IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

MELVIN MORRISS III, an individual,	)	**CASE NO. 8:13-cv-00024**
	)	
Plaintiff,	)	
	)	**DEFENDANT'S REPLY BRIEF IN SUPPORT OF SUMMARY JUDGMENT**
vs.	)	
	)	
BNSF RAILWAY COMPANY, a Delaware Corporation,	)	
	)	
Defendant.	)	

Defendant, BNSF Railway Company ("BNSF"), respectfully submits this Reply Brief in response to Plaintiff's Brief in Opposition (doc. 112), and in Support of BNSF's Motion for Summary Judgment (doc. 96). Plaintiff's disability discrimination claims fail for each of the following reasons: (1) Plaintiff does not have a qualified disability under either the ADA Amendments Act or the Nebraska Act; (2) BNSF did not perceive plaintiff as disabled under either the ADA Amendments Act or the Nebraska Act; and (3) BNSF properly determined that plaintiff was not currently qualified for the position of diesel mechanic due to the significant health and safety risks associated with Class III obesity (BMI ≥ 40). Based upon the undisputed materials facts, BNSF is entitled to summary judgment on plaintiff's claims as a matter of law.

FACTS

The relevant facts are set forth in BNSF's Brief in Support of Summary Judgment (doc. 97, pp. 1 through 41), and supported by the evidence submitted in support of BNSF's Motion for Summary Judgment (docs. 98-0 through 98-22). It does not appear that plaintiff materially disputes the facts set forth in BNSF's Brief. *See,* Doc. 112, pp. 1 through 3. Instead, plaintiff disputes the legal ramifications of the facts or the application of the law to the facts in this case. *See id.* For purposes of the competing motions for

summary judgment (docs. 96 and 99), BNSF does not dispute the majority of plaintiff's "Supplemental Statement of Undisputed Material Facts," however BNSF disputes the materiality of such facts to the issue pending before the Court. Specifically, BNSF does not dispute the facts cited in paragraphs 1, 7, 10, and 14. *See,* Doc. 112, pp. 3-6. BNSF does not dispute the facts cited in paragraphs 2 and 3, however plaintiff's weight management history beyond of the timeframe he was applying for a position with BNSF and outside of the medical records BNSF had available for review at the time of plaintiff's application are not material to the issues pending before the Court. *See,* Doc. 112, pp. 3-4 (discussing plaintiff's weight management issues *after* BNSF declined to hire him for the diesel mechanic position); *cf.* Doc. 97, pp. 4 through 6 (setting forth the information on plaintiff's weight that was available to BNSF.) Plaintiff's characterization of the testimony cited in paragraphs 4, 5, 6, 8, 9, 11, 12, 13, 15 and 16 is simply argumentative and not an accurate summary of the testimony cited. The testimony speaks for itself.

DISCUSSION

Plaintiff does not have an actual or perceived impairment and therefore cannot satisfy the definition of a regarded-as disability claim, the only type of disability claim he presses in his summary judgment response. Plaintiff continues to misstate the law that requires him to identify an actual or perceived impairment. He fails to meet the required showing that his weight either constitutes an actual impairment as defined by the applicable regulation or that BNSF perceived his weight to be an impairment as defined by that regulation. He has done neither and BNSF is therefore entitled to summary judgment on his claims.

Instead of directly addressing how his obesity fits into the definitional framework of the ADA, plaintiff ignores the requirement and attempts to bootstrap himself into showing an impairment by quoting pronouncements about the legal standards applicable when an employer takes certain actions or entertains certain perceptions about a condition that indisputably meets the definition of impairment such as HIV status, skin graft scars, angina, genetic defects, cancer, and back injuries. He spends an inordinate amount of discussion on the legislative history of the ADA Amendments Act, however the key phrases in those quotes concern "stereotypes about individuals *with a disability*" or persons *with an impairment* – and here plaintiff has failed to produce evidence of an actual or perceived impairment and thus cannot be an individual *with a disability* – actual or perceived.

Plaintiff concedes BNSF did not perceive him as having a *present* impairment. Even when plaintiff attempts to define his perceived disability as something BNSF somehow created by its decision, he argues that BNSF perceived him as susceptible to having a *future* impairment. In doing so, plaintiff overlooks that the EEOC has expressly rejected the future impairment theory, instead requiring a *present* impairment or perception of a *present* impairment. Plaintiff's claims should fail on that basis alone.

Plaintiff's interpretation of the ADA Amendments Act would transform the statute into catchall protection for all physical attributes and characteristics an employer may find undesirable. Such an interpretation would lead to ridiculous results where every adverse employment decision would be subject to a disability discrimination claim based upon some perceived dislike of an applicant's appearance or physical attribute with no required showing of any actual or perceived impairment under the longstanding

definition of that term. Also, plaintiff's argument suggesting that defendant employers can define the law by their subjective determination of what constitutes a disability or impairment cannot possibly be the result intended by Congress. This Court should reject plaintiff's broad brush and improper interpretation of the law.

I. PLAINTIFF'S CLAIMS ARE NOT COVERED BY THE ADA, BECAUSE HE HAS NO ACTUAL OR PERCEIVED IMPAIRMENT.

Plaintiff has abandoned his "actual disability" claim as he failed to present any argument on that claim or identify any evidence showing that his obesity "substantially limits" him in one or more "major life activity" as required under 42 U.S.C. § 12102(1)(A). For all the reasons set forth in BNSF's opening brief, summary judgment is appropriate on Counts I and II of the Complaint. *See,* Doc. 97, pp. 15-26. Plaintiff's regarded-as disabled claim also fails because plaintiff did not point to any evidence sufficient to create a genuine issue of material fact as to whether BNSF perceived that his obesity was such that it constituted an impairment as defined by law. In fact, plaintiff's arguments attempting to do so actually make clear that his legal theory is one that is not recognized in law and that the EEOC has expressly rejected.

