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No. 96335-5  
[Ninth Circuit No. 16-35205]

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IN THE SUPREME COURT OF THE STATE OF  
WASHINGTON

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CERTIFICATION FROM UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT  
IN

CASEY TAYLOR and ANGELINA TAYLOR, husband and wife  
and the marital community composed thereof,

Appellants,

v.

BURLINGTON NORTHERN RAILROAD HOLDINGS, INC., a  
Delaware Corporation licensed to do business in the State of Wash-  
ington, and BNSF RAILWAY COMPANY, a Delaware Corporation  
licensed to do business in the State of Washington,

Respondents.

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**BRIEF OF APPELLEES ON CERTIFIED QUESTION**

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Burlington Northern Railroad Holdings, Inc. and BNSF Railway Company (collectively, “BNSF”) submit this brief on the question certified by a Ninth Circuit panel. *See Taylor v. Burlington N. R.R. Holdings Inc.*, 904 F.3d 846 (9th Cir. 2018).<sup>1</sup>

## INTRODUCTION

Applying all of the methods that this Court uses to determine the meaning of statutes yields an unequivocal answer to the question certified by a Ninth Circuit panel: as a physical characteristic, body weight at any level—including “obesity”—can be an “impairment” under the Washington Law Against Discrimination (“WLAD”) only when the weight is both outside the statistically “normal” range and is the result of a physiological disorder.

In response to a decision of this Court, the legislature in 2007 adopted a definition of “impairment” indistinguishable in substance from a definition in a regulation promulgated by the federal Equal Employment Opportunity Commission (“EEOC”) and under which the

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<sup>1</sup> BNSF’s citations to the certification order are to the panel’s slip opinion, cited as “Panel Op.”

EEOC issued interpretive guidance setting out the two requirements just noted for when a physical characteristic such as height or weight can be an “impairment.” At that time, the federal courts had unanimously read the regulation as establishing those two requirements.

The state statutory definition included a comma that was present in the federal regulatory definition at the time of the adoption but was later inconsequentially removed as part of a larger reorganization and rewrite of the federal regulations. The state definition also followed a format used elsewhere in the WLAD by inserting the phrase “includes, but is not limited to” after the word “impairment,” another difference that decisions of this Court show to be of no legal consequence.

The Human Rights Commission (“HRC”), the body charged by the legislature with giving effect to the WLAD, saw matters the same way. In an official interpretive guide issued in 2007 in conjunction with the legislature’s enactment of the amendment defining “impairment,” the HRC adopted in substance the EEOC’s original guidance on physical characteristics. The amendment’s legislative history

likewise confirms the legislature's intention to adopt the EEOC's regulation and guidance.

Although neither the HRC nor this Court is bound generally to follow federal law when interpreting the WLAD—whose prohibitions in many cases preceded the federal enactments—federal interpretations of federal statutes remain a valued source, even in the typical case, for construing the meaning of corresponding WLAD provisions. This is not the typical case. Here the legislature adopted virtually verbatim the language of a federal definition against a background of unanimous federal courts-of-appeals decisions construing the relevant aspects of the definition. The HRC reading and legislative history reinforce that the legislature knew what it was adopting and why.

But even if doubt remained, every separation-of-powers consideration and principle of statutory interpretation counsels in favor of this Court holding that the legislature has not made body weight—at any level—an impairment for purposes of the WLAD if it is not the result of a physiological disorder. None of this Court's previous decisions under the disability (formerly "handicap") provisions of the

WLAD have addressed whether to expand or create a statutory “protected status” with consequences as practically far-reaching as the step the Taylors advocate: The disputed definition of “impairment” and thus the definition of “disability” apply not just to the employment relationship but to the entire range of activities covered by the WLAD’s nondiscrimination provisions. The Court should reject the Taylors’ invitation to bypass the legislative process (i) on the strength of a comma and an ordinary statutory format (“includes, but is not limited to”), (ii) based on terminology chosen by doctors and public-health authorities for reasons far removed from the antidiscrimination norm embodied in the WLAD, or (iii) in deference to the recently evolving enforcement interests of brief-writing lawyers for the federal EEOC.

### **QUESTION CERTIFIED**

The Ninth Circuit panel framed the certified question as follows:

Under what circumstances, if any, does obesity qualify as an “impairment” under the Washington Law against Discrimination (WLAD), Wash. Rev. Code § 49.60.040?

The Taylors spend a substantial amount of time addressing other aspects of the case that are not within the certified question and thus are not before the Court. *See Glaubach v. Regence BlueShield*, 149 Wn.2d 827, 835 n.2, 74 P.3d 115, 119 (2003) (“We are restricted in our review to the four corners of the question.”); *Kitsap Cty. v. Allstate Ins. Co.*, 136 Wn.2d 567, 577, 964 P.2d 1173, 1178 (1998) (“[W]hen a federal court certifies a question to this court, this court answers only the discrete question that is certified and lacks jurisdiction to go beyond the question presented.”). This response is confined to the certified question, which should not be taken as agreement with the Taylors on the other issues they discuss.

