No. 19-1030

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RONALD SHELL,
Plaintiff-Appellee,

v.

BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Illinois
Case No. 15-cv-11040
Hon. Sharon Johnson Coleman, District Judge

BRIEF OF THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE AND IN FAVOR OF AFFIRMANCE

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STATEMENT OF INTEREST

Congress charged the Equal Employment Opportunity Commission ("EEOC" or "the Commission") with interpreting, administering, and enforcing the employment provisions of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*, as amended ("ADA"). This appeal raises two important questions: (1) whether a job applicant rejected based on an employer's concerns that he will develop a physical impairment may invoke the protections of the ADA; and (2) if so, whether an employer may lawfully reject such an applicant based solely on unsupported and vague statements by a company physician that the applicant poses a safety threat. In furtherance of its strong interest in the effective enforcement of the ADA, and in response to this Court's invitation to participate in this appeal, the EEOC offers its views to the Court. Fed. R. App. P. 29(a)(2).

STATEMENT OF THE ISSUES[1]

1. Is a job applicant who is rejected based on an employer's determination that he presents an unacceptable risk of developing a physical impairment entitled to the protections of the ADA?

2. If so, would a reasonable juror be compelled to conclude that such an employer satisfied its burden of establishing the statute's "business-necessity" defense

[1] The EEOC takes no position on any other issue in the case, including the question whether severe obesity, standing alone, qualifies as an impairment under the statute. This Court resolved that question in *Richardson v. Chicago Transit Authority*, 926 F.3d 881, 888 (7th Cir. 2019).

when the employer relied solely on the vague and unsupported contentions of a company physician that individuals like the applicant are at a "substantially higher" risk of developing impairments that "frequently manifest" as sudden incapacitation?

PERTINENT STATUTORY AND REGULATORY PROVISIONS

Pertinent statutory and regulatory provisions are included in the addendum to this brief.

STATEMENT OF THE CASE

A. Factual Background

Plaintiff Ronald Shell worked for Rail Terminal Services, a company that performed services at a railyard owned by defendant Burlington Northern Santa Fe Railway Company ("BNSF"). Dkt. ("R.") 81-1 at 4.[2] After BNSF announced plans to take over those services, it invited Rail Terminal Services' employees to apply to work for BNSF. R.81-1 at 13-15. Shell applied for the position of Intermodal Equipment Operator, which comprises three jobs: a groundsman, who climbs on railcars to insert and remove devices connecting containers; a hostler, who operates trucks to move trailers within the yard; and a crane operator, who uses overhead cranes to load and unload containers from trains and trucks. R.88 at 2-4; R.88-9 at 2-4. Because the position involves work around and with heavy equipment, BNSF defined it as safety-

[2] Citations to page numbers in the district court record refer to page numbers in the header appended by the CM/ECF system.

sensitive. R.88 at 3-4. Shell had more than thirty-three years' experience working in the railyard in a similar capacity, though he had not performed precisely the same job. R.81-1 at 5-11, 37-38.

BNSF routinely evaluates the Body Mass Index ("BMI") of applicants for safety-sensitive positions as part of its hiring process. Appellant's Appendix ("App.") 33. In general, BNSF does not hire individuals for such positions if they have a BMI of 40 or more, a condition referred to as "Class III obesity," "severe obesity," or "morbid obesity." App. 33. BNSF believes such people face a substantially higher risk of developing several medical conditions, including sleep apnea, heart disease, and diabetes, all of which, it claims, can result in sudden and unexpected incapacitation and pose safety risks. App. 33-35.

After interviewing Shell, BNSF gave him a job offer conditioned on the successful completion of, *inter alia*, a medical evaluation. R.88 at 5. Shell submitted a medical history questionnaire describing his overall health as "very good" and reporting no problems with work or other daily activities. R.88 at 11. However, Shell's physical exam indicated that he was 5' 10" tall and 331 pounds, resulting in a BMI of 47.5. R.88 at 12. Based solely on the purported health and safety risks associated with Shell's BMI, BNSF's medical officer decided that Shell was not medically qualified and withdrew the job offer. App. 31, 33-35; R.81-6 at 28; R.88-3 at 2. BNSF informed Shell that it would reconsider his application, even if his BMI

still exceeded 40, if he lost 10% of his body weight, kept the weight off for six months, and provided BNSF any test results it requested. R.88 at 16; R.88-2 at 14-15; R.88-3 at 2. No evidence in the record indicates that Shell suffers from sleep apnea, heart disease, or diabetes. App. 35.

B. Procedural Background

Shell sued BNSF, contending that it violated the ADA by rescinding its job offer on the basis of disability. The district court denied BNSF's motion for summary judgment. App. 1-11.

As relevant here, the court held that Shell was entitled to the protections of the ADA because BNSF regarded him as having an impairment. The court explained that "BNSF has readily admitted that it refused to hire Shell based on its fear that he would develop sleep apnea, diabetes, or heart disease," conditions that BNSF did not dispute are "capable of constituting impairments under the ADA." App. 7-8. As the court summarized BNSF's position, "Shell . . . is a ticking time bomb who at any time may be suddenly and unexpectedly incapacitated" by one of those impairments. App. 8-9. Its refusal to hire Shell on that basis, the court reasoned, "suggests that BNSF believes that Shell suffers from the conditions — or perhaps more accurately the potential effects of the conditions — at the present time." App. 9. The court explained that BNSF's position — that it may freely discriminate against individuals believed to be likely to develop impairments even though it is generally barred from

discriminating against individuals believed to have current impairments — "is facially illogical and is antithetical to the protections afforded by the [ADA]." App. 9 n.4.

