

No. 14-3858

IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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MELVIN A. MORRISS, III,

Plaintiff – Appellant

v.

BNSF RAILWAY COMPANY, A Delaware Corporation,

Defendant - Appellee

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA-LINCOLN

Civil Action No. 8:13-cv-00024  
The Hon. Richard G. Kopf, U.S.D.J., Presiding

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**PETITION FOR PANEL REHEARING AND REHEARING *EN BANC***

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## **RULE 35 STATEMENT IN SUPPORT OF REHEARING**

Appellant, Melvin A. Morriss (“Morriss”), petitions for rehearing *en banc* and/or panel rehearing under Fed. R. App. P. 35 and 40. In a decision dated April 5, 2016, the Panel (Wollman, Bright and Loken) affirmed the district court’s grant of summary judgment to Appellee, BNSF Railway Company (“BNSF”). In upholding the judgment, the Panel determined (1) Morriss’s morbid obesity was not regarded as an actual impairment, and (2) BNSF did not perceive Morriss’s morbid obesity as an impairment. The Panel held that obesity does not qualify as a physical impairment—and thus a disability under the ADA—unless it results from an underlying physiological disorder or condition. Relying on an interpretive guidance of the EEOC, the Panel reasoned that an individual’s weight is generally a physical characteristic. The Panel also held that BNSF did not regard Morriss as having a perceived impairment because Morriss failed to show that BNSF perceived his obesity to be a condition that was an “actual impairment.”

The Panel’s decision raises questions of exceptional importance about the definition of disability with respect to the condition of morbid obesity in light of the ADAAA’s mandate to interpret the ADA broadly in favor of expansive coverage. The Panel overlooked uncontroverted medical evidence demonstrating that morbid obesity is a condition of the body affecting the body systems and misapprehended the law in finding that BNSF did not perceive Morriss as

impaired. Rehearing should be granted to properly consider the medical evidence. A rehearing should also be granted so the ADA can be applied correctly with respect to regarded as claims. This Court's decision should be in line with the First Circuit Court of Appeals, dealing with the same issues and similar facts, and which decision is consistent with Congress's mandate under the ADAAA.

### **RELEVANT FACTS AND PROCEEDINGS**

In March 2011, Morriss applied for a Diesel Mechanic position with BNSF. App 410. After successfully completing a written skills exam and panel interview, BNSF extended Morriss an offer of employment conditioned upon him completing a medical questionnaire and passing a medical examination. App 411; 476; 570; 588. Morriss was then examined by BNSF's doctor who administered various tests and measured his height and weight. App 411. On May 18, 2011, Morriss received a BNSF e-mail revoking the job offer stating 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.

In January 2013, Morriss filed a complaint against BNSF alleging violations of the ADA with the United States District Court of the District of Nebraska. App 1. On August 5, 2014, Morriss filed his Motion for Partial Summary Judgment alleging that he was unlawfully "regarded as" as having an actual or perceived impairment by BNSF. App 356. On the same date, BNSF filed its Motion for

Summary Judgment on all of Morriss's Complaint. App 38. The district court ruled in favor of BNSF on all matters. App 1781-86. Morriss then appealed to this Court.

### **ARGUMENT IN SUPPORT OF REHEARING**

#### *A. Applying the ADA consistent with the ADAAA is exceptionally important.*

So long as BNSF regarded Morriss as impaired, he would be deemed disabled under the regarded as prong of the ADA. Panel opinion p. 5 (referencing 42 U.S.C. § 12102(A)-(C)). “An individual is ‘regarded as having such an impairment’ if he establishes that he was discriminated against ‘because of an actual or perceived physical...impairment...’” *Id.* (quoting 42 U.S.C. § 12102(3)(A)). This matter rests entirely upon whether morbid obesity constitutes an “actual” impairment and/or whether BNSF “perceived” Morriss as having an impairment. The ADA does not define “impairment.” *Id.* at p. 6. According to the regulations, the term impairment is straightforward and defined as “[a]ny physiological disorder or condition . . . affecting one or more body systems . . .” 29 C.F.R. § 1630.2(h)(1).