BNSF asks the Court to address that issue and grant summary judgment on the impairment issue. The Court has a unique opportunity to be among the first few courts to address weight-related claims of disability discrimination following the enactment of the ADA Amendments Act. Only a handful of courts have done so and most involved motions to dismiss without full development of the arguments or a record. Although the few that involve summary judgments point the way by correctly focusing on the impairment question BNSF raises, an additional analysis would benefit the public.

A. Plaintiff's broad arguments about the ADA overlook the impairment requirement, or merely assume, without analysis or explanation, that obesity satisfies the requirement.

The purpose of the ADA and ADA Amendments Act, and particularly the amended regarded-as provision, is to protect against discrimination because of an actual or perceived impairment, not discrimination because of alleged misperceptions about characteristics that are not impairments. The ADA is not a catchall statute protecting all physical characteristics. The law protects only those who have an impairment or are perceived to have an impairment.

Plaintiff improperly argues about the broad purposes of the ADA and the ADA Amendments Act without actually applying the specific text of the law and regulations to his claim. Notably, the legislative history and language from cases that plaintiff relies upon for his broad purposes argument, involve discussions about conditions that are actual impairments under the governing regulation. *See,* Doc. 112, p. 7 (quoting a case discussing "HIV disease"); *id.* (quoting a case about myths, fears, and stereotypes "associated with diabetes"); *id.,* p. 8 (quoting a case reiterating that the ADA prohibits discrimination "because of an actual or perceived physical or mental impairment;" also quoting from the EEOC Interpretive Guidance discussing "skin graft scars," "cancer," and "angina," all of which, actually constitute impairments under the regulatory definition, 29 C.F.R. § 1630.2(h)(1)); *id.,* pp. 11-12 (quoting the EEOC's Interpretative Guidance discussing how determination of the qualified element is made for "an individual *with a disability*" (emphasis supplied)); *id.,* p. 12 (quoting *Arline* as expanding the definition to cover those regarded as having "an impairment"); *id.,* pp. 12-13 (quoting case discussing purposes of ADA Amendments Act and quoting language that "the

question of *whether an individual's impairment* is a disability under the ADA should not demand extensive analysis" (emphasis supplied)).[1]

Given that the issue presented to the Court is whether plaintiff has a perceived impairment, plaintiff's analysis is flawed. He is attempting to use statements about legal prohibitions when an impairment is present to prove that there is an impairment. That circular reasoning ignores the critical issue he must demonstrate – that BNSF perceived his obesity to be a condition that met the definition of an impairment in the first place. If and only if he can make that showing, would the broad statements he points to then come into play in analyzing his claim. The cases plaintiff relies upon clearly demonstrate his flawed analysis.

Plaintiff's reliance on *Kalskett v. Larson Mfg. Co. of Iowa, Inc.,* 146 F.Supp.2d 961 (N.D.Iowa 2001), is misplaced. First, the *Kalskett* case concerns a failure to accommodate a disability. Second, the court held an issue of fact existed whether the plaintiff was "…qualified to perform the essential functions of the assembly line job with reasonable accommodation." *Id.,* 146 F.Supp.2d at 987. Third and most importantly, "It is undisputed that Kalskett is disabled within the meaning of the ADA." Here, plaintiff has never asserted nor claimed he was entitled to a reasonable accommodation. No one has disputed that plaintiff is able to perform the essential functions of the diesel mechanic position (setting aside the safety concerns BNSF had). Contrary to *Kalskett*, plaintiff here has not and cannot show he is disabled – actual or perceived – within the meaning of the ADA.

[1] Plaintiff did the same thing with the cases and legislative history he quoted in his brief supporting his motion for summary judgment. *See,* Doc. 100, pp. 15-27.

Plaintiff's lengthy quotation from *Lizotte v. Dacotah Bank,* 677 F.Supp.2d 1155 (D.N.D. 2010), further undermines his argument, because the quotation from the EEOC regulations repeatedly describes individuals *with disabilities*, e.g., "…'myths, fears and stereotypes' *associated with disabilities*"; "….excluding individuals *with disabilities*"; and a "perception *of disability*[.]" (Doc. 112, p. 7) (emphasis supplied). The facts of *Lizotte* also showed that the employer perceived the plaintiff as having an impairment. *Lizotte* involved an involuntary commitment of the plaintiff to a mental institution after an aborted suicide attempt, and his employer's request that he take a leave of absence and ultimately resign from his position. The employer specifically said the reason for the request for him to resign was based, in part, "on the ability to perform your job[.]" *Lizotte,* 1160. Also, the plaintiff's treating psychiatrist "had diagnosed him with a mental disorder – mood disorder, not otherwise specified." *Id.,* 1163. The evidence further revealed that the employer was aware of the diagnosis and the mental health treatment the plaintiff was receiving in the months prior to the attempted suicide as well as the attempted suicide and subsequent hospitalization. *See id.,* 1164-65. Based on these facts, the court held that, "A jury could reasonably find that the defendants perceived Lizotte's mental impairment to be much more restricting than Dr. Anwar described, and so restricting that the defendant felt he could not work at the bank." *Id.,* 1165.

Unlike plaintiff here, the *Lizotte* court properly focused on the statutory definition that included protection from discrimination due to perceived "mental impairments." *Id.,* 1163 (*citing,* 29 C.F.R. § 1630.2(l) (defining "regarded as having an impairment" as including having a "physical or mental impairment" or "treated by a covered entity as having a substantially limited impairment.") "If an individual can show that an adverse

employment decision was made by the employer because of a perception *of a mental impairment* – whether based on myth, fear, or stereotype – the 'regarded as' prong of being defined as disabled under the ADA is generally satisfied." *Id.* (emphasis supplied). Naturally, the court required the plaintiff to show the perception of *an impairment* as defined under the law. *See id.* Here, plaintiff has failed to make that crucial showing.