The court also held that BNSF's business-necessity defense presented a disputed issue of material fact that it could not resolve on summary judgment. The court concluded that BNSF's evidence of the risks of obesity-related impairments was "indefinite and vague," making it "impossible to determine whether Shell's health posed so great a safety risk that his exclusion from safety-sensitive positions constituted a business necessity." App. 11 & n.5. In addition, the court explained that BNSF's defense was undercut by its willingness to "consider Shell for employment" if he lost 10% of his body weight, even if he remained severely obese. App. 11.

The district court then denied reconsideration. App. 13-17. Regarding BNSF's business-necessity defense, the court stated that its prior references to Shell's personal circumstances were "more suggestive of review under the direct threat framework than the business necessity framework," but it reaffirmed its conclusion that BNSF's evidence was "too indefinite" to warrant a grant of summary judgment. App. 16-17.

At BNSF's request, the court certified the case for interlocutory appeal under 28 U.S.C. § 1292(b), identifying the following "controlling question of law": "whether the ADA's regarded-as provision encompasses conduct motivated by the likelihood

that an employee will develop a future disability within the scope of the ADA." App. 17. This Court granted permission to appeal.

ARGUMENT

I. The ADA Protects Individuals Subjected to Discrimination Based on an Employer's Belief That They Pose an Unacceptable Risk of Developing Impairments.

1. The ADA generally prohibits "discriminat[ion] against a qualified individual on the basis of disability in regard to job application procedures [and] hiring." 42 U.S.C. § 12112(a). Paragraph (1) of § 12102 defines "disability" as "(A) a physical or mental impairment that substantially limits one or more major life activities"; "(B) a record of such an impairment"; or "(C) being regarded as having such an impairment (as described in paragraph (3))."

Paragraph (3), in turn, specifies when an individual is covered by the "regarded-as" provision of the statute, stating that an individual "meets the requirement of 'being regarded as having such an impairment'" "[f]or purposes of paragraph (1)(C)" if he shows he "has been subjected to an action prohibited [under the ADA] 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." *Id.* § 12102(3) (noting one exception not pertinent here); *see also* 29 C.F.R. § 1630.2(g)(1)(iii), (*l*). The implementing regulations define physical impairment to mean "[a]ny physiological disorder or condition . . . affecting one or more body systems," such as respiratory,

cardiovascular, digestive, circulatory, and endocrine. 29 C.F.R. § 1630.2(h)(1); *cf.* 42 U.S.C. §§ 12116, 12205a (authorizing the EEOC to issue regulations at issue here).

The district court correctly held that Shell is protected by the ADA because BNSF regarded him as having an impairment within the meaning of the statute. App. 7-10, 14-15. BNSF concedes that it rescinded Shell's job offer because it was unwilling to accept the risk that he would develop sleep apnea, heart disease, or diabetes. Br. of Appellant ("Br.") 6, 11-12, 26, 30. BNSF also does not dispute that sleep apnea, heart disease, and diabetes are "impairments" within the meaning of the statute and regulations. *Id.* at 34 n.7. Because BNSF refused to hire Shell based on its fear that he would develop these impairments, BNSF plainly acted "because of . . . perceived . . . impairment[s]," and Shell therefore "meets the requirements of 'being regarded as having such an impairment'" "[f]or purposes of paragraph (1)(C)." 42 U.S.C. § 12102(3)(A).

BNSF argues that the regarded-as provision of the ADA does not protect an individual from discrimination unless the employer perceives him to have a *current* (or perhaps a *prior*, Br. 39) impairment. *Id.* at 12-13, 27. Even if BNSF is correct, however, a reasonable jury could conclude that Shell is covered by the statute. BNSF decided it was unwilling to accept the risk that Shell may develop three impairments, Br. 43; R.81-2 at 90, viewing him as a "ticking time bomb," App. 8. When BNSF

excluded Shell from employment, it thus treated him as if he actually had those impairments. *See* App. 8-9.

In any event, coverage under the regarded-as provision is not limited to individuals perceived to have a current impairment. As noted above, paragraph (1)(C) of § 12102 specifies that the determination of whether an individual is covered by that provision must be based on the standards set forth in paragraph (3). *See* 42 U.S.C. § 12102(1)(C) (defining "disability" to include "being regarded as having such an impairment *(as described in paragraph (3))*" (emphasis added)). Paragraph (3) likewise makes clear that it controls such coverage questions, stating that an individual "meets the requirement of 'being regarded as having such an impairment'" "[f]or purposes of paragraph (1)(C)" if he makes the showing specified in paragraph (3). *Id.* § 12102(3)(A). Significantly, that showing — that an individual establish he was subjected to a prohibited action "because of [a] . . . perceived physical or mental impairment," *id.* — involves no temporal limitation. To the contrary, paragraph (3) encompasses victims of discrimination based on *all* perceived impairments, whether current, prior, or future.[3]

[3] Contrary to BNSF's argument, the other applicable language in paragraph (3) — which states that coverage does not turn on whether an employer perceives an impairment "*to limit* a major life activity," 42 U.S.C. § 12102(3)(A) (emphasis added) — likewise does not use the "present tense," Br. 28.