The ADAAA requires courts to interpret the term “disability” broadly. 29 C.F.R. § 1301.1. In this matter, the Panel narrowly defined the term “impairment” by finding that Morriss's morbid obesity was not an “actual” impairment and/or that BNSF did not perceive Morriss's body systems as being affected by his obesity. The Panel extensively focused on the EEOC's Interpretive Guidance and

concluded that its decision was consistent with some other pre-ADAAA circuit cases, such as *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436,442-43 (6th Cir. 2006) and *Francis v. City of Meriden*, 129 F.3d 281 (2nd Cir. 1997). Said cases determined that morbid obesity, not caused by an underlying condition, is merely a physical characteristic and not an “actual” impairment. The Panel concluded that had Congress intended the ADAAA to cover morbid obesity, the regulations defining impairment needed to be changed.

Morriss respectfully disagrees with the Panel. As concerns “physical impairment,” the current regulations do not require any change. The uncontroverted medical evidence showed that morbid obesity affects the body systems. At the very minimum, BNSF perceived Morriss’s morbid obesity as affecting his body systems when it revoked its offer of employment. Thus, it was improper to find that Morriss had to prove he had any condition, or that BNSF held any perception, beyond the plain language of the regulations. This error becomes even more evident in light of the ADAAA which was passed explicitly to broaden the definition of “disability.” The ADAAA and its regulations clearly state:

The primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA. . .the definition of “disability” ... shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. The question of whether

an individual meets the definition of disability under this part should not demand extensive analysis.

29 C.F.R. § 1630.1

As the ADAA requires the term disability to be interpreted broadly, so too must the term “impairment.” “Impairment” is inherent in the term disability. Even the Panel’s opinion could not ignore this basic fact, stating: “[t]his appeal turns on the meaning of the term ‘**disability**,’ which the ADA defines as ‘(A) physical . . . **impairment** . . . or (C) being regarded as having such **impairment**.’” Panel opinion p. 5 (quoting 42 U.S.C. § 12102(1)(A)-(C)) (emphasis added). Thus, the specific wording of the regulation’s definition of “impairment” requires no change. Instead, the prism of analysis of the regulation’s language should be broad in scope. The Panel ignored the ADAAA’s mandate and engaged in technical linguistic gymnastics in construing the EEOC’s Interpretive Guidance to support a narrow application of the term “impairment.” However, the Interpretive Guidance does not carry the force of law. See *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 899 (10th Cir. 1997), *aff’d*, 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999), *overturned due to legislative action* (2009) (stating, “. . . although we give great deference to the EEOC’s interpretation of the ADA found in the regulations promulgated under the express authority of Congress and the ADA itself, we do not do the same for interpretative guidance . . . while the EEOC’s [] Guidance may

be entitled to some consideration in our analysis, it does not carry the force of law and is not entitled to any special deference under *Chevron*.”).

In giving greater deference to the Interpretive Guidance over the plain language of the regulations and the ADAAA’s mandate, the Panel misapprehended the law by finding: (1) morbid obesity is simply a physical characteristic and not an “actual” impairment; and (2) BNSF’s beliefs about and actions towards Morriss was not indicative that it perceived his morbid obesity as if it was an impairment.

*B. The Panel overlooked uncontroverted evidence and misapprehended the law on the issue of “physical impairment” under 29 C.F.R §1630.2(h)(1).*

Morriss presented overwhelming evidence to support a finding that morbid obesity, in and of itself, meets the definition of “physical impairment” under 29 C.F.R §1630.2(h)(1). The testimony and evidence that Morriss offered proves that morbid obesity is a medically diagnosed disease of the human body that has profound effects on the functioning of the body systems in a person suffering from the disease. Morriss’s evidence showed that in the medical field, obesity is regarded as so much more than just a person’s weight. Both the American Medical Association (“AMA”) and the National Heart, Lung and Blood Institute (“NHLBI”) have recognized obesity to be a disease or disorder of the human body. App 1211; 1300 (“Obesity is a complex, multi-factorial disease that develops from the interaction between genotype and the environment.”). In support of its position that obesity is a disease, the NHLBI’s Practical Guide and Evidence Report

provides clinically empirical support of the physiological ways that obesity affects one or more body systems. App 1425-1432. NHLBI reports that obesity affects a number of the body systems by substantially increasing 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.