The case cited by plaintiff, *EEOC v. American Tool & Mold, Inc.,* ___ F.Supp.2d ___, 2014 WL 2185013, *6 (M.D.Fla. Apr. 16, 2014), notes that the ADA Amendments Act "made it significantly easier for plaintiffs to bring 'regarded as' disabled claims." The statement is true, because the amendments relieved plaintiffs from making the showing that the defendant perceived an impairment *that substantially limited a major life activity. See id*. As discussed in BNSF's opening brief, however, the language requiring a showing of an actual or perceived *impairment* was not amended and a plaintiff must still make that showing to fit within the post-amendment standard for a regarded-as disability claim. *See,* Doc. 97, pp. 15-23. Although the court in *American Tool,* granted summary judgment to the EEOC on the regarded-as claim, the evidence submitted showed that the applicant had back surgery which the employer relied on in perceiving the applicant had an existing impairment. The case thus was about the employer's perceptions concerning an actual impairment not whether a condition satisfied the definition of an impairment.

Unlike *Lizotte* and *American Tool,* plaintiff here has failed to show that BNSF perceived his obesity as a physical impairment defined under the law. Plaintiff concedes BNSF did not perceive plaintiff as having a present impairment such as diabetes, sleep

apnea, etc.[2] The EEOC Guidance actually supports BNSF's position that he must show that his obesity is the result of a physiological condition or that BNSF perceived it to be the result of a physiological condition. He has met neither burden of proof.

Another case cited by plaintiff, *Gaus v. Norfolk Southern Railway Company,* 2011 WL 4527359 (W.D.Pa. Sept. 28, 2011) (unreported), is actually helpful to BNSF's position that plaintiff must show his obesity is an impairment as defined under the law. Contrary to the assertion by plaintiff, *Gaus* does not hold that a plaintiff is absolved from making any showing whatsoever that the defendant perceived him as having an impairment under the ADA. *See,* Doc. 112, p. 12. Instead, the *Gaus* court first explained that one key goal of the ADA Amendments Act was to reduce the substantial limitation requirement. The court then correctly explained that Congress amended the latter portion of the definition of what will constitute regarded-as discrimination to eliminate the substantial limitation requirement and yet retained the impairment requirement:

> 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 chapter *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.*

Gaus, *16 (*quoting,* 42 U.S.C. § 12102(1)(C)(3)(A) (emphasis supplied)). Even after the ADA Amendments Act, the text of the statute still places the burden of proof on the plaintiff to show that any alleged discriminatory conduct was "because of" an "actual or perceived physical or mental impairment." *Id.*

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[2] *See,* Doc. 112, p. 10 (plaintiff did not have sleep apnea, coronary artery disease, or diabetes; plaintiff was precluded from employment solely based on BMI); and pp. 11-12, 17-18 (BNSF denied employment based upon a potential for *future* impairment as opposed to present impairment).

The *Gaus* court granted summary judgment to the railroad on events occurring prior the ADA Amendments Act because plaintiff could not show that his chronic pain condition and narcotic medication treatment substantially limited a major life activity. The court denied summary judgment for the railroad for events occurring after the ADA Amendments Act, because the railroad's decision finding the plaintiff unfit to work due to his chronic pain condition and narcotic medication treatment could lead a reasonable jury to find regarded as discrimination. *See, Gaus,* 20. **In so holding, the court actually considered and determined whether plaintiff's chronic pain and narcotic medication treatment met the definition of a physical impairment.** The court held that the plaintiff's "chronic pain condition and narcotic medication treatment easily satisfy the definition of a physical impairment – '[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems,….'" *Gaus,* *18 (*quoting,* 29 C.F.R. § 1630.2(h)(1) (2011)). "His chronic pain condition clearly affects one or more body systems, and indeed, courts have recognized chronic pain as an impairment." *Id.* (citations omitted). **Here, this is the exact type of analysis and proof plaintiff fails to provide.**

Plaintiff's attempts to distinguish the facts and holdings in *Powell* and *Sibilla* are superficial and unavailing. In *Powell,* the Court explained the "important distinction" between perceiving weight as an impairment versus perceiving weight as an undesirable characteristic:

> Plaintiff would draw an inference from this comment that Merrell viewed Powell's appearance as a whole (clothing, accessories, weight) as negatively affecting her sales performance. Assuming (without deciding) that such an inference is reasonable, it would show only that Merrell viewed Powell as overweight, not that Merrell perceived Powell's weight to constitute a physical impairment. **That is an**

important distinction. Plaintiff's argument improperly equates a physical characteristic (*i.e.,* overweight status) with an impairment.

Powell, Civ. A. 13-0007-WS-C, 2014 WL 554155, *7 (S.D. Ala. Feb. 12, 2014), appeal dismissed (May 19, 2014) (emphasis supplied). The *Powell* court noted, "Authority, both before and after the ADAAA, supports this proposition and rejects the notion that a disfavored physical characteristic is a disability under the ADA." *Id.,* fn. 15 (*quoting with approval, Francis v. City of Meriden,* 129 F.3d 281, 285-86 (2nd Cir. 1997) (obesity, without more, does not equate to a physiological disorder and physical characteristics are not impairments) and *Sibilla v. Follett Corp.,* 2012 WL 1077655, *9 (E.D.N.Y. Mar. 30, 2012) ("The fact that an employer regards an employee as obese or overweight does not necessarily mean that the employer regards the employee as suffering a physical impairment.")).