Because Congress directed courts to determine whether an individual is "regarded as having . . . an impairment" within the meaning of paragraph (1)(C) by looking to paragraph (3), there is no need separately to analyze the phrase "regarded as having . . . an impairment" in paragraph (1)(C). *See, e.g.*, *Dig. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 776 (2018) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from a term's ordinary meaning." (citation omitted)). Even if that phrase stood alone and was not defined in paragraph (3), however, it is not restricted to individuals "regarded as currently having an impairment," to the exclusion of those "regarded as previously having an impairment" or "regarded as having an impairment in the future." "Having," the pertinent word in the statutory phrase, is a gerund and may be used in conjunction with past, present, or future events: one could say, for example, that "having a broken leg was challenging," that "having a dog is wonderful," and that "having a law degree will be useful."

By insisting that the ADA protects only individuals perceived to have a current impairment, BNSF seeks to impose a temporal limitation on the statutory text where none exists. As the Supreme Court has cautioned, however, courts should not "add words to the law" to achieve a certain result; "[t]hat is Congress's province." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015); *see also Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 175 (2011); *cf. Robinson v. Shell Oil Co.*, 519 U.S. 337, 340-46 (1997) (interpreting the term "employees" in a provision of Title VII of the

Civil Rights Act of 1964 to include former employees in part because the statute included no "temporal qualifier" and the interpretation was consistent with the statute's broader context and purposes).

Congress enacted paragraph (3) of § 12102 when it passed the ADA Amendments Act of 2008 ("ADAAA"), Pub. L. No. 110-325, § 4(a), 122 Stat. 3553, 3555, and the ADAAA's broader context reinforces the EEOC's reading of § 12102. Most importantly, the ADAAA provides that "[t]he definition of disability . . . shall be construed in favor of broad coverage of individuals . . . , to the maximum extent permitted by the terms of this chapter." 42 U.S.C. § 12102(4)(A). Any doubt as to whether the statute covers Shell therefore must be resolved in his favor.

In addition, Congress explained that one purpose of the ADAAA was "to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987)[,] which set forth a broad view" of coverage under the regarded-as provision of the Rehabilitation Act of 1973, upon which the ADA was modeled. ADAAA, § 2(b)(3), 122 Stat. at 3554 (codified at 42 U.S.C. § 12101 note); *see also* 29 C.F.R. pt. 1630, app. § 1630.2(*l*) (regarded-as coverage "should not be difficult to establish"). As *Arline* explained, Congress enacted that regarded-as provision to combat "society's accumulated myths and fears about disability and disease," which Congress deemed to be "as handicapping as are the physical limitations that flow from actual impairment." 480 U.S. at 284. The legislative history of the ADAAA

reinforces this point, explaining that Congress established and amended the regarded-as provisions in the ADA and the ADAAA to fight discrimination based on "unfounded concerns, mistaken beliefs, fear, myths, or prejudice about disabilities." H.R. Rep. No. 110-730, pt. 1, at 12-13 (2008); *see also Moore v. J.B. Hunt Transp., Inc.*, 221 F.3d 944, 954 (7th Cir. 2000) ("[t]he concern [addressed by the regarded-as provision of the ADA]" was that "employers will act on a misunderstanding of an individual's impairment"); *see also, e.g.*, H.R. Rep. No. 110-730, pt. 2, at 8, 17-18 (2008). Given these statutory purposes and Congress's directive that the regarded-as provision be construed broadly, the district court correctly concluded that it would be "facially illogical and . . . antithetical to the protections afforded by the [ADA]" to allow BNSF's impairment-based decision to escape scrutiny under the ADA. App. 9 & n.4.

Two additional ADAAA amendments shed light on Congress's intent. First, the ADAAA modified the statute's general prohibition on discrimination by replacing text barring discrimination "against a qualified individual with a disability because of the disability of such individual," 42 U.S.C. § 12112(a) (2007), with text barring discrimination "against a qualified individual on the basis of disability," *id.* § 12112(a). The legislative history explains that Congress did so to focus courts' inquiry on whether an individual "has proven that the discrimination was based on a personal characteristic (disability), not on whether he or she has proven that the characteristic

exists." H.R. Rep. No. 110-730, pt. 2, at 21; 29 C.F.R. pt. 1630, app. § 1630.4. Consistent with that change and the other amendments described above, Congress codified its expectation that "the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations." ADAAA, § 2(b)(5), 122 Stat. at 3554 (codified at 42 U.S.C. § 12101 note).

If, despite consideration of the statutory text, context, purposes, and legislative history, this Court still harbors doubts about the scope of the regarded-as provision, the Dictionary Act should resolve such concerns. As that Act explains, "unless the context indicates otherwise . . . words used [in a statute] in the present tense include the future as well as the present." 1 U.S.C. § 1. Thus, even if this Court concludes that the relevant text in the ADA is written in the "present tense," it should deem the statute to cover individuals who have not yet manifested the impairment motivating an employer's decision because the ADA's "context" does not "indicate[] otherwise." *Id.*

This Court's decision in *EEOC v. Rockwell International Corp.*, 243 F.3d 1012 (7th Cir. 2001), a pre-ADAAA case, provides additional support for the EEOC's interpretation of the statute. The employer in *Rockwell* required all applicants to take a nerve conduction test and rejected applicants for certain jobs who scored outside the normal range. *Id.* at 1014. The Court "note[d] that the applicants did not suffer from

any impairment at the time they were turned away" by the employer, which "merely regarded them as having an enhanced likelihood of developing impairments in the future." *Id.* at 1015. Significantly, the Court gave no indication that the temporal scope of the perceived impairment foreclosed application of the ADA. Instead, the Court ruled in favor of the employer on a different ground, one the ADAAA rendered irrelevant. *Id.* at 1018; *see also id.* at 1019 (D. Wood, J., dissenting) (noting that the employer "decided to treat the claimants as if they already had the feared disorders"); *id.* at 1018-19 ("Although it is unimportant to the case in its present posture, . . . it is not at all clear to me that as a matter of law the ADA permits an employer to refuse to hire a person who is fully qualified to perform certain work, simply because that individual might at some unspecified time in the future develop a physical or other disability . . . . This smacks of exactly the kind of speculation and stereotyping that the statute was designed to combat.").[4]

