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Civil Rights—Morbid Obesity as a Disability Under the ADA *Morriss v. BNSF Ry. Co.*, 817 F.3d 1104 (8th Cir. 2016)

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CIVIL RIGHTS—MORBID OBESITY AS A DISABILITY
UNDER THE ADA

Morriss v. BNSF Ry. Co., 817 F.3d 1104 (8th Cir. 2016)

ABSTRACT

In *Morriss v. BNSF Ry. Co.*, the Court of Appeals for the Eighth Circuit *held* an employer may refuse to hire a morbidly obese individual because of his weight, and not run afoul of the Americans with Disabilities Act (ADA)—as long as the individual’s obesity does not have a physiological cause and as long as the employer does not perceive the individual as suffering from a current physical impairment. In addition, the court held that an employer could not be held liable under the “regarded-as” prong of the ADA if it denies employment to a morbidly obese individual based solely on fear that the individual will develop a physical disability in the future. The court’s holding in *Morriss* will make it difficult for morbidly obese individuals to bring a claim for employment discrimination under the ADA, while providing employers practical tips on how to avoid liability with employment policies and practices.

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I. FACTS

In March 2011, Melvin Morriss applied for and was granted a conditional offer of employment for a machinist position with BNSF.¹ According to BNSF policy for positions declared “safety sensitive,” Morriss’ offer was contingent upon a satisfactory medical review.² Morriss completed the company’s medical questionnaire, stating he was five feet, ten inches tall, and he weighed two hundred and seventy pounds.³ He also stated that while he had once been diagnosed as pre-diabetic, he did not currently suffer from diabetes, he had no other health concerns, he experienced no difficulties or limitations in his daily activities, and his

1. *Morriss v. BNSF*, 817 F.3d 1104, 1106 (8th Cir. 2016).

2. *Id.*

3. *Id.*

overall health was good.⁴ Morriss' doctor submitted treatment records in response to BNSF's follow-up on his possible history of diabetes, and those records did not reflect a current diagnosis, or any symptoms of the disease.⁵

Morriss underwent two separate physical examinations with BNSF doctors in May 2011.⁶ At the first, Morriss weighed 285 pounds and had a Body Mass Index ("BMI")⁷ of 40.9.⁸ At the second, he weighed 281 pounds and had a BMI of 40.4.⁹ Pursuant to the aforementioned policy, which denied employment in safety-sensitive positions to individuals with a BMI greater than 40, BNSF terminated Morriss' conditional offer of employment.¹⁰ In an email, the company told Morriss he was "[n]ot currently qualified . . . due to significant health and safety risks associated with Class 3 obesity¹¹ ([BMI] of 40 or greater)."¹²

Subsequently, Morriss filed a complaint against BNSF in January 2013, claiming BNSF had discriminated against him based on his obesity in violation of the Americans with Disabilities Act ("ADA"),¹³ which makes it unlawful for a covered employer to discriminate against any qualified individual on the basis of disability.¹⁴ Morriss' complaint asserted two causes of action under the ADA:¹⁵ first, he argued BNSF discriminated against him due to an actual disability, morbid obesity, under 42 U.S.C. § 12102(1)(A) ("actual disability" prong); and second, he argued BNSF discriminated against him when it regarded him as having a disability which

4. *Id.*

5. *Id.*

6. *Id.*

7. Body Mass Index (BMI) is a measure of body fat calculated by dividing a person's weight in kilograms by the square of his height in meters. *Body Mass Index (BMI)*, CENTERS FOR DISEASE CONTROL & PREVENTION (May 15, 2015), <https://www.cdc.gov/healthyweight/assessing/bmi/>.

8. *Morriss*, 817 F.3d at 1106.

9. *Id.*

10. *Id.*

11. The medical establishment classifies obesity based on BMI. Each successive class is associated with increased disease risk. Individuals with a BMI between 30.0 and 34.9 fall within Class I; 35.0 to 39.9, Class II; and 40.0 and above, Class III, also known as morbid obesity. *Classification of Overweight and Obesity by BMI, Waist Circumference, and Associated Disease Risk*, NATIONAL HEART, LUNG, AND BLOOD INSTITUTE, http://www.nhlbi.nih.gov/health/educational/lose_wt/BMI/bmi_dis.htm (last visited Oct. 17, 2016).

12. *Morriss*, 817 F.3d at 1106.

