of genetic information relating to illness, disease or other disorder. Covered entities that discriminate against individuals on the basis of genetic information are regarding the individuals as having impairment that substantially limit a major life activity. Those individuals, therefore, are covered by the third part of the definition of "disability."

Id.

Prohibiting employment decisions based on speculative risk that an individual is likely to suffer an impairment in the future is also supported by the Interpretive Guidance. The Interpretive Guidance states:

> The determination of whether an individual with a disability is qualified is to be made at the time of the employment decision. **This determination should be based on the capabilities of the individual with a disability at the time of the employment decision, and should not be based on speculation that the employee may become unable in the future or may cause increased health insurance premiums or workers compensation costs.**

29 CFR Part 1630 Appendix (emphasis added).

Thus, just because a candidate for employment, who happens to be a carrier of a genetic disease, could become sick and incapable of doing a job at some time in the future, is not a legitimate basis for denying said individual employment. Similarly, an individual who is HIV positive, or is in a relationship with someone that is HIV positive, may not be denied employment based on the speculation that

said person may develop AIDS in the future. See *Doe v. An Or. Resort*, 2001 U.S. Dist. LEXIS 17449, 17 (D. Or. May 10, 2001) (finding employer's treatment of employee, whose spouse was HIV positive, was discriminatory even though employee was at a greater risk of contracting the disease, and stating: "A person with a disability must not be excluded based on stereotypes or fear and an employment decision may not be based on speculation about the risk to others.").

Even before passage of the ADAAA, many courts recognized this basic principal of the ADA.

> Under the ADA, employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health. For example, an employer could not use as an excuse for not hiring a person with HIV disease the claim that the employer was simply "protecting the individual" from opportunistic diseases to which the individual might be exposed. That is a concern that should rightfully be dealt with by the individual, in consultation with his or her private physician.

Kalskett v. Larson Mfg. Co. of Iowa, Inc., 146 F. Supp. 2d 961, 985 (N.D. Iowa 2001) (referencing the legislative history of the ADA) (citations omitted).

Consequently, Morriss's extreme obesity is akin to a person who has a genetic condition that may lead to an illness in the future and/or to a person whose cancer is in remission. In these scenarios, the employment decision being made is based on a fear of future disorders, not on any current illness or disease or physiological disorder at the time of the hiring decision. Thus, as case law, the Interpretive Guidance and EEOC Compliance Manual show, the denial of

employment based on future illness or disease is discriminatory. There is no dispute, BNSF's fear that Morriss would suffer an impairment in the future was a basis for its wrongful denial of his employment.

Defendant medically disqualified Morriss because he had a condition which Defendant feared would develop into diabetes, sleep apnea, cardiac disease, etc. And in this instance, there is no genuine issue of fact regarding Defendant's intent.

Dr. Sharon Clark was the medical officer responsible for disqualifying Morriss after he received the conditional offer of employment. Clark was unequivocal with respect to the basis for her decision. Clark testified:

> Q. So the basis for Mr. Morriss's disqualification based on the Burlington Northern's protocol and his BMI was that he could eventually or could develop these health risks, not that he had those health risks?
>
> A. **Yes**.

(App 826, Clark Dep. 91:21-92:1) (emphasis added).

Moreover, the intent of the Defendant was affirmed by Jarrard, Defendant's Chief Medical Officer and expert witness who testified as follows:

> Q. Okay. You already – I think you talked about it to some degree, but why do the - - these health conditions preclude you from medical – medically qualifying someone with a BMI of 40?
>
> A. . . . **The probability that people with class three obesity will develop one of these medical conditions is so high it's unacceptable to us to accept that level of risk in these safety sensitive jobs**.

(App 1162, Jarrard Dep. 36:8-37:7) (emphasis added).

To conclude that the ADA does not protect those who are discriminated against with respect to employers' speculation of future impairment is nonsensical. After all, it is undisputed that an employer may not refuse to hire an applicant based on a mistaken belief that said applicant has an impairment. There is no logical difference between the employer who discriminates against an applicant based on a mistaken belief that said individual is presently impaired from the employer (like BNSF) who discriminates against an applicant based on a belief (reasonable or not) that the employee will be impaired in the imminent future. Why should the employee who is assumed will imminently suffer from a disability have any less rights that an employee who is mistakenly believed to be suffering from a disability? In each scenario, the intent of the employer is to discriminate against the employee on the basis of disability. Thus, even if this Court were to find that BNSF did not regard Morriss as having an actual impairment at the time it disqualified him from employment, it must find that BNSF based its decision on a fear that Morriss would inevitably and imminently suffer an actual impairment. Consequently, this Court can only conclude that BNSF violated the law,

To hold that discriminating against an employee based on a belief that said worker will suffer from a disability in the future is in violation of the ADA is also consistent with ADA's intent of not basing employment decisions on myth, fears and stereotypes. Another district court stated:

> An individual rejected from a job because of the "myths, fears and stereotypes" associated with disabilities would be covered under this part of the definition of disability, whether or not the employer's or other covered entity's perception were shared by others in the field and whether or not the individual's actual physical or mental condition would be considered a disability under the first or second part of this definition. As the legislative history notes, sociologists have identified common attitudinal barriers that frequently result in employers excluding individuals with disabilities. These include concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, workers' compensation costs, and acceptance by coworkers and customers.
>
> **Therefore, if an individual can show that an employer or other covered entity made an employment decision because of a perception of disability based on "myth, fear or stereotype," the individual will satisfy the "regarded as" part of the definition of disability**. If the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of "myth, fear or stereotype" can be drawn.

Lizotte v. Dacotah Bank, 2010 U.S. Dist. LEXIS 1223, 15-16 (D.N.D. 2010) (quoting 29 C.F.R. pt. 1630 app.) (emphasis added).

Making employment decisions on speculative risk is nothing short of making employment decisions based on myth, fear, and/or stereotype. Such is the very conduct the ADA is meant to prohibit. In addition to labeling Morriss as medically unqualified and acknowledging the physiological affects obesity has on the human body system, BNSF, primarily out of fear of future impairments, denied Morriss employment. Therefore, the District Court erred in its interpretation of the Interpretive Guidelines and erred in granting BNSF summary judgment with respect to Morriss's regard as disabled claim.

CONCLUSION

The District Court erred by finding that Morriss's severe obesity is not an actual impairment under the ADA. The District Court further erred by failing to consider whether BNSF perceived Morriss to have a impairment in light of BNSF's conduct and its stated reasons for refusing to hire him. The District Court relied on pre-ADAAA case law and concluded that so long as Morriss's morbid obesity was not caused by a physiological condition, Morriss could never have or even be perceived to have an impairment by BNSF. Such an analysis is inconsistent with the ADAAA, the Interpretive Guidance and post-ADAAA case law. Consequently, the District Court erred in granting BNSF summary judgment and by failing to grant Morriss summary judgment on his regarded as claim.

Date: March 16, 2015

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Dated: March 16, 2015

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