2. The EEOC's position finds additional support in decisions addressing the semi-analogous question whether so-called "anticipatory retaliation" is actionable

[4] BNSF relies on this Court's decision in *Silk v. Board of Trustees, Moraine Valley Community College*, 795 F.3d 698 (7th Cir. 2015), Br. 28, but that decision shows that regarded-as coverage is not limited to individuals perceived as having an existing impairment at the time of the employment decision. In *Silk*, a professor claimed that his employer reassigned upcoming classes because it regarded him as having an impairment. 795 F.3d at 707. This Court stated that, in the context of that case, the plaintiff needed to show the decisionmaker "perceived that [he] suffered (or would suffer from) an impairment *at the time that he would be teaching the . . . courses*." *Id.* BNSF's argument based on *EEOC v. Schneider National, Inc.*, 481 F.3d 507 (7th Cir. 2007), Br. 43-44, is also wide of the mark. *Schneider* did not address whether the ADA protects individuals discriminated against because an employer thinks they are likely to develop impairments.

under Title VII. That statute forbids discrimination against an employee because he "has opposed" an employment practice barred by Title VII or "has made a charge, testified, assisted, or participated in any manner" in a Title VII investigation, proceeding, or hearing. 42 U.S.C. § 2000e-3(a). This Court and other courts have recognized a cause of action when an employer discriminates against an employee based on protected activity (such as filing an EEOC charge) that has not yet occurred and may never occur. *See, e.g.*, *Beckel v. Wal-Mart Assocs., Inc.*, 301 F.3d 621, 624 (7th Cir. 2002) (holding that a threat to fire a plaintiff if she sued "would be a form of anticipatory retaliation, actionable as retaliation under Title VII"); *Sauers v. Salt Lake Cty.*, 1 F.3d 1122, 1128 (10th Cir. 1993).

Similarly, in interpreting the ADA's text referencing "reassignment to a vacant position" as a reasonable accommodation that must be offered to an individual with a disability in certain circumstances, 42 U.S.C. § 12111(9)(B), courts of appeals have held that the term "vacant position[s]" includes not only positions *currently* vacant but also those that will *become* vacant in a reasonable or short amount of time. *See, e.g.*, *Faidley v. United Parcel Serv. of Am., Inc.*, 889 F.3d 933, 943 (8th Cir. 2018) (en banc); *Dark v. Curry Cty.*, 451 F.3d 1078, 1089-90 (9th Cir. 2006); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1175 (10th Cir. 1999) (en banc); *see also* 29 C.F.R. pt. 1630, app. § 1630.2(o).

In another analogous context, the Supreme Court recently explained that Title VII's prohibition on discriminating against applicants based on the need to accommodate religious practice applies even when the applicant has not requested an accommodation. *Abercrombie*, 135 S. Ct. at 2032-33. The Court reached that conclusion because the statute "prohibits [employers' discriminatory] *motives*, regardless of the state of the actor's knowledge [of the actual need for an accommodation]." *Id.* at 2033. Similarly, when an employer discriminates against an individual because of perceived impairment, it does not matter whether the employer thinks the impairment currently exists or instead will subsequently manifest; the individual is protected by the ADA because of the employer's discriminatory motive.

3. BNSF seeks support for its position in the EEOC's interpretive guidance defining the term "impairment" to exclude a "characteristic predisposition to illness or disease." Br. 27 (quoting 29 C.F.R. pt. 1630, app. § 1630.2(h)). As explained on page 7, however, the "impairments" at issue here are sleep apnea, heart disease, and diabetes *themselves*, not any characteristic predisposition to those impairments. The cited definition of "impairment" thus has no bearing on the question presented here, which instead turns on the meaning of the ADA's regarded-as provision.[5] The

[5] The cited language in the guidance may be relevant in other types of cases, such as where an employee claims that an actual predisposition to disease is an impairment that qualifies her as an individual with a disability under 42 U.S.C. § 12102(1)(A). An employee may advance such an argument in connection with contending she is entitled to an accommodation, given that an employer "need not provide a reasonable accommodation . . . to an individual who meets the

section of the EEOC's Compliance Manual addressing the regarded-as provision confirms the cited guidance's limited reach. EEOC Compl. Man. § 902.8, 2009 WL 4782113. Even under the more restrictive pre-ADAAA version of the statute in effect when the manual was promulgated, the EEOC explained that if an applicant's "genetic profile reveals an increased susceptibility to colon cancer" and an employer withdraws a conditional job offer based on concerns stemming from that fact, then the employer "is treating [the applicant] as having an impairment," and the applicant is "covered by the [regarded-as] part of the definition of 'disability.'" *Id.* § 902.8(a).