Morriss's evidence demonstrated that morbid obesity is a disease or disorder of the body that a medical professional diagnoses and prescribes treatment for. The most practical and cost effective way to diagnose morbid obesity in a clinical setting is by calculating the patient's Body Mass Index ("BMI"). App 1303. BMI is a weight-to-height ratio, calculated by dividing one's weight in kilograms by the square of one's height in meters and used as an indicator of obesity. App 1296. A BMI of 40 or above is Class III Obesity or otherwise referred to as extreme or morbid obesity. App 1222. NHLBI endorses several medical treatments for morbid obesity as a disease, including surgical intervention as well as the avenue pursued by Morriss's physicians, pharmacology. App 1320;1410.

Morriss's evidence confirmed that he had been diagnosed with morbid obesity and that his disease was affecting his body systems. Morriss's family physician diagnosed Morriss with morbid obesity with a BMI of 43.30 in February



3, 2011. App 1022; 1117. Dr. Pees testified that he considered morbid obesity to be a serious medical condition, and that he treated Morriss's condition by prescribing him medication to suppress his appetite. App 1071; 1025-1026. Dr. Pees also found that Morriss's morbid obesity was causing him elevated blood pressure (i.e. affecting his cardiovascular system). App 1034. 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. BNSF's medical staff also diagnosed Morriss with the disease during his medical examination and that diagnosis was the sole basis for revoking his job offer. App 340; 343; 411.

All of this evidence presented by Morriss was essentially uncontroverted by BNSF. The medical literature that BSNF's medical expert, Dr. Michael Jarrard, relied on to formulate its discriminatory hiring practices unequivocally supports Morriss's position. Dr. Jarrard admitted that as Chief Medical Officer for BNSF, he relied upon NHLBI's literature to form his expert opinions because they are authoritative information regarding obesity and risk of disease. App 1209. The Panel ignored Morriss's uncontroverted evidence proving that morbid obesity is a physiological disorder affecting the body systems, and instead misapplied the EEOC's Interpretative Guidance to find that Morriss's disease was merely a "physical characteristic." However, there is no medical support before the Court

that morbid obesity is simply “excess weight.” The Panel’s mischaracterization of Morriss’s disease as a physical characteristic illustrates the prevalence of society’s misconception that obesity is a voluntary and lifestyle related condition. Voluntariness is irrelevant when determining whether a condition constitutes an impairment as the ADA indisputably applies to numerous conditions that may be caused or exacerbated by voluntary conduct, such as alcoholism, AIDS, diabetes and cancer. *Andrews v. Ohio*, 104 F.3d 803, 809 (6th Cir. 1997). The Panel’s decision to treat obesity as a voluntary condition only perpetuates the social bias that the ADA was designed to combat.

Moreover, the Panel misstated Morriss’s position to be that the regulatory definition of physical impairment “...cannot be read in isolation and must be considered in light of the EEOC Interpretive Guidance, which refers to weight...” Panel opinion p. 6. Morriss’s position has been the opposite—arguing that there is no need for the Court to look to the EEOC’s Interpretive Guidance regarding weight and physical characteristics because Morriss proved that his morbid obesity was a disease that—on its own—was a physiological disorder affecting his body systems. The Panel’s inquiry should have stopped once Morris met his burden under 29 C.F.R §1630.2(h)(1). Moving on to the Interpretive Guidance and discussing the physical characteristic of weight was unwarranted and only served the purpose of narrowing the application of the ADA.