13. Americans with Disabilities Act, 42 U.S.C. §§ 12101-12103 (1990).

14. *Id.*

15. Morriss also sued under the Nebraska Fair Employment Practice Act (NFEPa), NEB. REV. STAT. §§ 48-1101 to -1126 (2016). "Because disability-discrimination claims under the NFEPa are analyzed under the same framework as claims brought under the ADA, we need not conduct a separate analysis of Morriss's state-law claims." *Morriss*, 817 F.3d at 1106 n.2 (citation omitted).

he did not have, under 42 U.S.C. § 12102(1)(C) (“regarded-as” prong).¹⁶ BNSF moved for summary judgment, arguing that Morriss’ obesity did not meet the definition of disability under the ADA, and that the company did not regard his obesity as a disability.¹⁷ Morriss moved for partial summary judgment on the regarded-as claim.¹⁸

The Nebraska district court found that Morriss had failed to provide any evidence to support his claim that his obesity was an actual disability under the ADA.¹⁹ Specifically, the district court found that Morriss’ claim failed because he did not prove that his obesity was a physical impairment, a necessary component of a disability under the ADA.²⁰ The court also rejected Morriss’ regarded-as claim because it found no evidence that BNSF regarded Morriss as having a current disability.²¹ “[T]herefore [the district court] granted BNSF’s motion for summary judgment, denied Morriss’ motion for partial summary judgment, and dismissed the action with prejudice.”²² Morriss appealed only his regarded-as claim to the Eighth Circuit Court of Appeals.²³

II. LEGAL BACKGROUND

Individuals with disabilities have faced serious and pervasive discrimination throughout American history; they have been denied equality in critical areas of life, including education, access to public services and accommodations, and employment.²⁴ Nonetheless, individuals with disabilities traditionally lacked legal recourse.²⁵ The ADA was passed in 1990 “to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce” in order to remedy this widespread discrimination.²⁶

16. *Morris*, 817 F.3d at 1106-07.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 1107.

22. *Morriss*, 817 F.3d at 1107.

23. *Id.* at 1107-08.

24. 42 U.S.C. § 12101(a) (2016).

25. *Id.*

26. *Id.* § 12101(b).

A. THE AMERICANS WITH DISABILITIES ACT (ADA) AND ITS
IMPLEMENTING REGULATIONS

One goal of the ADA is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”²⁷ Title I of the ADA bars discrimination in employment.²⁸ An individual has a disability under the ADA if he or she has: “(A) a physical or mental impairment that substantially limits one or more major life activities . . . ; (B) a record of such an impairment; or (C) [been] regarded as having such an impairment.”²⁹

Central to the disability test is the concept of “impairment.”³⁰ The ADA does not define impairment, but the term is defined in the regulations promulgated by the Equal Employment Opportunity Commission (“EEOC”), the agency Congress charged with implementing the ADA.³¹ A physical or mental impairment includes “[a]ny physiological³² disorder or condition, cosmetic disfigurement, or anatomical loss 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.”³³ The ADA’s implementing regulations are accompanied by interpretive guidance, also promulgated by the EEOC.³⁴ The interpretive guidance attempts to elucidate the concept of physical impairment by ascertaining conditions and characteristics that are *not* impairments.³⁵ Specifically, the interpretive guidance 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

27. *Id.*

28. *Id.* § 12112(a).

29. *Id.* § 12102(1).

30. 42 U.S.C. § 12102(1) (2016).

31. *See id.* § 12205a (effective Jan. 1, 2009).

32. Physiological means “of or relating to physiology,” which is “a branch of biology that deals with the functions and activities of life or of living matter (as organs, tissues, or cells) and of the physical and chemical phenomena involved.” *Physiology*, MERRIAM-WEBSTER (Aug. 17, 2016), <http://www.merriam-webster.com/dictionary/physiology>.

33. 29 C.F.R. § 1630.2(h)(1) (effective Apr. 4, 2012).

34. Interpretive Guidance on Title 1 of the Americans with Disabilities Act, 29 C.F.R. § 1630 app. (2016).

35. *Id.* § 1630.2(h).

are not the result of a physiological disorder. Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments.³⁶

B. THE ADA AMENDMENTS ACT (ADAAA)

In 2008 Congress passed the ADA Amendments Act (“ADAAA”) “[t]o restore the intent and protections of the Americans with Disabilities Act. . .”³⁷ in response to actions by the Supreme Court that severely narrowed the ADA’s intended scope.³⁸ Congress was particularly concerned with the Supreme Court’s restrictive reading of “disability,” which required a person be limited to a more significant degree than Congress had intended with the requirement that an individual be “substantially limit[ed]” by his or her disability.³⁹ Accordingly, the ADAAA instructs courts to construe the term disability in favor of broad coverage of individuals, to the maximum extent permitted by the terms of the ADA.⁴⁰ The ADAAA, however, did not change the definition of the term “impairment.”