BNSF also relies heavily on the Eighth Circuit's decision in *Morriss v. BNSF Railway Co.*, 817 F.3d 1104 (8th Cir. 2016), which concluded that the ADA does not cover individuals subjected to discrimination based on an employer's "assessment that although no physical impairment currently exists, there is an unacceptable risk of a future physical impairment," *id.* at 1113. Br. 28-29, 34-38. Although *Morriss* suggested that "the plain language" of the regarded-as provision covers only "the perception of an existing impairment," 817 F.3d at 1113, the word "existing" appears nowhere in 42 U.S.C. § 12102. Quite the opposite: the text of § 12102(3)(A) clearly covers a situation where, as here, an employer discriminates against an applicant "because of a[] . . . perceived physical or mental impairment," whenever that

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definition of disability . . . solely under" the regarded-as provision of the statute, 42 U.S.C. § 12201(h).

impairment is feared to arise. This Court should not follow *Morriss*, which failed to analyze that controlling text or the relevant statutory context, purposes, and legislative history discussed above, and which also mistakenly relied on the inapposite interpretive guidance just discussed, 817 F.3d at 1113.

Similarly, the Ninth Circuit mischaracterized the ADA in *EEOC v. BNSF Railway Co.*, 902 F.3d 916 (9th Cir. 2018), *petition for cert. filed* (U.S. Feb. 27, 2019) (No. 18-1139), when it suggested in dictum that the employer "must have regarded [an applicant] as having a *current* impairment" for the regarded-as provision to apply.[6] *Id.* at 923. The court justified that conclusion solely by citing *Morriss* and inaccurately stating that § 12102(3)(A) "prohibits discrimination on the basis of an 'actual or perceived impairment' in the present tense." *Id.*

* * *

In arguing that the ADA covers Shell under the facts of this case, the EEOC is not contending that BNSF is necessarily liable for not hiring him. Acceptance of the Commission's regarded-as argument merely means that the factfinder must scrutinize BNSF's reasons for not hiring Shell under the ADA's substantive provisions, such as the business-necessity defense described below. *See, e.g.*, 29 C.F.R. § 1630.2(*l*)(3).

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[6] *BNSF* noted that the EEOC (which was the plaintiff in that case) and the defendant "agree[d]" with this conclusion. 902 F.3d at 923. But that case did not involve discrimination against an individual based on the belief that he did not yet have an impairment but could develop one at any moment. Instead, the EEOC's argument was based on evidence showing that the employer knew that the applicant there had a spinal disc extrusion — a permanent impairment. *Id.*

Ensuring that employment decisions like this one are subject to such scrutiny furthers the core purpose of the regarded-as provision: eradicating discrimination based on unfounded concerns and mistaken beliefs. *See supra* pp. 10-11.

II. BNSF Did Not Establish a Business-Necessity Defense as a Matter of Law.

BNSF contends that, even if the ADA covers Shell's claims, it established an affirmative defense as a matter of law because it proved that its exclusion of applicants with a BMI of 40 or more was job-related and consistent with business necessity. Br. 47-51. The district court correctly denied BNSF summary judgment on this question, holding that its evidence was too indefinite and vague to satisfy its burden. App. 11, 16-17. A reasonable juror would not be compelled to find that BNSF met its burden of showing that the magnitude and likelihood of harm from sudden incapacitation were sufficient to justify BNSF's blanket exclusion of severely obese individuals from consideration, or that BNSF based its beliefs about these risks on objective medical evidence.

1. Under the ADA, "[i]t may be a defense to a charge of discrimination . . . that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation." 42 U.S.C. § 12113(a); 29 C.F.R. § 1630.15(b)(1); *see also* 42 U.S.C.

§ 12112(d)(3); 29 C.F.R. § 1630.14(b) (providing that an employer may condition a job offer on the results of a medical examination in certain circumstances, but if an employer uses criteria to screen out individuals with disabilities as a result of the examination, then, *inter alia*, "the exclusionary criteria must be job-related and consistent with business necessity"). "[Q]ualification standards," in this context, "may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b); 29 C.F.R. § 1630.15(b)(2) (extending the direct-threat defense to threats to the applicant or employee himself). Thus, the statutory "direct-threat" defense is a subset of the more general "business-necessity" defense. *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 78, 80, 87 (2002).

To establish that a qualification standard is "job-related" for purposes of the business-necessity defense, 42 U.S.C. § 12113(a), "an employer must demonstrate that [it] fairly and accurately measures the individual's actual ability to perform the essential functions of the job." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 996 (9th Cir. 2007) (en banc); *see also Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 698-99 (7th Cir. 1998); H.R. Rep. No. 101-485, pt. 3, at 32 (1990). To qualify as "consistent with business necessity," 42 U.S.C. § 12113(a), a standard must be "vital to the business," rather than a "mere expediency." *Wright v. Ill. Dep't of Children & Family Servs.*, 798 F.3d 513, 523 (7th Cir. 2015) (citation omitted). The employer "cannot merely rely on

reasons that have been found valid in other cases but must actually show that the . . . requirement contributes to the achievement of those business necessities." *Id.* (alteration in original) (citation omitted).

