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Job applicant fails to make argument his weight protected by ADA

By Michael R. Lied

Michael R. Lied, of Howard & Howard Attorneys PLLC, has practiced employment, labor and immigration law for more than 30 years. A frequent author and lecturer on these subjects, he is former chair of the Illinois State Bar Federal Civil Practice Section Council and Employment Law Section Council. He can be reached at mlied@howardandhoward.com and 309-999-6311.

Melvin Morriss applied for a machinist position with BNSF in March 2011 and was given a conditional offer of employment. Because the position was safety sensitive, the offer was contingent on a satisfactory medical review.

Morriss was 5-feet-10 tall and weighed 270 pounds. He had once been diagnosed as pre-diabetic but was not currently being treated for diabetes. He had taken appetite-suppressant medication to lose weight but not to address any health concerns, considered his overall health "good" and experienced no difficulties or limitations with his daily activities.

BNSF doctors conducted two physical examinations of Morriss: at one, Morriss had a body mass index of 40.9; at the other, he had a BMI of 40.4. BNSF's policy was not to hire a new applicant for a safety-sensitive position if his BMI equaled or exceeded 40.

BNSF's medical department notified Morriss that he was not currently qualified for the safety-sensitive machinist position due to significant health and safety risks associated with Class 3 obesity (a BMI of 40 or greater). BNSF revoked its offer of employment.

Morriss filed suit alleging that BNSF discriminated against him based on his obesity.

The U.S. District Court found that Morriss failed to provide any evidence to support his claim that his obesity was an actual disability under the Americans with Disabilities Act. The court also granted BNSF summary judgment on Morriss' claim that the company regarded him as having a disability.

On appeal, Morriss argued that his obesity, even without evidence of an underlying physiological disorder or condition, was a physical impairment under the ADA and that BNSF regarded it as such. The question on appeal was when obesity qualifies as a disability under the ADA.

Morriss contended that the definition of “physical impairment” could not be read in isolation and had to be considered in light of Equal Employment Opportunity Commission interpretive guidance that states:

“It is important to distinguish between conditions that are impairments and 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. Other conditions, such as pregnancy, *that are not the result of a physiological disorder are also not impairments.*” (Emphasis by the court.)

The appeals court disagreed. Like the district court, it reasoned that a more natural reading of the interpretive guidance is that an individual’s weight is generally a physical characteristic that qualifies as a physical impairment only if it falls outside the normal range and it occurs as the result of a physiological disorder.

Both requirements must be satisfied before a physical impairment can be found. Even weight outside the normal range — no matter how far outside that range — must be the result of an underlying physiological disorder to qualify as a physical impairment under the ADA.

Two other circuit courts have reached this result: *EEOC v. Watkins Motor Lines Inc.*, 463 F.3d 436 (6th Cir. 2006), and *Francis v. City of Meriden*, 129 F.3d 281 (2d Cir. 1997).

Morriss argued that the decisions in *Watkins Motor Lines* and *Francis* were inapposite because they were decided prior to the enactment of the ADA Amendments Act of 2008, which made substantial revisions to the ADA.

The court was not persuaded. Congress did not express any disagreement with judicial interpretations of the term “physical impairment,” and even after the ADAAA, “physical impairment” is defined as a physiological disorder or condition that affects a major body system.

Thus, because the ADAAA did not alter that definition, pre-ADAAA case law holding that obesity qualifies as a physical impairment only if it results from an underlying physiological disorder or condition remained relevant and persuasive.

Morriss also argued that his obesity was a physical impairment because it has been labeled “severe,” “morbid” or “Class III” obesity.

The EEOC regulations state, however, that weight is merely a physical characteristic — not a physical impairment — unless it is both outside the normal range and the result of an underlying physiological disorder.

Morriss cited the EEOC compliance manual, which states that while normal deviations in weight that are not the result of a physiological disorder are not impairments, at extremes, such deviations may constitute impairments. The compliance manual also states that “severe obesity,” namely, “body weight more than 100 percent over the norm,” is an impairment.

According to the court, this compliance manual pronouncement directly contradicted the plain language of the act, as well as the EEOC's own regulations and interpretive guidance, which all define "physical impairment" to require an underlying physiological disorder or condition.

The court concluded that for obesity, even morbid obesity, to be considered a physical impairment, it must result from an underlying physiological disorder or condition.

The court also rejected Morriss' argument that BNSF discriminated against him because it perceived him as having a physical impairment. Morriss argued that BNSF refused to hire him because it considered his obesity to present an unacceptably high risk that he would develop certain medical conditions in the future, and that BNSF therefore perceived him as having a current physical impairment.

The ADA does not prohibit an employer from acting on some other basis, such as on its assessment that although no physical impairment currently exists, there is an unacceptable risk of a future physical impairment.

An individual has a "disability" under the ADA if he has a physical impairment or is regarded as having such an impairment. In sum, Morriss was required to show that BNSF perceived his obesity to be a condition that met the definition of "physical impairment." The ADA does not prohibit discrimination based on a perception that a physical characteristic — as opposed to a physical impairment — may eventually lead to a physical impairment as defined under the act.

Morriss failed to produce evidence that BNSF perceived his obesity to be an existing physical impairment — in fact, the questionnaire and treatment records that Morriss and his doctor provided to BNSF notified the company that Morriss was not suffering from any physical impairment.

Thus, it was 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 or above, Morriss would or could develop such health risks in the future.

Melvin Morriss III v. BNSF Railway Co., 2016 WL 1319407 (8th Cir., April 5, 2016).

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