Likewise, in *Sibilla*, the court discussed the ADA Amendments Act and still concluded, "Even under the new, broader 'regarded as' definition, plaintiffs' claims still fail since there is no evidence in the record suggesting that Follett perceived the Sibillas as *having an impairment*." 2012 WL 1077655, *7. The plaintiffs in *Sibilla* failed to point out any essential function of the job the defendant claimed the plaintiffs could not perform. *See id.* The *Sibilla* court compared the lack of plaintiffs' evidence to the evidence produced in *Frank v. Lawrence Union Free Sch. Dist.,* 688 F.Supp.2d 160, 171 (E.D.N.Y. 2010). In *Frank,* the employer's comments that the teacher's obesity was preventing him from performing the essential functions of his job supported a "regarded as claim," i.e. the employer viewed the plaintiff's obesity in *Frank* as an impairment. *See also, Whittaker v. America's Car-Mart, Inc.,* Civ. No. 1:13CV108 SNLJ, 2014 WL 1648816, * 2 (E.D.Mo. Apr. 24, 2014) (Motion to dismiss denied. Plaintiff alleged he had

"severe obesity" which substantially limited him in the major life activity of walking. "Whether or not plaintiff can in fact *prove* that his weight rises *to the level of a disability under the ADA* is not at issue here[.]") (*quoting, Lowe v. American Eurocopter, LLC,* Civ. No. 1:10CV24-AD, 2010 WL 5232523, *7-8 (N.D.Miss. Dec. 16, 2010) (obesity may form the basis of a regarded as claim if the "employer perceived her weight *as an impairment*.")).

In contrast here, plaintiff offers no evidence that BNSF perceived his obesity as a condition that constituted an impairment under the applicable definition. Instead, like the plaintiffs in *Powell* and *Sibilla,* plaintiff improperly equates BNSF's actions based on a physical characteristic with actions based on an impairment. As such, his claims must fail. Plaintiff's faulty analysis is further demonstrated by an example that substitutes obesity for another characteristic — red-headedness. If an employer believed (however irrationally) that red-headed employees were unsafe and at risk of future potential conditions, the impairment standard for regarded-as claims would not be met because the employer's irrational beliefs were about a characteristic not an impairment. *See e.g., Powell,* *8 ("Neither the hairstyle nor the weight is an actual or perceived impairment in that scenario.")

Conversely, if the same employer thought that all red-headed employees have cancer or that red-headedness resulted from cancer, and acted on that basis, the employer would have perceived the red-headed employees to have an impairment, i.e., cancer. In both scenarios, red-headedness is not actually an impairment, but in the latter scenario, the employer *perceived* red-headedness as something that does meet the definition of an impairment, i.e., cancer, and thus would have satisfied the perceived

impairment standard. The same hypothetical can be used with other characteristics that are not impairments, including left-handedness, having blue eyes, and pregnancy that does not involve complications. *See,* 29 C.F.R. § 1630.2(h) Appx. In short, an employer's views about safety concerns and future potential conditions associated with a *characteristic* cannot satisfy the impairment requirement necessary to make out a regarded-as disability claim – unless the employer perceived the characteristic to be a disorder or something else that meets the definition of impairment.

The same analysis applies to weight. So long as an employer does not view an employee's weight as an impairment and it is not actually an impairment, an employer can entertain all the perceptions it wants, correct or not, about an employee's weight and act on them, because the employer is acting based on a characteristic, not an impairment. The critical question thus is whether the employee's weight is an impairment or the employer has perceived it as an impairment as that term is defined under the ADA. Because that is the critical question, the Court should disregard the multitude of statements in plaintiff's brief about the legal requirements and purposes of the law when there is an impairment – something plaintiff here has failed to show.

B. The EEOC's Interpretative Guidance and the statutory and regulatory language refute plaintiff's argument based on perceived *future* impairment.

The EEOC has rejected the suggestion that a perceived impairment can be established by an employer's concern about a potential *future* impairment. Yet that is plaintiff's entire argument. Plaintiff repeatedly emphasizes that BNSF was concerned he would develop *future* impairments, i.e., diabetes, to support his contention that BNSF perceived his weight as a *present* impairment rather than a characteristic. *See,* Doc.

112, p. 17 ("…the Defendant has tied [plaintiff's] obesity to a fear that he will likely develop future health conditions."); *id.* ("…because of the future impairments [plaintiff] was likely to encounter[.]); *id.,* pp. 18 ("…based on the risk that [plaintiff] would develop a future condition (i.e. sleep apnea, diabetes, cardiac disease, etc.)"). Plaintiff concedes though that he neither had any such impairment, e.g., diabetes, nor did BNSF perceive him as presently having any such impairment. *See,* Doc. 112, p. 10 (no evidence plaintiff had sleep apnea, coronary heart disease or diabetes.)

Notably, plaintiff *never* discusses the definition of impairment or the EEOC Interpretative Guidance discussing the term. Using present tense, the language of the statute and regulations show that to be covered a perception must be of a *presently* existing impairment not a perception of a *future* impairment. 42 U.S.C. § 12102(1)(C)("being regarded *as having* such an impairment) (emphasis supplied); § 12102(3)(A)("individual meets the requirement … if the individual establishes that he or she has been subjected to an action prohibited under this chapter 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") (emphasis supplied); *accord,* 29 C.F.R. § 1630.2(g)(1)(3), (g)(2), (l).