## **ARGUMENT**

The certified question differs from the ones this Court has grappled with for more than 40 years under the “handicap” and later “disability” provisions of the WLAD. Those questions involved whether the duration, seriousness, or effect of an undisputed impairment or medical condition (physical or mental) was enough to make the condition a “handicap” or a “disability.” *See Chi., Milwaukee, St.*

*Paul & Pac. R.R. Co. v. Wash. State Human Rights Comm'n*, 87 Wn.2d 802, 557 P. 2d 307 (1976); *Doe v. Boeing Co.*, 121 Wn.2d 8, 846 P.2d 531 (1993); *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 9 P.3d 787 (2000); *McClarty v. Totem Elec., Inc.*, 157 Wn.2d 214, 137 P.3d 844 (2006); *Hale v. Wellpinit School Dist. No. 49*, 165 Wn.2d 494, 198 P.3d 1021 (2009). Here the issue is whether under the WLAD body weight can be an “impairment.” The Taylors assert that the answer is “yes” because doctors can observe a person’s weight and opine about the probability of it being correlated with<sup>2</sup> undisputed diseases or medical conditions. The Court should reject their proposed answer and hold that body weight at any level, including weight labeled for certain purposes as “obesity,” is not an “impairment” unless it is the result of a physiological disorder.

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<sup>2</sup> “Correlated with” better describes the current state of medical knowledge than “causes,” “leads to,” or “contributes to.” The physiological processes by which and the degree to which “excessive” or “abnormal” body weight causes impairments or medical conditions is a focus of continuing debate and study.

**A. The problem: can a trait be an “impairment”?**

Over the years the legislature and this Court have used these words to define “handicap” and “disability”: impairment, abnormality, disorder, disadvantage, medical condition, medically cognizable or diagnosable. *See McClarty*, 157 Wn.2d at 221-228, 137 P.3d at 848-51. None of those terms applies to a human body’s weight. Every human body has weight. Weight is a *characteristic* or *trait* of a physical body. So are height, skin tone, eye and hair color, left or right handedness, age, and biological gender, among others. Doctors can observe and identify each of those characteristics. But nobody, including doctors, refers to any of them using the terms just listed that under Washington law define an impairment and thus a disability. That is what distinguishes a trait or characteristic from a disorder or abnormality. Nobody is described as “suffering from” their height, weight, skin tone, and so on.

“Obesity” is a medicalized term for having *more* body weight than many doctors currently think healthy. The Taylors provide this unexceptionable definition: “Obesity is an ‘*abnormal* or *excessive* fat

accumulation that *presents a risk* to health.’ World Health Organization (“WHO”), [www.who.int/topics/obesity/en/](http://www.who.int/topics/obesity/en/).” Taylor Brief, 11 (emphasis added). But other physical characteristics and traits are also correlated with medical conditions (“present[] a risk”). They include height,<sup>3</sup> skin tone,<sup>4</sup> hair color,<sup>5</sup> age,<sup>6</sup> and biological gender.<sup>7</sup> Yet nobody would describe any of those characteristics as *themselves* diseases

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<sup>3</sup> Disorders correlated with height:

<https://www.webmd.com/a-to-z-guides/ss/slideshow-height-affects-health>

<https://www.medicaldaily.com/how-your-height-affects-your-health-tall-and-short-people-face-different-types-395443>

<sup>4</sup> Disorders correlated with skin tone:

<https://www.cancer.org/cancer/skin-cancer/prevention-and-early-detection/sun-damage.html>

<https://medlineplus.gov/skinpigmentationdisorders.html>

<sup>5</sup> Disorders correlated with hair color:

<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0190238>

<https://www.everydayhealth.com/skin-beauty/health-hair-color-connection/>

<sup>6</sup> Disorders correlated with age:

<http://www.who.int/news-room/fact-sheets/detail/adolescents-health-risks-and-solutions>

[http://www.who.int/ageing/publications/global\\_health.pdf](http://www.who.int/ageing/publications/global_health.pdf)

<sup>7</sup> Disorders correlated with biological gender:

or medical conditions, even though doctors can observe them and opine about the probability that they are correlated with diseases or medical conditions.