Where safety-based qualification standards relating to alleged risk are at issue, a court evaluating the business-necessity defense must conduct analysis similar to that which applies in evaluating the closely related direct-threat defense. As the Fifth Circuit has explained, "direct threat and business necessity do not present hurdles that comparatively are inevitably higher or lower," and the "proofs" for each must "ensure that the risks are real and not the product of stereotypical assumptions." *EEOC v. Exxon Corp.*, 203 F.3d 871, 875 (5th Cir. 2000); *see also, e.g.*, *Verzeni v. Potter*, 109 F. App'x 485, 491 (3d Cir. 2004) ("[a]lthough [plaintiffs] do not technically have to satisfy the direct threat defense, a factfinder [evaluating the business-necessity defense] must face the same concerns").[7] Among other things, courts evaluating the direct-threat defense consider "(1) the duration of the risk; (2) the nature and severity

[7] Where, as here, an employer relies on a qualification standard to screen out an individual with a disability based on a concern that the individual poses a safety threat to himself, his co-workers, and the general public, it is the EEOC's position that the employer must demonstrate that its standard satisfies the requirements set forth in the direct-threat provisions of the statute and regulations. 29 C.F.R. pt. 1630, app. § 1630.15(b) & (c); EEOC, ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, No. 915.002, 1995 WL 1789073, at *2 (Oct. 10, 1995); *cf. Branham v. Snow*, 392 F.3d 896, 905-06 (7th Cir. 2004) (applying direct-threat analysis to employer's safety-based qualification standard). Shell has not raised that issue, however, and this Court need not decide it. As noted above, the standard courts use when evaluating a safety-based business-necessity defense is very similar to the standard used when evaluating a direct-threat defense, given that the latter is a subset of the former. The district court's denial of summary judgment should be affirmed under either standard.

of the potential harm; (3) the likelihood that potential harm will occur; and (4) the imminence of potential harm." *Emerson v. N. States Power Co.*, 256 F.3d 506, 514 (7th Cir. 2001) (citing 29 C.F.R. § 1630.2(r)). They also ensure that employer determinations are "based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence." 29 C.F.R. § 1630.2(r).

A court analyzing whether a safety-based qualification standard is job-related and consistent with business necessity therefore must take into account both the "magnitude of possible harm" and its "probability of occurrence": "[A] probability that might be tolerable in an ordinary job might be intolerable for a position involving atomic reactors, for example." *Exxon*, 203 F.3d at 875; *see also Bates*, 511 F.3d at 996; *Verzeni*, 109 F. App'x at 491 (courts must evaluate the nature, duration, and severity of the risk and likelihood of harm). In making this assessment, the court must ensure that employer determinations are supported by "current medical knowledge" and are based on "real risks." *Verzeni*, 109 F. App'x at 491; *Exxon*, 203 F.3d at 875; 29 C.F.R. pt. 1630, app. § 1630.14(b) (allowing revocation of a conditional job offer based on results of medical examination when the decision is premised on "reasonable medical judgment that relies on the most current medical knowledge"); *cf., e.g.*, *Duda v. Bd. of Educ. of Franklin Park Pub. Sch. Dist. No. 84*, 133 F.3d 1054, 1060 n.12 (7th Cir. 1998) (noting that the EEOC's interpretive guidance "constitute[s] a body of experience and

informed judgment to which courts and litigants may properly resort for guidance" (citation omitted)).

An employer seeking summary judgment based on the business-necessity defense bears the burden of proof and must show that the evidence "is so one-sided no reasonable jury could find for" the plaintiff. *Branham*, 392 F.3d at 906-07 (noting the employer bears the burden of showing an employee poses a direct threat); *Bates*, 511 F.3d at 995. The assessment of the defense is "fact-intensive and requires close analysis by the district court." *Bates*, 511 F.3d at 997 n.14.

2. Here, the district court correctly concluded that a reasonable juror would not be compelled to find that BNSF met its burden of showing that the magnitude and likelihood of harm from sudden incapacitation were sufficient to justify its blanket exclusion of severely obese individuals from consideration. App. 10-11, 16-17. BNSF seeks to support its position with evidence suggesting that (1) severely obese individuals have a "substantially higher" risk of developing sleep apnea, heart disease, and diabetes; and (2) those conditions, in turn, "frequently manifest[] as a sudden incapacitation or serious impairment of alertness or cognitive ability." Br. 50-51; *see also id.* at 6. In particular, BNSF cites the declaration and deposition testimony of its chief medical officer, Dr. Michael Jarrard. *Id.* at 6, 50-51 (citing declaration that uses the "substantially higher" and "frequently manifest" terminology, App. 33, and also citing App. 34-35 and Dkt. 81-2 at 45, 85-88). But that material does not justify

granting BNSF summary judgment, for two related reasons: it is not specific enough to allow an assessment of whether the risk was sufficiently large to justify excluding all severely obese individuals, and it is not adequately supported by objective medical evidence.

As the district court correctly explained, BNSF provided no information "as to how often 'frequently is' or what constitutes a 'substantially higher' risk," and without this information, "these terms are too indefinite to support a finding of business necessity." App 17. Vague generalities like Jarrard's make it impossible for the factfinder to assess the "probability" and "magnitude" of the feared harm, as required under the business-necessity analysis, *Exxon*, 203 F.3d at 875. *Cf. Branham*, 392 F.3d at 908 (reversing summary judgment for employer on direct-threat defense because, *inter alia*, the employer did not produce "any statistical evidence of the likelihood that the harm it fears will occur"). BNSF argues that as long as it can hypothesize a "tremendous" harm occurring, it need not produce any evidence of the particular likelihood of that harm. Br. 56-57. But even when the feared harm is serious, an employer must establish "more than merely an elevated risk" of its occurrence. *Knapp v. Nw. Univ.*, 101 F.3d 473, 483 (7th Cir. 1996) (so holding in Rehabilitation Act case in which the harm in question was death); *see also Bragdon v. Abbott*, 524 U.S. 624, 649 (1998) (noting in a direct-threat case involving HIV that "[b]ecause few, if any, activities in life are risk free, . . . the ADA do[es] not ask whether a risk exists, but

whether it is significant"); *Branham*, 392 F.3d at 906 (similar, in case where employer feared that applicant would become incapacitated in position involving use of firearm); H.R. Rep. 101-485, pt. 3, at 46 (a mere "elevated risk of injury" is insufficient).