The ADA does not purport to reach perceptions of a future impairment. Plaintiff attempts to craft just such an argument by relying on cases discussing an employer's views about the future effects of an *existing impairment. See,* Doc. 112, p. 11 ("…[plaintiff's] obesity is analogous to having a genetic condition which at some time *could* develop into a future disability or being HIV positive which at some point *could* develop into AIDS.") Again, plaintiff fails to first show that his obesity is akin to a

"genetic condition" or "HIV" (conditions that meet the definition of impairment under the law) before he can legitimately analogize his obesity to those conditions. Clearly, improper perceptions about *existing impairments* can create coverage under the ADA. That is not the same here where a perception about an existing non-impairment (i.e., obesity that is not part of a weight-related physiological disorder) may become a covered impairment in the future (e.g., diabetes). As previously discussed in BNSF's brief opposing plaintiff's motion for summary judgment, plaintiff's obesity is not the same as the asymptomatic nature of an actual impairment that is covered by the ADA, e.g. HIV positive status. *See,* Doc. 109, pp. 9-10. In the HIV positive status case, an actual impairment is present because the impairment definition is met as a disorder affecting a bodily system from the moment of infection even absent outward symptoms. *See*, *Bragdon v. Abbott*, 524 U.S. 624, 637, 118 S.Ct. 2196 (1998) ("In light of the immediacy with which the virus begins to damage the infected person's white blood cells and the severity of the disease, we hold *it is an impairment* from the moment of infection." (emphasis supplied)). Again, no court has held that perceptions about a non-impairment becoming an impairment in the future creates a present actionable claim under the ADA, and yet that is the only argument plaintiff advances in his opposing brief.

Not only is plaintiff's theory unsupported by any statute, regulation, or court decision, the EEOC in its Interpretive Guidance definitively rejects plaintiff's future impairment argument. In the lengthy passage BNSF quoted in its opening brief, the EEOC explains, "It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural, and economic characteristics that are not impairments." 29 C.F.R. § 1630. 2(h) Appx.; Doc. 97, p. 17. The EEOC goes on

to specifically point out that the definition of impairment "does not include characteristic predisposition to illness or disease." *Id.* Thus, plaintiff's theory that BNSF's concerns about his weight causing future illness or disease somehow constitute perceiving him as having a present impairment is wrong: the predisposition to illness or disease is not an impairment. *See id.*; *cf. Cornman v. N.P. Dodge Management Co.*, 43 F.Supp.2d 1066, 1071 (D. Minn. 1999) (alleged statement to plaintiff that he was worried about her cancer returning suggested that defendant perceived plaintiff as more susceptible or prone to cancer than other people, but did not support a finding that defendant regarded plaintiff as being disabled.) "A 'characteristic predisposition to illness or disease' does not qualify as an impairment, 29 C.F.R. § 1630.2(h) interpretive guidance; thus, the fact that Defendant regarded Plaintiff as predisposed to some illness cannot, by definition, mean that Defendant regarded Plaintiff as disabled." *Cornman,* 43 F.Supp.2d at 1071. Here, plaintiff has solidified BNSF's entitlement to summary judgment by agreeing that BNSF did not perceive him as having an impairment and focusing only on a perception of a future impairment that as a matter of law does not show a perceived impairment for purposes of a regarded-as disability claim.

C. BNSF is entitled to summary judgment.

In sum, plaintiff has failed to show any genuine issue of material fact supporting his claims. As a last ditch effort to save his claims, plaintiff alleges that "severe obesity" has been found to be an impairment, and obesity is described as a "disease" and a "multifactorial chronic disease" in the medical literature. Doc. 112, p. 18. First, "severe obesity" has a definitive meaning that plaintiff fails to bring to the Court's attention. As described in *EEOC v. Res. For Human Dev., Inc.,* 827 F.Supp.2d 688, (E.D.La. Dec. 6,

2011) and already discussed in BNSF's opening brief (doc. 97, pp. 28-30), "severe obesity," which as defined in the EEOC Compliance Manual, means weight that is 100% over the norm. Plaintiff has not attempted to satisfy that requirement, and the undisputed evidence shows he cannot. He also fails to identify any evidence that BNSF perceived his weight as exceeding 100% over the norm. Thus, even if the Court were to adopt and apply the "100% over the norm" test to plaintiff's obesity, his claims still fail. In other words, the only issue raised by plaintiff's reference to "severe obesity" is which definition applies — the longstanding one used by a multitude of federal courts under which a weight-related physiological disorder is required of the severe obesity or "100%-over-the-norm" standard from the EEOC Compliance Manual that a few courts have recently adopted. But on that issue, as BNSF explained in its opening brief, the Court need not make a decision because plaintiff fails to meet either standard. *See,* Doc. 97, pp. 26-30.

Second, plaintiff cites to no authority (because he cannot) holding that all "diseases" are covered by the ADA. If calling obesity a "disease" and saying that all diseases are covered by the ADA was sufficient, then all obesity would be covered by the ADA. Also, as already discussed, no authority has ever come to that conclusion and the EEOC and numerous courts have rejected it. Plaintiff is mistakenly confusing medical terminology with a *legal definition* under the ADA. Simply calling obesity a "disease" does not equate to obesity as an impairment under the ADA any more than a person deemed to have a "disability" under some other law necessarily means that person meets the ADA definition of "disability."

Finally, plaintiff is incorrect in suggesting that summary judgment is not appropriate on perceived impairment cases because such a decision depends on the defendant's intent. *See,* Doc. 112, p. 9 ("…'employer's motive or intent is rarely susceptible to resolution at the summary judgment stage.'" (*quoting, American Tool, supra.*) That legal view is an incorrect, yet oft-repeated refrain by plaintiffs in employment law cases. In fact, courts routinely grant summary judgment on the merits of discrimination claims, which are entirely about intent. *See e.g., Withers v. Johnson,* ___ F.3d ___, 2014 WL 3973099 (8th Cir. Aug. 15, 2014) (summary judgment for employer on plaintiff's failure to show discriminatory animus or retaliation); *E.E.O.C. v. Product Fabricators, Inc.,* ___ F.3d ___, 2014 WL 3971477 (8th Cir. Aug. 15, 2014) (summary judgment for employer on plaintiff's failure to show termination was a as result of disability); *Ryan v. Capital Contractors, Inc.,* 679 F.3d 772 (8th Cir. 2012) (summary judgment for employee on plaintiff's failure to show evidence of pretext); *Lenzen v. Workers Compensation Reinsurance Association,* 705 F.3d 816 (8th Cir. 2012) (summary judgment for employer on plaintiff's failure to show evidence of pretext, retaliation or failure to accommodate her disability).