C. WEIGHT-BASED DISCRIMINATION IN EMPLOYMENT

Discrimination against obese individuals is widespread, including in the employment context.⁴¹ Despite this, the federal government, and all but a few states and municipalities, provides no legal protection against discrimination based on weight.⁴² Obese individuals who experience discrimination in employment may bring a cause of action under the ADA on the theory that they have been disabled by their obesity, or that their employer perceives their obesity to be disabling, but the results of such lawsuits have been mixed.⁴³ The success of these cases has depended on

36. *Id.*

37. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

38. *Id.*

39. *Id.* at 3555.

40. *Id.*

41. See, e.g., Jane Korn, *Too Fat*, 17 VA. J. SOC. POL’Y & L. 209, 224 (2010); Kari Horner, *A Growing Problem: Why the Federal Government Needs to Shoulder the Burden in Protecting Workers from Weight Discrimination*, 54 CATHOLIC U. L. REV. 589 (2005); Camille A. Monahan, et al., *Establishing a Physical Impairment of Weight Under the ADA/ADAAA: Problems of Bias in the Legal System*, 29 ABA J. LAB. & EMP. L. 537, 542 (2014).

42. Horner, *supra* note 41, at 603-05 (discussing laws prohibiting weight discrimination in Michigan, the District of Columbia, and San Francisco and Santa Cruz, California).

43. See Molly Henry, *Do I Look Fat? Perceiving Obesity as a Disability Under the Americans with Disabilities Act*, 68 OHIO ST. L.J. 1761, 1774-86 (2007) (analyzing the results of cases brought under state and federal law and concluding the jurisprudence is “confusing and sometimes contradictory”).

whether the obese individual could prove his or her obesity was an impairment—which has been widely interpreted under the ADA to require the obesity have a *physiological cause*.⁴⁴ Notably, courts examine the physiological cause issue on a case-by-case basis, not as a matter of law.⁴⁵ In other words, each individual plaintiff has the burden of proving that his or her obesity has a physiological cause, such as metabolic or thyroid disorder, rather than more stereotypical causes like overeating and lack of physical activity.⁴⁶ Congress and the Supreme Court have yet to address the issue of whether obesity is, or can be, an impairment under the ADA.⁴⁷

III. ANALYSIS

In *Morriss*, the Eighth Circuit Court of Appeals held that “for obesity, even morbid obesity, to be considered a physical impairment [under the ADA] it must result from an underlying physiological disorder or condition.”⁴⁸ Because *Morriss* failed to produce evidence that his obesity was the result of an underlying physiological disorder or condition, the Eighth Circuit upheld the district court’s finding that *Morriss* did not have a physical impairment.⁴⁹ The court based its decision on the plain language of the statute and its interpretive guidance, prior case law, and the fact that the ADAAA did not change the definition of impairment.⁵⁰ The Eighth Circuit also affirmed the district court’s decision that BNSF did not discriminate against *Morriss* on the basis of a perceived disability (i.e., *Morriss*’ regarded-as claim) because *Morriss* did not produce evidence that BNSF “perceived his obesity to be an *existing* physical impairment.”⁵¹

44. See, e.g., *EEOC v. Watkins Motor Lines*, 463 F.3d 436, 443 (6th Cir. 2006) (holding that “to constitute an ADA impairment, a person’s obesity, even morbid obesity, must be the result of a physiological condition”); *Francis v. City of Meriden*, 129 F.3d 281, 287 (2d Cir. 1997) (holding that “physical characteristics that are ‘not the result of a physiological disorder’ are not considered ‘impairments’ for the purposes of determining either actual or perceived disability”) (citation omitted).

45. See generally *Henry*, *supra* note 43.

46. See *Korn*, *supra* note 41, at 222. See also *Monahan, et al.*, *supra* note 41, at 538-39 (arguing that physiological cause is an “extralegal” element that requires an obese individual prove he is not “culpable in [his] own disability [in order] to be entitled to the ADA’s protections, unlike all other ADA plaintiffs.”). For example, lung cancer qualifies as an impairment even if caused by smoking; same result for a paraplegic whose condition was the result of a drunk driving accident. See *id.*

47. *Henry*, *supra* note 43, at 1763-64.