**B. The EEOC found a solution: only if it is the result of a physiological disorder.**

After enactment of the federal Americans with Disabilities Act (“ADA”) in 1990, the federal EEOC confronted—and found a solution to—the problem of when a physical trait or characteristic such as height, weight, or muscle tone can be an “impairment,” and thus potentially a disability, for purposes of the ADA. The EEOC concluded that to be an impairment such a characteristic must meet two tests: it must be “outside the normal range” *and* it must be a “result of a physiological disorder.” 29 C.F.R. pt. 1630, App., § 1630.2(h).<sup>8</sup>

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<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3388783/>

<sup>8</sup> Sometimes litigants dispute the “and,” arguing that the guidance means that an underlying physiological disorder is required only if weight is within “normal” range. That argument is mistaken for several reasons. First, the federal court rulings discussed below all necessarily reject that view. Second, the guidance rejects that view because the text requires a physiological disorder where there is no range, *e.g.*, “*Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments.*” Third, a view that a physiological disorder is necessary only when weight is *within* normal range

Specifically, the EEOC guidance states the following:

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, lefthandedness, 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*. Similarly, the definition does not include common personality traits such as poor judgment or a quick temper *where these are not symptoms of a mental or psychological disorder*. Environmental, cultural, or economic disadvantages such as poverty, lack of education or a prison record are not impairments. *Advanced age, in and of itself, is also not an impairment. However, various medical conditions commonly associated with age, such as hearing loss, osteoporosis, or arthritis would constitute impairments* within the meaning of this part. See Senate Report at 22–23; House Labor Report at 51–52; House Judiciary Report at 28–29.

29 C.F.R. pt. 1630, App., § 1630.2(h) (emphasis added).

The EEOC’s solution was not intended, as the Taylors argue, to find “fault” with those whose behavior causes or contributes to that

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violates logic because no *disorder* causes weight or height or muscle tone that is *within* normal range.

person having an “impairment.” Taylor Brief, 15. Otherwise the EEOC intended to find “fault” with pregnancy and age too since the guidance specifies that neither—among other conditions that are not the result of a physiological disorder—is an “impairment” any more than height or weight is. Like body weight, pregnancy and age can present risks of (be correlated with) medical conditions or diseases. But nobody refers to or thinks of pregnancy or age as a *disorder* or an *illness*. Cf. *Hegvine v. Longview Fibre Co. Inc.*, 162 Wn.2d 340, 352, 172 P.3d 688, 694 (2007) (“neither pregnancy nor pregnancy-related medical conditions are disabilities under Washington law”). Instead of assigning “fault,” the EEOC’s physiological-disorder requirement ensures that the ADA’s coverage remains bound to the statute’s “high purpose”: protection of persons with physical or mental *infirmities* or *maladies*. See *Francis v. City of Meriden*, 129 F.3d 281, 286-87 (2nd Cir. 1997).<sup>9</sup>

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<sup>9</sup> Some have confused the requirement of an underlying physiological disorder with the principle that “[v]oluntariness is irrelevant when determining whether a condition constitutes an impairment.” *EEOC Compliance Manual* § 902.2(e). That principle is not new and co-exists with the principle that physical characteristics are not impairments

The legislature, in response to this Court’s *McClarty* decision, amended the WLAD to adopt for the first time a definition of “disability.”<sup>10</sup> That definition did two things. First, it drew heavily from the HRC’s regulatory definition of “disability,” which this Court had addressed in *McClarty*, and which is still in effect today. *See McClarty*, 157 Wn.2d at 222-24, 137 P.3d at 848-49 (discussing WAC § 162-22-020). Second, it adopted a definition of “impairment” that is virtually identical to the federal EEOC’s regulation that defines the same term. *Compare* 29 C.F.R. § 1630.2(h) (2007 version) *with* RCW § 49.60.040(7)(c).

The version of 29 C.F.R. § 1630.2(h) in effect when the legislature adopted its definition read as follows (with emphasis added):

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unless they are “the result of a physiological disorder.” 29 C.F.R. § 1630.2(h) App. The “voluntary” issue simply means that a condition that otherwise meets the definition of an impairment is not excluded because it resulted from voluntary conduct. For example, lung cancer is an impairment and remains so even if it resulted from smoking. The voluntary-conduct issue does not transform characteristics or traits that are not impairments into impairments.

<sup>10</sup> *See Hale*, 198 P.3d at 1024-25, 165 Wn.2d at 500-02 (explaining legislative action after *McClarty*).