Of course, here it would not matter even if that were the law. Unlike in other cases where the parties dispute the employer's perception, plaintiff and BNSF *agree* on what the evidence shows about BNSF's perception. Specifically, both sides agree that BNSF's did *not* perceive plaintiff as actually having any present impairment but as presenting a risk of a future impairment. Thus, there is no "intent" issue to resolve, which is why plaintiff also has moved for summary judgment.

In sum and based upon the foregoing discussion and that contained in BNSF's opening brief, plaintiff's claims fail as a matter of law and BNSF is entitled to judgment as a matter of law. Although there should be no need to reach the remaining arguments, BNSF will briefly reply to plaintiff's mistaken contentions on those issues.

II. PLAINTIFF'S OBESITY DOES NOT MEET THE DEFINITION OF IMPAIRMENT, BECAUSE IT IS TRANSITORY AND MINOR.

As already previously discussed in BNSF's opening brief, plaintiff's Class III obesity was a minor and transitory condition. *See,* Doc. 97, p. 33.[3] BNSF's decision was premised upon plaintiff's Class III obesity – not obesity at any level. *Cf.*, Doc. 112, pp. 20-21 (The facts cited by BNSF "…only prove that [plaintiff's] weight had fluctuated and not that [plaintiff's] obesity was gone.")[4] It was plaintiff's Class III obesity that BNSF said was transitory and minor. Plaintiff cannot now attempt to reframe the argument to focus on *all* obesity unless he is actually contending that *all* obesity is an impairment. And if so, his argument is even weaker than already discussed as no single authority has ever held or suggested that *all* obesity is an impairment. Plaintiff's Class III obesity in fact was transitory because he fluctuated above and below the Class III level. *See,* Morriss Dep., Ex. 6 [Internal Medicine Records Pltsdisc117-124] (showing, at one point, that plaintiff's BMI dropped below Class III obesity.) BNSF considered it to be (present tense) "minor" because BNSF did not perceive it as actually causing any present

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[3] BNSF has not waived this defense even assuming it is correct to say that an exception from a definition of a required element of a plaintiff's claim is an affirmative defense. *See,* Doc. 6, ¶¶ 36 and 41 [Answer]. BNSF alleged that plaintiff failed to state a claim under the ADA and that he did not meet the definition of "disabled" under the ADA. *See also,* 42 U.S.C. § 12102(3)(B) ("…shall not apply to impairments that are transitory and minor.")

[4] Plaintiff has no factual support of his assertion that BNSF had a policy that required applicants to "lose weight and maintain it for at least six months before reapplication[.]" Doc. 112, p. 20.

disorder, as explained above, and plaintiff admits that it did not actually result in any present disorder. Thus, the condition was transitory and minor.

III. PLAINTIFF'S OBESITY POSES A DIRECT THREAT, BECAUSE OF THE ASSOCIATED SAFETY RISKS.

Plaintiff's contention that a "direct threat" requires an impairment is mistaken. As already discussed in BNSF's opening brief, employees can impose a direct threat based on risks in the future without presently having an impairment. *See,* Doc. 97, pp. 37-39. For example, an employee could be highly accident prone or could have a predisposition for injury, which as explained earlier is not an impairment, but could nevertheless present a "direct threat."

As BNSF explained in its opening brief, it is important to keep in mind that the inquiry on "direct threat" is not which party is historically correct about the direct threat, but rather whether BNSF relied on reasonable medical judgment for its decision that there was a direct threat. Dr. Jarrard's qualifications and bases for BNSF's decisions are all sound and are set forth in detail in BNSF's opening brief (*see id.*), and BNSF's brief in opposition to plaintiff's motion to exclude Dr. Jarrard's opinions (doc. 107).

Plaintiff's statement that "logically speaking" it makes no sense to hire someone at risk of developing a condition while actually hiring people with the condition is deliberately obtuse. Of course it makes sense. If one knows there is a medical condition, steps can be taken to address it. If a medical condition does not yet exist, however there is an "extremely high" risk that one or more than one severe medical conditions will occur at an unknown future time while an employee is working in an unforgiving environment, there is no way to take appropriate precautions. Finally, plaintiff's arguments regarding Dr. Jarrard and his opinions are all wrong for the reasons

already set forth in BNSF's brief. *See,* Doc. 107. Dr. Jarrard is imminently qualified to offer the opinions he offered given his years of being an occupational medicine specialist and physician. *See id.* Plaintiff had multiple extensions to retain his own expert to rebut Dr. Jarrard's opinions and yet he failed to do so. Simply put, an expert – especially a non-retained expert – does not have to point to every scientific study supporting every step of his analysis, conclusions and opinions that he draws based on his extensive education, training and experience and studies that are available to him throughout his career.