48. *Morriss v. BNSF*, 817 F.3d 1104, 1112 (8th Cir. 2016).

49. *Id.* at 1113.

50. *Id.* at 1107-12.

51. *Id.*

Again, the Eighth Circuit relied on the “plain language of the ADA” and its interpretive guidance in making its decision.⁵²

A. THE DEFINITION OF PHYSICAL IMPAIRMENT REQUIRES A
PHYSIOLOGICAL CAUSE

First, the court examined the language of the ADA, the EEOC implementing regulations, and the interpretive guidance.⁵³ The court considered the plain language of the implementing regulations, defining impairment as “[a]ny *physiological disorder or condition*, cosmetic disfigurement, or anatomical loss *affecting one or more body systems . . .*” and to clearly lay out two requirements for obesity as a physical impairment: (1) it must be a physiological disorder or condition, *and* (2) it must affect a major body system.⁵⁴ In coming to this conclusion, the court rejected Morriss’ argument that an individual’s obesity need only be the result of a physiological disorder if his weight was within “normal range.”⁵⁵ Morriss read the ADA statute in light of EEOC interpretive guidance stating, “[t]he definition of the term ‘impairment’ *does not include physical characteristics such as . . . weight . . . that are within ‘normal’ range and are not the result of a physiological disorder.*”⁵⁶ According to Morriss,⁵⁷ this use of the conjunctive “and” meant weight was an unprotected “physical characteristic” *only* when (1) it was within normal range and (2) it was not caused by a physiological disorder.⁵⁸ The court considered its reading of the interpretive guidance “more natural,” particularly in light of additional language in the interpretive guidance providing that “[o]ther conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments.”⁵⁹

52. *Id.* at 1113.

53. *Id.* at 1107-08.

54. *Morriss*, 817 F.3d at 1108.

55. *Id.*

56. *Id.*

57. Some courts have agreed with Morriss. *See BNSF Ry. Co. v. Feit*, 365 Mont. 359, 367 (2012) (holding that “[o]besity that is not the symptom of a physiological disorder or condition may constitute a ‘physical or mental impairment’ within the meaning of [Montana law modeled on the ADA] if the individual’s weight is outside ‘normal range’ and affects ‘one or more body systems’ as defined in [EEOC interpretive guidance].”); *see also EEOC v. Res. for Human Dev., Inc.*, 827 F. Supp. 2d 688, 694 (E.D. La. 2011) (concluding that “[a] careful reading of the EEOC guidelines and the ADA reveals that the requirement for a physiological cause is only required when a charging party’s weight is within normal range. However . . . if the charging party is severely obese . . . there is no explicit requirement that obesity be based on a physiological impairment.”).

58. Brief for Appellant at 29, *Morriss v. BNSF Ry. Co.*, 817 F.3d 1104 (8th Cir. 2016) (No. 14-3858), 2015 WL 1407182, at *29.

59. *Morriss*, 817 F.3d at 1108-09.

Despite some support for Morriss' interpretation,⁶⁰ the court relied on federal circuit court of appeals case law supporting its position.⁶¹ The Sixth Circuit, in *EEOC v. Watkins Motor Lines, Inc.*,⁶² and the Second Circuit, in *Francis v. City of Meriden*,⁶³ both held that in order to be an impairment, obesity, even morbid obesity, must have a physiological cause.⁶⁴ The majority of district courts have reached the same conclusion.⁶⁵

B. THE ADA AAA DID NOT CHANGE THE PHYSICAL IMPAIRMENT ANALYSIS

A major point of contention between Morriss and BNSF was the impact of the ADA AAA on the analysis of obesity as impairment, and thus the relevance of pre-ADA AAA case law.⁶⁶ The court sided with BNSF, finding that since the ADA AAA did not alter the definition of impairment, "pre-ADA AAA case law holding that obesity qualifies as a physical impairment only if it results from an underlying physiological disorder or condition remains relevant and persuasive."⁶⁷ As the court explained, Congress' goal in enacting the ADA AAA was to ensure the definition of disability be construed in favor of broad coverage of individuals.⁶⁸ Specifically, the ADA AAA abrogated specific Supreme Court rulings that Congress believed too narrowly interpreted the requirement that an impairment "substantially limit a major life activity."⁶⁹ Through the ADA AAA, Congress instructed the EEOC to revise the definitions of "substantially limits" and "major life activity" to create a less demanding standard for disability.⁷⁰ Congress, however, "*did not* express any disagreement with judicial interpretations of the term 'physical impairment,'" which it presumably would have done if it intended to

60. See *BNSF Ry. Co.* 365 Mont. at 367; *Res. for Human Dev., Inc.*, 827 F. Supp. 2d at 694.

61. *Morriss*, 817 F.3d at 1109-10.