*C. The Panel misapprehended the law on the issue of perceived impairment.*

The Panel's decision conflates "actual" impairment with "perceived" impairment and analyzes the two as if they are the same. The Panel found that morbid obesity is only an "actual" impairment if said obesity is caused by an underlying physiological condition. It thus concluded that Morriss may only succeed on a perceived impairment claim so long as BNSF believed Morriss's morbid obesity was caused by an underlying physiological condition. Such a finding is not supported by the plain language of the ADA or its regulations. Notwithstanding Morriss's position that his obesity is an "actual" impairment, under a "perceived" impairment claim, Morriss is only required to prove that BNSF perceived him as having any "physiological . . . condition . . . affecting one or more body systems." 29 C.F.R. § 1630.2(h)(1).

Assuming, *arguendo*, that morbid obesity is not an "actual" impairment, the Panel did not address BNSF's perception of Morriss in light of the justification used in refusing to hire him. BNSF stated that Morriss's morbid obesity affected his health and prevented him from performing his job safely. BNSF stated Morriss was, "[n]ot 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; 528. BNSF unabashedly admits that the risks it contemplated included a fear that Morriss would likely suffer from sudden

incapacitation due to: sleep apnea, cardiovascular disease, hypertension, stroke, coronary artery disease, heart attacks, diabetes, etc. App 155-58; 829; 905;1157.

It is logically inconsistent to argue that BNSF does not consider morbid obesity as a physiological disorder, while at the same time, it crafted its policies based solely on medical literature characterizing morbid obesity as nothing short of a disease of the human body affecting its body systems. The inconsistency is further displayed by BNSF arguing that morbid obesity is so benign as to not constitute a physiological disorder, yet also believing that Morriss's obesity is so damaging that he is a current and extreme health and safety risk. These inconsistencies were not addressed by the Panel.

Assuming morbid obesity is not an "actual" impairment, had BNSF simply based its decision on a dislike for fat people, BNSF's conduct wouldn't violate the ADA. However, BNSF's conduct was not akin to refusing to hire Morriss because of his hair color, his eye color, because he was too tall, too short or because of any other physical characteristic contemplated in the Interpretive Guidance. The **only** reason BNSF did not employ Morriss was because it believed that his morbid obesity was affecting his body systems.

Although the Panel states that other circuit courts are in alignment with its decision, the Panel ignored *Cook v. State of R.I.*, 10 F.3d 17 (1st Cir. 1994). In *Cook*, a plaintiff was denied employment because the employer believed her

morbid obesity prevented her from doing her job safely and placed her at risk for developing serious ailments. *Id.* at 21. While *Cook* was decided pursuant to the Rehabilitation Act, the court stated: “. . . perceived disability [is] satisfied whether or not a person actually has a physical . . . impairment . . . the regulations define the term ‘physical impairment’ broadly; it includes, inter alia, any physiological disorder or condition significantly affecting a major bodily system...” *Id.* at 23. The employee’s evidence established the impairment in two ways, as the jury could have concluded the plaintiff suffered from a metabolic disorder, or:

The jury could have found that plaintiff, although not handicapped, was treated by [the employer] as if she had a physical impairment. Indeed, [the employer]'s stated reasons for its refusal to hire—its concern that Cook's limited mobility impeded her ability to evacuate patients in case of an emergency, **and its fear that her condition augured a heightened risk of heart disease, thereby increasing the likelihood of workers' compensation claims—show conclusively that [the employer] treated plaintiff's obesity as if it actually affected her musculoskeletal and cardiovascular systems.**

*Id.* at 23-24 (emphasis added).