(h) Physical or mental impairment means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculo-skeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

RCW § 49.60.040(7)(c) states as follows (with emphasis

added):

(c) For purposes of this definition, “impairment” includes, but is not limited to:

(i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculo-skeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or

(ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

The EEOC guidance document spelling out that physical characteristics such as weight are not “impairments” unless the result of

a physiological disorder is an interpretation of 29 C.F.R. § 1630.2(h). The natural conclusion, using ordinary principles of statutory interpretation, is straightforward: by adopting verbatim the operative text of the federal regulation the state legislature intended to adopt for the WLAD the federal definition of “impairment,” including the EEOC’s solution to when a physical trait can be such an impairment for purposes of the ADA.<sup>11</sup>

**C. The legislature and the HRC adopted the EEOC’s solution—which guides this Court’s answer to the question.**

Despite being amended numerous times since its enactment the WLAD has never defined body weight or “obesity”—or any other

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<sup>11</sup> The legislative history material that the Taylors include in their Addendum likewise confirms the legislature’s intent to adopt the EEOC regulation as part of the 2007 WLAD amendments. *See* Taylor Brief Addendum C: House Bill Report, SSB 5340, at 4 (pdf page 182 of the Taylors’ electronic brief) (“The bill gets its definition from three sources: The current WHRC regulation, but without the problem of circularity found in that rule; the regulations of the Equal Employment Opportunity Commission; and the *Pulcino* decision of the Washington Supreme Court.”); Testimony by Attorney General on Proposed Substitute HB 1322, ¶ 2 (pdf page 154 of the Taylors’ electronic brief) (“The EEOC has issued guidance on the federal definition under the Americans with Disabilities Act (ADA) and that guidance discusses impairments.”).

physical characteristic—as an impairment or a disability. *See Kilian v. Atkinson*, 147 Wn.2d 16, 29, 29-31, 50 P.3d 638, 644, 644-45 (2002) (WLAD amended ten times since enactment as of 2002). No reported case under the WLAD involves even the contention, much less a holding, that body weight at any level is an impairment or a disability. And the HRC has not promulgated rules defining body weight or “obesity”—or any other physical characteristic— as an impairment or disability. *Cf. Hegvine*, 162 Wn.2d 340, 349-50, 172 P.3d 688, 693-694 (2007) (deferring to HRC regulations defining sex discrimination to include pregnancy discrimination); *Marquis v. City of Spokane*, 130 Wn.2d 97, 111, 922 P.2d 43, 50-51 (1996) (deferring to HRC regulations providing that independent contractors are protected against discrimination).

Much to the contrary, the HRC in its published guide on disability discrimination under Washington law agrees that physical characteristics or traits are *not* themselves disabilities and adopts the EEOC’s original physiological-result solution:

### **What characteristics are not disabilities?**

.... Physical traits such as being left handed or being short are not disabilities. (Though there are medical and genetic conditions that cause extreme short stature that are disabilities.)....

Washington State Human Rights Commission, *Guide to Disability and Washington State Nondiscrimination Laws*, “Frequently Asked Questions and Answers,” at 4 (2007/updated 2012).<sup>12</sup>

The HRC’s guidance uses fewer words than the EEOC’s guidance but in substance is identical. “Left handed” or right handed,

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<sup>12</sup> [www.hum.wa.gov/media/dynamic/files/158\\_Disability%20Q%20and%20A.pdf](http://www.hum.wa.gov/media/dynamic/files/158_Disability%20Q%20and%20A.pdf). The full text, which further shows that it draws from the EEOC’s interpretive guidance, reads as follows:

Personality traits such as chronic tardiness or irritability are not in and of themselves disabilities (although they may be symptoms of disabilities). Physical traits such as being left handed or being short are not disabilities. (Though there are medical and genetic conditions that cause extreme short stature that are disabilities.) A normal pregnancy is not considered to be a disability, although pregnancy related medical conditions, such as gestational diabetes or hypertension, can sometimes be disabilities. Discrimination against a pregnant woman is prohibited under the Washington Law Against Discrimination as sex discrimination. Pregnancy and maternity discrimination are covered by other sections of the Washington Law Against Discrimination.

“short” or tall, underweight or overweight—none is a disability because each is a physical trait or characteristic not an “impairment.”

The legislature authorized the HRC to give effect to the WLAD. RCW 49.60.110 (“The commission shall formulate policies to effectuate the purposes of this chapter.”); *id.*, 49.60.120(3) (granting HRC the power “[t]o adopt, amend, and rescind suitable rules to carry out the provisions of this chapter.”). This Court defers to HRC “interpretive guides” as well as to formal rules. *Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d. 481, 494-95 &, 325 P.3d 193, 199 & n. 21 (2014). The HRC plainly understood the legislature’s adoption of the federal definition of impairment to also adopt the EEOC’s guidance about physical characteristics or traits. A physical characteristic like weight cannot be an impairment unless caused by a physiological disorder.