62. 463 F.3d 436, 443 (6th Cir. 2006).

63. 129 F.3d 281, 287 (2d Cir. 1997).

64. *Morriss*, 817 F.3d at 1109.

65. See, e.g., *Wagner's Pharmacy, Inc. v. Pennington*, No. 2013-SC-000541, 2015 WL 2266374, at *8 (Ky. Sept. 24, 2015) (unpublished per curiam); *Ivey v. District of Columbia*, 949 A.2d 607, 612-13 (D.C. 2008); *Merker v. Miami-Dade Cnty. Fla.*, 485 F. Supp. 2d 1349, 1353 (S.D. Fla. 2007); *Marsh v. Sunoco, Inc.*, No. 06-CV-2856, 2006 WL 3589053, at *4 (E.D. Pa. Dec. 6, 2006).

66. Compare Brief for Appellant, *supra* note 58, at *25-33, with Brief for Appellee at 42-51, *Morriss v. BNSF Ry. Co.*, 817 F.3d 1104 (8th Cir. 2016) (No. 14-3858), 2015 WL 2379169, at *42-51.

67. *Morriss*, 817 F.3d at 1111.

68. *Id.* at 1110.

69. *Id.*

70. *Id.*

abrogate the interpretations from *Watkins Motor Lines* and *Francis*.⁷¹ Therefore, the Eighth Circuit assumed Congress did not disagree with the courts' interpretation in those cases.⁷²

Ultimately, the court determined that the ADA's general policy statement encouraging broad coverage could not trump the plain language of the statute requiring obesity have a physiological cause.⁷³ While Congress may have expressed its intent for a less rigorous standard of determining whether an impairment "substantially limits a major life activity," the court maintained that an individual must first establish that he has a qualifying impairment before this less rigorous standard could be applied.⁷⁴

Pursuant to this interpretation, the court rejected Morriss' contention that his obesity was a *per se* physical impairment because it was labeled "severe," "morbid," and "Class III."⁷⁵ Here, the court emphasized it was not enough for Morriss to establish his weight was outside the realm of "normal deviations" and thus so "extreme" as to constitute an impairment; rather, he needed to provide evidence that *his individual* case of morbid obesity was the cause of a physiological disorder.⁷⁶ Morriss failed to do this.

C. THE ADA DOES NOT PROHIBIT DISCRIMINATION BASED ON THE PERCEPTION THAT A CURRENT PHYSICAL CHARACTERISTIC COULD LEAD TO A FUTURE PHYSICAL IMPAIRMENT

Finally, the court considered Morriss' argument on appeal: that BNSF had discriminated against him under the ADA's regarded-as prong because it perceived him as having a physical impairment he did not have.⁷⁷ The Eighth Circuit affirmed the district court's decision in favor of BNSF.⁷⁸ The crux of Morriss' regarded-as claim was that BNSF refused to hire him because it believed his obesity placed him at an unacceptably high risk of

71. *Id.* at 1111 (citing *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)) (noting that "Congress is presumed to be aware of [a] . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

72. *Id.*

73. *Morriss*, 817 F.3d at 1112.

74. *Id.*

75. *Id.*

76. *Id.* (rejecting as contradictory to the plain language of the statute § 902.2(c)(5) of the EEOC's Compliance Manual, which states that "body weight more than 100% over the norm," i.e., "severe obesity," is an impairment.). In any event, the court found that Morriss' weight was not "more than 100% over the norm." *Id.*

77. *Id.* at 1113.