The Panel was silent as to this aspect of the *Cook* decision. However, *Cook* is most instructive because the employer used the same arguments against the plaintiff as BNSF uses against Morriss. Having been decided pursuant to the Rehabilitation Act and before the ADAAA, *Cook*'s relevancy is heightened. The ADAAA was passed after courts failed to interpret the ADA consistent with Congress' intent. As stated by the Ninth Circuit, the ADAAA was passed because:

“. . . Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act . . . that expectation has not been fulfilled.” *Rohr v. Salt River Project Agric. Imp. & Power Dist.*, 555 F.3d 850, 861 (9th Cir. 2009).

*Watkins* and *Francis*, circuit court cases upon which the Panel primarily relied upon, are distinguishable because both were decided prior to the ADA. More importantly, in neither case did either employer justify their decision by expressing a belief that the employees’ morbid obesity affected their body systems. In analyzing these cases, there is little to no evidence that either the *Watkins* or *Francis* courts considered whether the respective employers *perceived* the employees to have a condition affecting the body systems. Rather, those courts focused, as has the Panel, only on the issue of whether morbid obesity is itself an “actual” impairment. On this basis, *Cook* is most relevant when determining whether BNSF perceived Morriss as being impaired.

To hold that only “actual” impairments are covered under the law narrows the definition of disability in a manner explicitly rejected by the ADA. The error in the Panel’s analysis and its potential negative consequences can best be viewed in light of the following hypothetical. Assume Employee “A” returns to work after having visited Paris, France. Employer mistakenly believes that

Employee “A” contracted a fictional disease called *Parisitis*. Employer is under the impression that *Parisitis* is a contagious disease causing one’s lungs to malfunction and eventually die. Employer, out of fear, terminates Employee “A” stating it cannot allow a worker who is contagious and whose lungs will malfunction to remain employed.

Under such scenario, did the employer violate the ADA? The answer should be simple. The employer is liable as it perceived Employee “A” as having a condition affecting his body systems and terminated his employment due to that perception. According to the plain language of the regulations, nothing more should be required. It is immaterial whether Employee A actually had *Parisitis*, or if *Parisitis* is even an “actual” impairment. However, in light of the Panel’s decision, Employee “A” is not protected because *Parisitis* is not an “actual” impairment. Of note, even before the ADAAA, courts recognized that the ADA was passed to protect people from the danger of mistaken beliefs of their employers. One circuit court stated:

The . . . Act's protection is the embodiment of its drafters' will to stamp out the stereotyping of and discrimination against persons with disabilities in all their forms, even when that stereotyping or discrimination is misplaced. . . .we do not always look to the individual claiming discrimination; . . . under a “regarded as” theory, we must look to the state of mind of the employer . . . Under the “regarded as” prong of the ADA, membership in the protected class becomes a question of intent. And . . . “that question—i.e., the employer's motive—is one rarely susceptible to resolution at the summary judgment stage.”

*Ross v. Campbell Soup Co.*, 237 F.3d 701, 706 (6th Cir. 2001).

Since BNSF perceived Morriss's body systems as being affected by his morbid obesity, BNSF perceived him as having an impairment. It is immaterial whether or not morbid obesity is an "actual" impairment. BNSF did not revoke its offer because it simply believed Morriss weighed too much. It perceived him as having a medical condition. It perceived that condition as affecting his body systems. It correlated his morbid obesity with a current heightened risk for other conditions leading to sudden incapacitation. If BNSF did not believe in a correlation between morbid obesity and those other risks, BNSF would not have revoked its offer. Thus, its belief that morbid obesity "currently" heightened the risk to developing other conditions is an admission that it perceived Morriss's obesity as affecting his body systems. At the very minimum, a jury question exists as to whether BNSF perceived Morriss's obesity as affecting his body systems.

### **CONCLUSION**

The correct interpretation of the ADA in light of Congress' mandate of expansive coverage in the ADAAA is an issue of exceptional importance to this Court. Rehearing of Morriss's case should be granted so that this Court may ensure that all the evidence is considered and that the law is properly applied with respect to regarded as claims under the ADA.



Date: April 26, 2016.

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Certificate of Service

I hereby certify that on April 26, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: April 26, 2016

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