Federal courts construing the EEOC’s guidance have agreed. Under the federal definition of “impairment” and the EEOC guidance, every federal circuit court, and almost every federal district court, to consider the issue has held that “to constitute an ADA impairment, a person’s obesity, even morbid obesity, must be the result

of a physiological condition.” *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 443 (6th Cir. 2006) (rejecting arguments of EEOC litigation attorneys otherwise); accord *Morriss v. BNSF Railway Co.*, 817 F.3d 1104, 1112-13 (8th Cir. 2016) (“for obesity, even morbid obesity, to be considered a physical impairment, it must result from an underlying physiological disorder or condition”); *Francis*, 129 F.3d at 286 (same); *Andrews v. Ohio*, 104 F.3d 803, 808 (6th Cir. 1997) (same for police officers who failed to satisfy established weight guidelines); *Cook v. R.I. Dept. of Health*, 10 F.3d 17, 23-25 (1st Cir. 1993) (ruling in favor of a plaintiff on an obesity-based disability claim but only after explaining that the plaintiff had presented expert testimony that her obesity was the result of a physiological disorder).<sup>13</sup>

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<sup>13</sup> Numerous federal district court rulings likewise emphasize the requirement of a physiological disorder before obesity can support a disability claim. See, e.g., *Brownwood v. Wells Trucking, LLC*, 2017 WL 9289453, at \*4-\*6 (D. Colo. Nov. 9, 2017) (“[T]he Court is persuaded by the conclusion reached by a majority of courts that obesity—even severe or morbid obesity—does not qualify as an impairment without evidence of a physiological cause.”); *Silva v. Bd. of Cty. Comm’rs*, 2017 WL 4325769, at \*8 (D.N.M. Sept. 26, 2017) (adopting *Morriss*’s conclusion that “obesity that is not the result of an underlying physiological condition is not a ‘disability’ under the ADA”); *Powell v. Gentiva Health Servs.*, 2014 WL 554155, at \*5 n.9 (S.D. Ala. Feb 12, 2014)

“Washington courts...look to federal case law interpreting [federal antidiscrimination statutes] to guide...interpretation of the WLAD.” *Kumar*, 180 Wn.2d at 491, 325 P.3d at 197. “Federal cases are not binding” on this Court. *Kumar*, 180 Wn.2d at 491, 325 P.3d at 197-98. But when the evidence is so clear and uncontradicted that the legislature intended to adopt the EEOC’s original interpretive guidance approach to physical traits or characteristics as an “impairment,” and the HRC agrees, this Court holding otherwise would be

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(morbid obesity itself is not a disability under the ADAAA and reasoning for pre-ADAAA cases regarding obesity is still applicable); *Sibilla v. Follett Corp.*, 2012 WL 1077655, at \*9 (E.D.N.Y. Mar. 30, 2012) (Under ADAAA, the “fact that an employer regards an employee as obese or overweight does not necessarily mean the employer regards the employee as having a physical impairment.”); *Lescoe v. Pennsylvania Dept. of Corrections - SCI-Frackville*, 2011 WL 1258334, \*14 (M.D. Pa. March 5, 2011) (“It repeatedly has been held that excess weight or obesity, except in special instances where they relate to a physiological disorder, are not ‘physical impairments’ within the meaning of the statutes.”), *adopted*, 2011 WL 1343144 (M.D. Pa. March 30, 2011), *aff’d*, 2012 WL 505896, 2 (3rd Cir. Feb. 16, 2012); *Middleton v. CSX Transp., Inc.*, 2008 WL 846121, at \*2 & n.6 (N.D. Fla. Mar. 28, 2008) (“[o]besity, even morbid obesity, however, does not constitute a physical impairment unless it is the result of a physiological disorder or condition”).

creating *new* “purposes and mandates”<sup>14</sup> of the WLAD—would be legislating—rather than “furthering” the *legislature’s* purposes and mandates.

**D. The Taylors’ arguments to deviate from the solution adopted by the legislature and the HRC are unsupported.**

**1. The suggested distinctions between the text of the federal regulation and the WLAD language do not support a different reading.**

The Ninth Circuit panel that certified the question to this Court identifies “two potentially significant respects” in which the WLAD and EEOC definitions differ. The Taylors rely on those differences in their brief to this Court. One is that the *current version* of the federal regulation lacks the comma present in the WLAD definition. The other is the introductory phrase to RCW 49.60.040(7)(c): “includes, but is not limited to.” Neither difference affects the natural conclusion from the legislature’s action.

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<sup>14</sup> See *Kumar*, 180 Wn.2d at 491, 325 P.3d at 197-98.

**a. The presence or absence of the comma is of no consequence.**

The Taylors contend that the placement of a comma between “disorder” and “condition” in RCW 49.60.040(7)(c) means that the word “physiological” does not modify “condition.” Taylor Brief, 16-17, 20. The Taylors overlook that, as explained above, in defining “impairment,” the legislature adopted the *exact* pertinent language from the federal regulation as it was written at the time. That regulation included the comma before the word “condition.” Yet, as also set out above, the EEOC still explained in its interpretive guidance to the regulation that a characteristic is an impairment only if it is the “result of a physiological disorder.” And as discussed above the federal courts unanimously held that obesity was an impairment only if it was the result of a physiological disorder.