IV. BNSF'S QUALIFICATION STANDARDS ON BMI IS VALIDLY BASED ON SAFETY CONCERNS.

As already set forth in BNSF's opening brief and contrary to plaintiff's assertion otherwise, BNSF's qualification standard on BMI is not the same as the direct threat defense. *See,* Doc. 97, pp. 35-37; *cf.,* Doc. 112, p. 36. As the case *EEOC v. Exxon Corporation* explained, where an employer has developed a standard applicable to all employees of a class, the employer is not required to proceed under the "direct threat" provision and individualized assessment, but rather may rely and defend its standard as a business necessity. 203 F.3d 871, 875. BNSF properly raised the qualification requirement in its answer. *See,* Doc. 6, ¶¶ 37, 38 and 39; *cf. Hohn v. BNSF Ry. Co.,* Civ. No. 8:05-cv-00552-TDT (D.Neb. Jun. 2, 2006) at Doc. 15 [Answer]. Plaintiff can hardly claim surprise as BNSF asserted that plaintiff did not meet its qualification standard in the initial email to plaintiff declining him for the diesel mechanic position ("…not currently qualified…" [Doc. 1, ¶ 14; *see also,* Morriss Dep., 52:21-54:18 and Ex. 11, BNSF00035]; BNSF's response to plaintiff's charge [*see,* Voloshin-Kile Dep., Ex. 25, BNSF00080-84]; and the report of parties' planning conference (*see,* doc. 10, pp. 5-9).

Plaintiff overstates what is required under the qualification standard: all BNSF is required to show (which it has) is that the standard was adopted for safety purposes and the decision (not currently qualify Class III obese applicants for safety sensitive positions) serves those safety purposes (which it does), not that the decision eliminates all risks (e.g., very few internal candidates with Class III obesity that are covered by collective bargaining agreements). *See id.*; *cf.,* Doc. 112, pp. 35-38. Finally, plaintiff confuses reasonable accommodation in the direct threat context with reasonable accommodation for the qualification standard. The former requires a showing that the threat cannot be eliminated or reduced below direct threat level by an accommodation. Under the latter, the only reasonable accommodation that matters is one that will allow the applicant to satisfy the qualification standard. *See e.g.,* Doc. 112, p. 36.[5] Here, as there is no reasonable accommodation that would cause plaintiff to be less than a 40 BMI, reasonable accommodation of plaintiff is not an issue for the qualification standard argument.

[5] *See Allmond v. Akal Security, Inc.*, 558 F.3d 1312, 1317-18 (11th Cir. 2009) (rejecting argument that hearing-aid ban should be removed entirely, noting that "[t]hat proposal is not reasonable: it destroys the very standard we have just upheld as a legitimate business necessity."); *Cremeens v. City of Montgomery*, 2010 WL 3153721, at *9 (M.D. Ala. Aug. 9, 2010) (concluding that fit-for-duty evaluation of firefighters was job-related and consistent with business necessity, and rejecting the "proposed accommodation" of eliminating the qualification entirely); *Atkins v. Salazar*, 2010 WL 393960, at *7 (N.D. Miss. Oct. 5, 2010) ("The Court finds that Defendant has provided sufficient evidence that its Medical Standards medically disqualifying those with uncontrolled insulin-dependent diabetes are job-related and consistent with business necessity. Plaintiff has failed to offer any reasonable accommodation that would allow him to comply with the Medical Standards.")

V. THE MOST RECENT MONTANA DECISION FOUND BNSF'S BMI POLICY NON-DISCRIMINATORY.

Plaintiff's discussion of Montana law is both flawed and incomplete, particularly in failing to mention or discuss that the most recent Montana ruling found in favor of BNSF on the very same no-impairment ground BNSF urges here. The Montana cases plaintiff references (*Bilbruck, Cringle*, and *O'Dea*) were exclusively state-law cases, not federal law cases as asserted by plaintiff.[6] The state agency that issued the rulings plaintiff points to all failed to examine the impairment element of a regarded-as disability claim, glossing over it and focusing on the latter part of the liability analysis under Montana law. In fact, in *Bilbruck*, the reviewing state district court acknowledged that BNSF was correct in its impairment arguments, and yet failed to recognize the import of that determination by then focusing on a Montana-specific regulation: "While obesity does not constitute a physical impairment unless it is the result of a physiological disorder or condition, an employer may not eliminate an obese applicant for employment unless the applicant fails a physical capacities evaluation or is otherwise disqualified based on an individualized assessment. ARM 24.9.606(7), (8)." *Bilbruck v. Burlington N. & Santa Fe Ry. Co.*, 2008 Mont. Dist. LEXIS 177, *16, ¶ 27 (Mont. Dist. Ct. 2008).

In any event, the most recent Montana case — the one plaintiff conspicuously omits from discussing in his response — did use the correct

[6] BNSF notes that plaintiff's discussion of the Montana cases misstates the procedural history of the cases and misrepresents some of the orders he cites. For example, the *O'Dea* court citations are orders denying BNSF's motion for voluntary dismissal and the order affirming that decision. Further, the links to some of the agency proceedings are not to the correct orders. BNSF acknowledges, however, that the state agency found BNSF liable, solely under Montana law, in *Bilbruck, Cringle*, and *O'Dea*, all of which involved claims based on disqualification of applicants based on obesity, although the more recent developments have clarified the legal standard in a way that means those cases were wrongly decided.

analysis and found in favor of BNSF. In *Feit v. BNSF Ry. Co.*, the same hearing officer involved in *Bilbruck, Cringle*, and *O'Dea* initially found in favor of Feit on the same cursory reasoning used in the prior cases. *See, Feit v. BNSF Ry. Co.*, HRB Case No. 0091013577 (MT Dep't of Labor and Indus., Aug. 5, 2010) (available at http://assets.dli.mt.gov/erd/Human%20Rights%20Decisions/feit_bnsf_hod.pdf) (last visited August 31, 2014). On judicial review (before a federal court under diversity jurisdiction), the reviewing court focused the dispute on the impairment issue. **The court agreed with BNSF that federal law required a physiological weight-based disorder**, however the court certified to the Montana Supreme Court the question of whether *state law* imposed the same requirement. [see Exhibit 1, at p.2 (Order)]; *see also, BNSF Ry. Co. v. Feit*, 281 P.3d 225, 2012 MT 147 (Mont. Jul 6, 2012).

