

## **FUTURE IMPAIRMENTS CAUSED BY OBESITY NOT COVERED BY ADA**

Health care providers who staff for safety-sensitive positions should take notice of a Seventh Circuit appeals panel ruling on October 29, 2019, that an obese applicant cannot claim a violation of the Americans with Disabilities Act for an employer's rejection of him over concerns about future possible health conditions and related safety concerns arising from the worker's weight.

### **THE REJECTED JOB APPLICANT**

When he applied for the job, Ronald Shell was 5'10" tall and weighed 331 pounds, with a body-mass index of 47.5. BNSF Railway Company refused to hire Shell because it believed his obesity presented an unacceptably high risk that he would develop certain medical conditions like sleep apnea, diabetes and heart disease and that unpredictable onset of those conditions can result in sudden incapacitation. For this reason, BNSF does not hire applicants for safety-sensitive positions involving heavy equipment, like the one Shell was applying for, if their BMI is 40 or greater. BNSF informed Shell that his application could be reconsidered if he lost at least 10 percent of his weight and maintained the weight loss for at least six months.

### **THE LAWSUIT**

Shell sued BNSF under the Americans with Disabilities Act, alleging that BNSF discriminated against him because it regarded him as having a disability. BNSF moved for summary judgment asserting that the ADA's definition of "disability" is not met where an employer regards an applicant as not presently having a disability but at high risk of developing one. The district court denied BNSF's motion, but a unanimous three-judge panel of the Seventh Circuit reversed, holding that the ADA's "regarded as" prong does not cover a situation where an employer views an applicant as at risk for developing a qualifying impairment in the future.

### **THE REJECTED ARGUMENTS**

Shell argued strenuously that by refusing to hire him based on the risk of future impairment, BNSF has treated him as if he has the impairments now. But, the judges responded, "the evidence is clear that BNSF did not believe that Shell had any of the feared impairments when it refused his application."

The EEOC invoked "the ADA's purpose, part of which is to combat "society's accumulated myths and fears about disability and disease," and the direction of Congresses that "[t]he definition of disability... shall be construed in favor of broad coverage of individuals." The panel responded, "to the extent BNSF's BMI policy reflects a stereotype, it is one about obesity" which is not a physical impairment under the ADA unless the obesity is caused by an underlying physiological disorder or condition. "We cannot decide the question presented based on broad statutory purposes where the answer is supplied by the statute's plain language."

### **THE STATUTE**

The ADA's "regarded as" prong defines "disability" as "being regarded as having [a physical or mental] impairment." The analysis focused on "having" as the decisive keyword.

### **THE CONCLUSION**

The judges said, "'Having' means presently and continuously. It does not include something in the past that has ended or something yet to come." The judges concluded, "the text plainly encompasses only current impairments, not future ones."

### **PRACTICAL TAKEAWAYS**

Based on this case, employers are now on notice that they may need to consider whether a BMI policy is needed for a safety-sensitive position. The opinion did not address the science behind the employer's reasoning or the details of the position, except that it involved operation of heavy equipment, which could result in danger to many people. It may be that safety concerns can be addressed and resolved in other ways. In any event, this case will motivate continued discussion of a complex issue.

If you have any questions or would like more information on this topic, please contact **Mark Sabey** at (303) 801-3538 or [marksabey@hallrender.com](mailto:marksabey@hallrender.com) or your regular Hall Render attorney.

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