When the Taylors attempt to distinguish the federal regulation from the WLAD by pointing to the absence of the comma in the federal regulation, they leave out that the comma was deleted from the federal regulation only after the EEOC revised it following Congress’s amendment of the ADA in 2008. But for most of the ADA’s existence,

during the period when the federal courts solidified the position that weight, even if labeled “obesity,” requires an underlying physiological disorder to be an impairment, the comma was present, just as it is in the WLAD. The state legislature is presumed to have been aware of that federal law when it adopted the federal regulation. *See Health Ins. Pool v. Health Care Authority*, 919 P.2d 62, 65, 129 Wn.2d 504, 510 (1996) (applying the principle that the legislature is presumed to know the law in the area in which it legislates to knowledge of relevant *federal* law).

Moreover, as also explained below, after the EEOC modified the regulation to eliminate the comma as part of a general rewriting of the regulations, it retained the same language in the interpretive guidance. Likewise, federal courts have continued to apply the same standard. Both circumstances make plain that the presence or absence of the comma is immaterial: with it or without it, a physical trait must result from an underlying physiological disorder to constitute an impairment for purposes of the ADA.

**b. “Includes” does not authorize the coverage of obesity by the WLAD.**

The “includes, but is not limited to” phrase follows and refers to “impairment.” That ordinary meaning of the word is “the state of being diminished, weakened, or damaged, especially mentally or physically.”<sup>15</sup> Specifically in the medical context—and the WLAD makes that the relevant context by referring to “medically cognizable or diagnosable,” RCW 49.60.040(7)(a)(i)—the term “impairment” means “any abnormality of, partial or complete loss of, or loss of the function of, a body part, organ, or system; this may be due directly or secondarily to pathology or injury and may be either temporary or permanent.”<sup>16</sup>

Although “includes” is a word of expansion not limitation and the definitions that follow it are examples not an exhaustive list, anything *not* expressly listed yet proposed as a statutory “impairment”

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<sup>15</sup> <https://www.dictionary.com/browse/impairment>.

<sup>16</sup> <https://medical-dictionary.thefreedictionary.com/impairment>.

must still satisfy the ordinary medical meaning of the word “impairment.” This Court confirmed that understanding of the “includes” phrase in *Kilian*, 147 Wn.2d at 27, 29-31, 50 P.3d at 643, 644-45 (majority and concurring opinions). The plaintiffs there argued that RCW § 49.60.030 prohibits age discrimination against independent contractors—despite age not being listed as a protected characteristic in that section of the statute. They relied on an earlier decision of this Court holding that independent contractors could sue for violation of the WLAD. *Marquis v. City of Spokane*, 130 Wn.2d 97, 922 P.2d 43 (1996). *Marquis* turned on the phrase “This right shall include, but not be limited to” in RCW § 49.60.030(1). The Court in *Marquis* held that because “include, but not be limited to” signaled examples rather than an exhaustive list, the enumeration of subject-matters that followed the “include” phrase—which did not encompass the contracting relationship—were not necessarily the only subject matters to which the statutory right applied. *Id.*, 130 Wn.2d at 107, 922 P.2d at 49. That made the reach of the statute ambiguous and because the HRC had

interpreted the law to apply to independent contractors the Court did too. *Id.*, 130 Wn.2d at 107-112, 922 P.2d at 49-51.

The plaintiffs in *Kilian* asked the Court to apply the *Marquis* reasoning to add age to the list of protected characteristics in RCW § 49.60.030(1). The Court declined: “Plaintiffs misinterpret both the statute and...*Marquis*....The court’s decision in *Marquis* was limited to the protected classes listed in RCW 49.60.030(.1) [and] age is not one of the protected classes listed in it.” 147 Wn.2d at 23, 27; 50 P.3d at 641, 643; *see also id.*, 147 Wn.2d at 29-32; 50 P.3d at 644-45 (concurring opinion). In other words, the Court held that “include, but not be limited to” takes its meaning from and is limited by the word that precedes it. In *Marquis* and *Kilian* that word is “right,” and as the majority and concurring Justice both observe, the “right” granted by the section of the statute at issue does not include freedom from age discrimination. By the same reasoning, the word “impairment” that precedes “includes, but is not limited to” in RCW 49.60.040(7)(c) limits

statutory “impairments” to circumstances that are within the ordinary medical meaning of the word “impairment.” As discussed above, body weight is not.

Thus, neither of the two potentially distinguishing characteristics noted by the Ninth Circuit panel and embraced by the Taylors has any effect on the resolution of the certified question.

## 2. “Condition” as a freestanding term.

The Taylors also contend that everyone has overlooked until now that under the WLAD all that is required for an impairment is a “condition” — a “mode of being” — that affects one or more of the body systems identified in the statute. Taylor Brief, 12-13. For three reasons, the Taylors are mistaken.