The Montana Supreme Court decided that state law permitted an exception to the physiological disorder requirement such that obesity also can be an impairment when the obesity is outside normal range, meaning "severe obesity," and affects one or more body systems. *Feit*, 2012 MT 147, ¶¶10-16. The court did not hold that any level of obesity is an impairment as plaintiff suggests. *See id.* Instead, the court relied heavily on the ADA Amendments Act and the EEOC Compliance Manual standard under which "severe obesity" — that is, weight 100% over the norm — constituted an impairment even in the absence of an underlying physiological disorder, and adopted the Compliance Manual standard as an alternative to the physiological-disorder standard. *Id.*, ¶¶ 10-16. Thus, on return to the federal court, the court held that under the Montana Supreme Court's decision "a person's weight may be a physical or mental impairment if: (1) it is more than 100% over the norm and (2) it affects one or more body systems as

defined in 29 C.F.R. § 1630.2(h)(1*).*" *BNSF Ry. Co. v. Feit*, 2013 U.S. Dist. LEXIS 62601, *2-*3, 2013 WL 1855832, *1 (D. Mont. May 1, 2013).

The federal court then remanded the case to the state agency to apply that standard. **With the agency finally focused on the impairment question, and clarifying the definition of impairment under state law, the state agency used the correct analysis and ruled that by rejecting Feit based on his BMI of near 40, BNSF *did not* perceive Feit as having an impairment.** *Feit v. BNSF Ry. Co.*, HRB Case No. 0091013577 (MT Dep't of Labor and Indus., Jan. 24, 2014) (attached as Exhibit 2).

The state agency explained that "BNSF regarded Feit, because of his weight (based upon his BMI) as being extremely obese, and thereby being at significant risks of developing conditions affecting one or more body systems as defined in 29 C.F.R. § 1630.2(h)(l)." *Id.*, p. 8, ¶ 17. **The agency pointed out that viewing one as at risk of developing conditions is not the same as viewing the person as presently affected as necessary to show a perceived impairment.** *Id.*, p. 8, ¶ 20 ("There is no credible and substantial evidence that Feit's weight, at any time during the process by which BNSF decided not to hire him, already had affected one or more body systems as defined in 29 C.F.R. § 1630.2(h)(l)"); *id.*, p. 10 ("The Hearing Officer's interpretation of 'having a weight that affected one or more body systems' is that it means 'having a weight that has damaged or impaired one or more body systems.'"). Further, because BNSF never considered whether Feit's weight was more than 100% over the norm, Feit could not satisfy that aspect of the definition of impairment either. *Id.*, p.10.

The hearing officer summarized his decision, and acknowledged the new legal development that applied to Feit but not the previous cases, as follows:

> [P]hysical characteristics, including weight, within "normal" range, that are not the result of a physiological disorder are not impairments, pure and simple. The definition of "severe obesity" as "body weight more than 100% over the norm" appeared in the EEOC Compliance Manual, Sec. 902.2(c)(5)(ii). Eric Feit is an extremely obese individual (according to "a standard that we commonly use in the field [of healthcare sciences)", Dr. Gaskill, see Finding No. 4, p. 5). He was, according to Dr. Pitman, entirely capable of performing the duties of a conductor for the BNSF Railway Co. when he applied for and was conditionally accepted for the job of conductor-trainee. *Nonetheless if he is within the "normal" range for weight (under the legally applicable standard) and he does not prove that his obesity is the result of a physiological disorder, any employer can legally refuse him a job because of his weight, as BNSF did. His weight is not within the definition of the term "impairment" and denying him employment because of his weight thus cannot be disability discrimination.*
>
> *The Montana Supreme Court's decision on the certified question is entirely a decision of first impression, and controls this case. With the adoption of the EEOC's regulatory definition of what is not an impairment, by the Montana Supreme Court, this Hearing Officer is now bound by law to decide that Feit could not have been regarded as disabled because of his weight under the Montana Human Rights Act.*
> …
> BNSF did not refuse employment to Feit because of a physical or mental disability … when it withdrew its conditional offer of employment because of his weight.

Id., p. 11-12 (emphasis supplied).

If this Court is going to entertain a discussion of Montana law in this case, it should focus on the most recent decision, not the earlier ones cited by plaintiff that employed a faulty analysis. The only difference between *Feit* and the primary analysis BNSF offers here is that *Feit* allowed for an impairment finding in one instance even in the absence of a weight-based physiological disorder — when the individual's weight is more than 100% over the norm. That is the same standard used in the *EEOC v. Resources for Human Development* case that plaintiff cites. But that standard makes no

difference here because plaintiff has made no effort to show that he satisfies it, and as BNSF pointed out, his weight, in fact, is not more than 100% over the norm, and there is no evidence suggesting that BNSF perceived it was or that BNSF perceived his weight as presently affecting any of his body systems. *See,* Doc. 97, pp. 28-30. Although BNSF urges the Court to follow the overwhelming federal authority under which weight is an impairment *only* when there is a weight-based physiological disorder, the Court need not resolve that issue. Plaintiff does not satisfy either of the impairment standards and therefore cannot show an actual or perceived impairment as required for his regarded-as disability claim.

CONCLUSION

Based upon the foregoing and the discussion set forth in BNSF's opening brief, BNSF respectfully requests the Court to dismiss Plaintiff's Complaint in its entirety, with prejudice, and award BNSF its costs.

Dated this 9th day of September, 2014.

BNSF RAILWAY COMPANY, A
Delaware Corporation, Defendant

By: */s/ Nichole S. Bogen*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing ***Defendant's Reply Brief in Support of Summary Judgment*** was electronically filed with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following, on this 9th day of September, 2014 upon the following:

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