78. *Id.*

developing certain medical conditions in the future, and that the company, therefore, regarded him as having a current physical impairment.⁷⁹ After all, the email BNSF sent to Morriss rescinding his conditional employment offer stated that Morriss was “[n]ot *currently* qualified . . . due to significant health and safety risks associated with Class 3 obesity.”⁸⁰ Morriss considered this email to be clear evidence that BNSF perceived his obesity not as a mere physical characteristic, but as a physiological disorder that affected one or more body systems, i.e., a physical impairment.⁸¹

The court found Morriss’ argument unpersuasive.⁸² It determined that BNSF refused to hire Morriss “not because of any *then current* health risk” but because the company “believed by having a BMI of 40, [Morriss] would or could develop such health risks in the future.”⁸³ According to the court’s interpretation, while the ADA prohibited an employer from discriminating against an individual on the basis of a presently existing physical impairment, it did not prohibit an employer from discriminating based on its assessment that a currently unimpaired individual had an unacceptable risk of developing a physical impairment in the future.⁸⁴ The court found particularly persuasive the plain language of the EEOC’s interpretive guidance stating “the definition [of impairment] . . . does not include characteristic predisposition to illness or disease.”⁸⁵ Because Morriss failed to provide any evidence that he suffered from diabetes, or any other physical impairment, at the time of his conditional offer of employment, BNSF’s decision was based solely on Morriss’ predisposition to future medical conditions, and was, therefore, not discriminatory under the ADA.⁸⁶

IV. IMPACT OF DECISION

As American society becomes increasingly heavier, employment discrimination against overweight and obese individuals is likely to keep pace.⁸⁷ Approximately thirty-one percent of adults in North Dakota are

79. *Morriss*, 817 F.3d at 1113.

80. *Id.* at 1106.

81. See Brief for Appellant, *supra* note 58, at *33-44.

82. *Morriss*, 817 F.3d at 1113.

83. *Id.* (emphasis added) (citations omitted).

84. *Id.*

85. *Id.* (citing 29 C.F.R. § 1630 app.).

86. *Id.* at 1113.

87. Obesity rates in the United States have more than doubled over the past thirty-five years, and currently approximately one-third of the American adult population is obese. *Obesity Rates & Trends Overview*, THE STATE OF OBESITY (Aug. 17, 2016), <http://www.stateofobesity.org/obesity-rates-trends-overview>.

obese, making the state the seventeenth most obese in the country.⁸⁸ Accordingly, it is fair to assume that weight-based employment discrimination exists in North Dakota. The decision in *Morriss v. BNSF*, provides some practical tips for legal practitioners that may be looking to bring a claim of weight-based employment discrimination under the ADA, as well as for employers who wish to avoid liability when developing weight or BMI requirements for specific positions.

A. BRINGING A WEIGHT-BASED EMPLOYMENT DISCRIMINATION CLAIM UNDER THE ADA

The *Morriss* decision continued a trend in the ADA/obesity caselaw requiring individual plaintiffs prove their obesity is the result of a physiological disorder or condition, and not the result of voluntary behavior, even in regarded-as cases.⁸⁹ This can be very difficult to do, as most obese individuals do not know the cause of their obesity,⁹⁰ and many scientists agree the causes are complicated⁹¹ and involve “more than simply eating too much and moving too little.”⁹²

Regardless of the challenge, it is critical for a plaintiff to bring evidence establishing that his or her obesity has some physiological cause, whether it be an identified medical disorder, such as an underactive thyroid (hypothyroidism), Cushing’s syndrome, polycystic ovarian syndrome (PCOS), or a generalized dysfunction of the metabolic system.⁹³ Doing so will require expert testimony from the plaintiff’s physician or a physician with expertise in obesity. In one case where the plaintiff, a morbidly obese health care worker, successfully survived summary judgment, her expert physician testified that the plaintiff’s “morbid obesity is a physiological disorder involving a dysfunction of both the metabolic system and the

88. *Adult Obesity in the United States*, THE STATE OF OBESITY (Aug. 17, 2016), <http://stateofobesity.org/adult-obesity>.

89. Korn, *supra* note 41, at 233.

90. *Id.*

91. See, e.g., Christine L. Kuss, *Absolving a Deadly Sin: A Medical and Legal Argument for Including Obesity As a Disability Under the Americans with Disabilities Act*, 12 J. CONTEMP. HEALTH L. & POL’Y 563, 570-79 (1996) (discussing medical evidence pointing to several factors, including genetic, endocrine, metabolic, neurologic, psychological, and social, that contribute to obesity).

92. Henry, *supra* note 43, at 1762 (citing Cecile Bouchardeau, Siobhan Nolan & Ann Reynolds, *Medical Mystery: Morbid Obesity*, ABC NEWS (Jan. 17, 2007), <http://abcnews.go.com/Health/story?id=2799700&page=1>).