First, the HRC disagrees. A rule defines when a “condition,” as that term is used in the WLAD, is a disability: “A condition is a ‘sensory, mental, or physical disability’ if it is *an abnormality....*” WAC § 162-22-020(2) (emphasis added). Weight is not “an abnormality.” Weight is intrinsic to human bodies. It changes naturally over a lifespan and is not immutable. *See, e.g., In Re Detention of Coe*, 175 Wn.2d 482, 499-500, 286 P.3d 29, 38 (2012) (“The varying physical

descriptions are explained by the fact that Coe’s physical appearance did vary. He gained and lost weight due to occasional fasting.”). Body weights in a population at any given time can be plotted on a “normal distribution” (bell) curve.<sup>17</sup> And the population’s median, average, or typical weight or weight range—the weights that fall in the broad middle of the bell curve representing all weights in the population—can be described as normal or the normal range. But “normal” in that context is a statistical term, not a medical diagnosis. It does not mean that some weights (or heights) are *medically* “an abnormality.”

Height and weight are the classic examples of what in biology are called continuous traits, meaning “a characteristic that doesn’t fit in to easily defined groups.”<sup>18</sup> That explains why it is arbitrary to define any height or weight as “abnormal” except in the statistical sense.

Second, *all* body weights—including those that fall within the “normal” range on a population bell curve—“affect” one or more of

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<sup>17</sup> See <https://www.merriam-webster.com/dictionary/normal%20curve>.

<sup>18</sup> See <https://www.quora.com/What-is-a-continuous-trait>.

the body systems identified in RCW 49.60.040(7)(c)(i). The definition that the Taylors rely on refers, in addition to a “condition,” to a “disorder,” “disfigurement,” and “loss.” One of those three “affecting one or more...body systems” *defines* a medical “abnormality” or medical condition, *i.e.* an impairment. By contrast, a “condition” “affecting one or more ...body systems” describes *every* physical condition, not just those affecting the body in a harmful way. Being in “good condition” or “fit” is a physiological “condition” that affects the body—in a positive way. Nobody would describe it as an “impairment,” nor does it satisfy the dictionary meaning of “impairment.” Body weight being a physiological “condition” as the Taylors use that term cannot and does not make it an “impairment.” Indeed, the way they use the term even statistically normal body weight would be a “condition.”

Third, the Taylors’ argument renders the other terms in the definition of “impairment” meaningless. There would be no point to the legislature including those terms in the definition if “condition”

meant what the Taylors claim (“a mode of being”). Disorders, cosmetic disfigurements, and anatomical loss are *all* “conditions” under their proposed meaning. This Court presumes the legislature does not use such superfluous words. *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 458, 219 P.3d 686, 689 (2009).

To treat the word “condition” as though it means any state of the body also ignores the principle that words in a list must be interpreted in a similar manner. *See, e.g., Five Corners Family Farmers v. State*, 268 P.3d 892, 906, 173 Wn.2d 296, 322 (2011) (“It is well established that ‘words grouped in a list should be given related meaning.’...In Washington, this is enshrined in the principle of *noscitur a sociis*, which roughly translates to ‘words are known by the company they keep.’”) (citations omitted); *see also AllianceOne Receivables Mgmt., Inc. v. Lewis*, 180 Wn.2d 389, 396, 325 P.3d 904, 908 (2014) (dictionary definitions must be used in a manner consistent with statutory context).

In context, the word “condition” therefore means essentially the same thing as a “disorder” and is simply another term used to ensure that no “conditions” that may not be “disorders” are omitted. Understanding the term in that way is consistent with the statutory construction principles discussed above. It treats the words in the list as having similar meanings, and it avoids an interpretation that would render superfluous those other words. Moreover, the legislative history the Taylors attach to their brief repeatedly omits the term “condition” when summarizing the then-new statutory language, confirming that there is little if any substantive difference between that term and “disorder.”<sup>19</sup> Accordingly, the Taylors’ reliance on a very different meaning of the term “condition” is mistaken.

Nor does the Taylors’ reliance on *Clipse v. Commercial Driver Servs., Inc.*, 189 Wn. App. 776, 793, 358 P.3d 464 (2015), *rev. denied*,

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<sup>19</sup> See, e.g., Taylor Brief Addendum C: House Bill Report, SSB 5340, at 1 (pdf page 67 of the Taylors’ electronic brief) (“‘Impairment’ includes a physiological disorder, cosmetic disfigurement, anatomical loss affecting one or more of several specified body systems, and mental, developmental, traumatic, or psychological disorders.”).