BNSF's evidence also falls short because Jarrard provided no objective medical basis for his statements linking severe obesity to other conditions beyond (1) vague references to "government agencies" that "publish[ed] research data on the clinical problems associated with obesity"; and (2) a solitary reference to a particular government study unaccompanied by any details about the study. R.81-2 at 22-23; App. 34-35. And even if Jarrard had shown a sufficient causal connection between severe obesity and the three impairments, he provided no evidence to support his critical assertion that those conditions "frequently" manifest as incapacitation without any warning. *Cf.* R.81-2 at 22-23, 86-88; App. 33-35. To prevail on summary judgment regarding alleged safety qualifications, however, an employer relying on a business-necessity defense must provide a medical basis for its decision. *See, e.g.*, *Verzeni*, 109 F. App'x at 491; *see also, e.g.*, 29 C.F.R. pt. 1630, app. § 1630.14(b); EEOC, A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act § VI.4 (Jan. 1992) ("Manual"), *available at* https://askjan.org/publications/ada-specific/Technical-Assistance-Manual-for-Title-I-of-the-ADA.cfm#spy-scroll-heading-56. By contrast, "unsubstantiated speculation

about future risks from a perceived disability" cannot support a business-necessity defense. *Garrison v. Baker Hughes Oilfield Operations, Inc.*, 287 F.3d 955, 960 (10th Cir. 2002).

In this context, it does not matter that Jarrard is himself a doctor. As the Supreme Court explained in a direct-threat case, "[s]cientific evidence and expert testimony must have a traceable, analytical basis in objective fact before it may be considered on summary judgment." *Bragdon*, 524 U.S. at 653. In the absence of supporting objective medical evidence, Jarrard's opinion is insufficient to justify summary judgment. *See Holiday v. City of Chattanooga*, 206 F.3d 637, 645 (6th Cir. 2000) (rejecting reliance on doctor's "unsubstantiated and cursory medical opinion" that was "unsupported by any concrete medical findings"); *see also* Manual § VI.4 (an employer may not rely on the opinion of a doctor that an individual is at risk of injuring his back when the doctor "provided no specific medical documentation that this would happen or was likely to happen").

BNSF cites several decisions in support of its claim that the assertions in Jarrard's declaration and deposition were enough to establish a business-necessity defense, but these cases all involved substantially more robust evidence. For example, the employer in *Atkins v. Salazar*, 677 F.3d 667 (5th Cir. 2011), concluded that the plaintiff's repeated episodes of diabetes-triggered hypoglycemia precluded him from working in the field, but only after a year of testing revealed evidence of seven

hypoglycemic episodes during one month and eleven such events during another month. *Id.* at 673, 683-84. Similarly, in *Allmond v. Akal Security, Inc.*, 558 F.3d 1312 (11th Cir. 2009), the employer determined that passing a hearing test was a necessary prerequisite to employment only after evaluating the "detailed analysis" contained in an independent doctor's study that identified essential functions of the position and the medical qualifications necessary to perform it. *Id.* at 1317-18. *Darnell v. Thermafiber, Inc.*, 417 F.3d 657 (7th Cir. 2005), turned on the plaintiff's longstanding refusal to control his diabetes, as confirmed by his admissions during a medical interview and a urine glucose test. *Id.* at 661. The court relied on expert evidence that the plaintiff's failure to manage his blood sugar, particularly on a job site where heat reached 110 degrees and could lead to dehydration, created a risk of fainting that three doctors variously described as "significant," "a very definite likelihood," and "a reasonable medical certainty." *Id.* at 662.

As the district court correctly observed, App. 11, the overbreadth of BNSF's qualification standard further undercuts its business-necessity defense. The record shows that BNSF was willing to reconsider Shell for employment if he lost 10% of his body weight and maintained the weight loss for six months, even if he remained severely obese. *See* R.88-3 at 2; *see also* R.81-2 at 64-65 (indicating that BNSF would likely hire Shell under those circumstances if the results of follow-up tests were satisfactory). Accordingly, a reasonable jury could conclude that BNSF did not satisfy

its burden of showing that its rule excluding severely obese individuals from consideration for safety-sensitive positions — at least when they initially apply — is "necess[ary]," 42 U.S.C. § 12113(a), rather than merely "expedient," *Wright*, 798 F.3d at 523. *Cf. Lawson v. CSX Transp., Inc.*, 245 F.3d 916, 929-30 (7th Cir. 2001) (a company's willingness to make "exceptions" to a selection criterion may call into question the criterion's genuineness); *Wright*, 798 F.3d at 523 (medical examinations given to current employees in the name of business necessity "must be a reasonably effective method of achieving the employer's goal" (citation omitted)); *Conroy v. N.Y. State Dep't of Corr. Servs.*, 333 F.3d 88, 98 (2d Cir. 2003) (such medical examinations must be "no broader or more intrusive than necessary").