93. *What Causes Overweight and Obesity*, NATIONAL HEART, LUNG, AND BLOOD INSTITUTE (Aug. 19, 2016), <http://www.nhlbi.nih.gov/health/health-topics/topics/obe/causes>.

neurological appetite-suppressing signal system.”⁹⁴ Both the plaintiff’s and the defendant’s experts also agreed that heredity—“a genetic or familial disposition”—was a cause of morbid obesity, and that the metabolic dysfunction was incurable even when a morbidly obese individual loses weight.⁹⁵ These types of factors may help a plaintiff establish a physiological cause for his or her morbid obesity.

In addition to providing expert testimony on the physiological cause of one’s obesity, a plaintiff bringing a cause of action under the actual disability prong of the ADA must produce evidence that he *actually suffered* from a disability.⁹⁶ This provides a conundrum for a plaintiff like *Morriss*, who attempted to show his obesity was a physical impairment at the same time that he “unequivocally denied suffering from any medical impairment or condition on BNSF’s medical questionnaire, had described his health as ‘good,’ and had disclosed no difficulties or limitations in his daily activities.”⁹⁷ While a discussion of the requirement that a disability under the ADA “substantially limits a major life activity” is beyond the scope of this Case Comment, it is sufficient to be aware that someone alleging an impairment cannot simultaneously claim the impairment does not limit him or her in any way.

B. AVOIDING LIABILITY IN EMPLOYMENT

Another practical tip gleaned from the decision in *Morriss* is how to avoid liability when developing and implementing human resources policies that implicate an individual’s weight or BMI. The *Morriss* court interpreted the ADA as not prohibiting an employer from discriminating against an applicant or employee based on weight or BMI, so long as the basis for the decision is risk of a future impairment, not the existence of a present one.⁹⁸ Therefore, so long as an employer provides evidence that its policy—such as BNSF’s maximum allowable BMI for “safety-sensitive” positions—is based on risks associated with impairments that may result from morbid obesity, such as excessive daytime sleepiness (associated with sleep apnea), heart attack, stroke, or some other form of sudden incapacitation (associated with atherosclerosis), or osteoarthritis of the knee or severe ankle injury (associated with body mass), and not the morbid

94. *Cook v. R.I. Dept. of Mental Health, Retardation, and Hosps.*, 10 F.3d 17, 23 (1st Cir. 1993).

95. Brief for Appellee at 5-7, *Cook v. R.I. Dept. of Mental Health, Retardation, and Hosps.*, 10 F.3d 17 (1st Cir. 1993) (No. 93-1093), 1993 WL 13622642.

96. *Morriss*, 817 F.3d. at 1106.

97. *Id.*

98. *Id.* at 1113.

obesity itself,⁹⁹ a court following *Morriss* is likely to consider the policy ADA-compliant. Reliance on the medical literature or the expert advice of a physician is advised so that these policies are neither under-inclusive (and thus, do not achieve the stated safety goal), nor over-inclusive (by discriminating against qualified individuals who are not at an unacceptable risk for dangerous medical complications). Finally, in the event an employer becomes the target of a weight-based discrimination claim under the ADA, a documented medical basis for the policy becomes indispensable.

V. CONCLUSION

In *Morriss v. BNSF Ry. Co.*, the Eighth Circuit Court of Appeals held that, in order for an individual's morbid obesity to qualify as an impairment, and thus a disability, under the Americans with Disabilities Act ("ADA"), it must be the result of a physiological disorder or condition.¹⁰⁰ The court also held that an employer may discriminate against a morbidly obese individual so long as the discrimination is based on an unacceptable risk of a future impairment, not the existence of a current one.¹⁰¹ The decision will require anyone bringing a claim of weight-based employment discrimination under the ADA to provide expert medical testimony that his or her morbid obesity is due to a condition such as hypothyroidism, polycystic ovarian syndrome, or a metabolic disorder, while also allowing employers to avoid liability by carefully drafting the language of human resources policies placing limits on weight or BMI for safety purposes.¹⁰² Overall, the decision is a continuation of ADA/obesity circuit court caselaw.¹⁰³

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99. This was BNSF's argument. See Brief for Appellee, *supra* note 66, at *17-20.

100. *Morriss*, 817 F.3d at 1106.

101. *Id.* at 1113.

102. See discussion *supra* Part IV.A-B.

103. See discussion *supra* Part III.A.

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