* * *

The EEOC does not contend BNSF can *never* prove that severely obese individuals pose a significant risk in safety-sensitive positions. But on this record, it has not demonstrated that a reasonable juror would be compelled to find that it satisfied its burden of showing that the BMI criterion was job-related and consistent with business necessity. Endorsement of BNSF's position here would be dangerous, giving employers carte blanche to exclude all individuals with disabilities from safety-sensitive positions based on unsubstantiated testimony from a doctor — including one, like Jarrard, who is an assistant vice president of the employer, App. 31 — that such individuals pose some unquantified increased risk of potentially "catastrophic" harm. To avoid that result, the statute requires employers to show the objective

medical basis for their concern and some quantification of the actual risk probabilities involved. A contrary rule would eviscerate critical ADA protections, allowing employers to traffic in precisely the sorts of unfounded concerns and mistaken beliefs the ADA was enacted to prevent. *See supra* pp. 10-11; *cf. Knapp*, 101 F.3d at 483 ("[a]ny physical qualification based on risk of future injury must be examined with special care if the Rehabilitation Act is not to be circumvented").

CONCLUSION

For the foregoing reasons, the orders of the district court should be affirmed.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume requirements set forth in Seventh Circuit Rule 29. This brief contains 6,999 words, from the Statement of Interest through the Conclusion, as determined by Microsoft Word 2016. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) and Seventh Circuit Rule 32(b) because it has been prepared in Garamond, a proportionally spaced typeface, and it uses 14-point type in the body of the brief and 12-point type in the footnotes.

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ADDENDUM

Pertinent Statutory and Regulatory Provisions

Table of Contents

42 U.S.C. § 12102. Definition of disability

As used in this chapter:

(1) Disability

The term "disability" means, with respect to an individual—

> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment (as described in paragraph (3)).

. . . .

(3) Regarded as having such an impairment

For purposes of paragraph (1)(C):

> (A) 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.
>
> (B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

(4) Rules of construction regarding the definition of disability

The definition of "disability" in paragraph (1) shall be construed in accordance with the following:

> (A) The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.

. . . .

42 U.S.C. § 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

. . . .

(d) Medical examinations and inquiries

. . . .

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

. . . .

(C) the results of such examination are used only in accordance with this subchapter.

42 U.S.C. § 12113. Defenses

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

. . . .

Pub. L. No. 110-325, § 2(b)(3) & (5), 122 Stat. 3553, 3554 (codified at 42 U.S.C. § 12101 note):

Sec. 2. FINDINGS AND PURPOSES.

. . . .

(b) PURPOSES. — The purposes of this Act are —

. . . .

(3) to reject the Supreme Court's reasoning in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;

. . . .

(5) to convey congressional intent that the standard created by the Supreme Court in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) for "substantially limits", and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis[.]

. . . .

29 C.F.R. § 1630.2. Definitions.

. . . .

(g) Definition of "disability"—(1) *In general. Disability* means, with respect to an individual—

(i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(ii) A record of such an impairment; or

(iii) Being regarded as having such an impairment as described in paragraph (*l*) of this section. This means that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both "transitory and minor."

. . . .

(*l*) "*Is regarded as having such an impairment.*" The following principles apply under the "regarded as" prong of the definition of disability . . . :

(1) Except as provided in § 1630.15(f), an individual is "regarded as having such an impairment" if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity. Prohibited actions include but are not limited to refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment[.]

(2) Except as provided in § 1630.15(f), an individual is "regarded as having such an impairment" any time a covered entity takes a prohibited action against the individual because of an actual or perceived impairment, even if the entity asserts, or may or does ultimately establish, a defense to such action.

(3) Establishing that an individual is "regarded as having such an impairment" does not, by itself, establish liability. Liability is established under title I of the ADA only when an individual proves that a covered entity discriminated on the basis of disability within the meaning of section 102 of the ADA, 42 U.S.C. 12112.

. . . .

(r) *Direct Threat* means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge

and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.

29 C.F.R. § 1630.14. Medical examinations and inquiries specifically permitted.

. . . .

(b) *Employment entrance examination.* A covered entity may require a medical examination (and/or inquiry) after making an offer of employment to a job applicant and before the applicant begins his or her employment duties, and may condition an offer of employment on the results of such examination (and/or inquiry), if all entering employees in the same job category are subjected to such an examination (and/or inquiry) regardless of disability.

. . . .

(2) The results of such examination shall not be used for any purpose inconsistent with this part.

(3) Medical examinations conducted in accordance with this section do not have to be job-related and consistent with business necessity. However, if certain criteria are used to screen out an employee or employees with disabilities as a result of such an examination or inquiry, the exclusionary criteria must be job-related and consistent with business necessity, and performance of the essential job functions cannot be accomplished with reasonable accommodation as required in this part. . . .

. . . .

29 C.F.R. § 1630.15. Defenses.

. . . .

(b) *Charges of discriminatory application of selection criteria*—

> (1) *In general.* It may be a defense to a charge of discrimination, as described in § 1630.10, that an alleged application of qualification standards, tests, or selection criteria that screens out or tends to screen out or otherwise denies a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished with reasonable accommodation, as required in this part.
>
> (2) *Direct threat as a qualification standard.* The term "qualification standard" may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace. . . .

(c) *Other disparate impact charges.* It may be a defense to a charge of discrimination brought under this part that a uniformly applied standard, criterion, or policy has a disparate impact on an individual with a disability or a class of individuals with disabilities that the challenged standard, criterion or policy has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished with reasonable accommodation, as required in this part.

. . . .

CERTIFICATE OF SERVICE

I certify that on August 28, 2019, I filed the foregoing brief with the Court via the appellate CM/ECF system. I also certify that all counsel of record have consented to electronic service and will be served via the appellate CM/ECF system.

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