185 Wn.2d 1017 (2016), help them. Although the case held that “any mental or physical condition may be a disability,” that is an unremarkable statement given that it is true under both state and federal law. That is, it is correct that any condition “may” be a disability. Whether it *is* a disability turns on additional information. Moreover, *Clipse* is particularly distinguishable because it did not address a physiological condition that is merely a physical trait, like weight. *Clipse* identified that under Washington law, side effects of prescription drug use could be considered as a perceived disability where the perception was that the employee was a drug user. Relying on federal law, *Clipse* identified that addiction to opiates, so long as the addict is not taking illegal drugs, is a disability. Therefore, the impairment of the side effects of the drugs already has the requisite underlying physiological cause: addiction. *Clipse* does not stand for the legal proposition suggested by the Taylors.

### **3. The ADAAA did not change federal law.**

The Taylors argue that federal law has changed based on the passage of the Americans with Disabilities Amendments Act of 2008 (“ADAAA”). The federal courts have rejected that view. The

ADAAA broadened the definition of a “disability” and Congress directed that the term be interpreted broadly, yet only as broadly as the language allowed. But as noted, the regulations implementing the ADAAA did *not* change the definition of “impairment” as it did with respect to the “substantial limitation” aspect of the definition of disability. Without any change to the definition of an impairment, the same pre-ADAAA authority that weight must be the result of a physiological disorder in order to qualify as a disability remains federal law. *Morriss*, 817 F.3d at 1111 (holding that the “ADAAA’s overarching policy objective to provide ‘broad coverage’” does not permit “a more expansive interpretation of physical impairment” because “the ADAAA’s policy goal is itself constrained by language that limits the intended broad coverage to the ‘extent permitted by the terms of [the ADA]’”). In fact, many of the decisions cited above were issued after the ADAAA yet they continue to apply the pre-ADAAA approach.

The *Morriss* court explained in detail why the pre-ADAAA law still applies. Congress’s focus in adopting the ADAAA was (similar to the Washington legislature in overruling *McClarty* a year earlier) to

overrule the “substantially limit” requirement for a “disability” under the pre-amendment statute. The ADAAA did not, however, amend or require the federal regulations to be changed to address any issues with how the law was interpreted with regard to what it meant to be impaired as it did with respect to the substantial limitation aspect of disability. Instead, as the Eighth Circuit explained, “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.” *Morriss*, 817 F.3d at 1111.

When the EEOC re-adopted the same regulatory definition of “impairment” it also retained the same critical language in its interpretive guidance. And the agency expressly stated that no change in meaning was intended:

Neither the original ADA nor the ADAAA provides a definition for the terms “physical or mental impairment.” However, the legislative history of the Amendments Act notes that *Congress “expect[s] that the current regulatory definition of these terms, as promulgated by agencies such as the U.S. Equal Employment Opportunity Commission (EEOC), the Department of Justice (DOJ) and the Department of Education Office of Civil Rights (DOE*

*OCR) will not change.*” 2008 Senate Statement of Managers at 6.

29 C.F.R. 1630.2(h) App. (emphasis added). Thus, the agency policymakers—as distinguished from the EEOC attorneys who have sometimes tried to change federal law through litigation positions and amicus briefs contradicting the official agency position—understood that although much changed with the ADAAA, the meaning of “impairment” did not.<sup>20</sup> As the *Morriss* court held, “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 remains relevant and persuasive.” *Morriss*, 817 F.3d at 1111. The Taylors’ contrary position is mistaken.

#### **4. The EEOC’s Compliance Manual and litigation positions**

The Ninth Circuit panel invited this Court to consider the EEOC’s Compliance Manual and amicus brief in that court as guides to interpretation of the WLAD. But the panel’s account of the

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<sup>20</sup> See *Morriss*, 817 F.3d at 1111 n.4 (explaining that amicus and litigation positions of the EEOC could not prevail when the agency did not modify its regulation or interpretive guidance).

EEOC’s Compliance Manual and its reception by courts is at the very least incomplete. The panel mistakenly viewed the Compliance Manual standard as the same as the EEOC interpretive guidance discussed above when in fact the two are different.<sup>21</sup>

The panel explains that the Compliance Manual states that although normal deviations in height, weight, and strength are not “impairments,” “[a]t extremes...such deviations may constitute impairments.” *EEOC Compliance Manual* § 902.2(c)(5). What the panel overlooked was that the Compliance Manual described those “extremes” in a precise and limited way:

Being overweight, in and of itself, generally is not an impairment....On the other hand, severe obesity, which has been defined as body weight more than 100% over the norm...is clearly an impairment.

*Id.* § 902.2(c)(5)(ii).

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<sup>21</sup> Given that the federal panel has not adjudicated the dispute, the statements it makes in a certifying order are necessarily *dicta*. Even if otherwise, however, this Court would not be bound by them. *In re Markel*, 111 P.3d 249, 253, 154 Wn.2d 262, 271 (2005) (“We have never held that an opinion from the Ninth Circuit is more or less persuasive than, for example, the Second, Sixth, Seventh, Eighth, or Tenth Circuits....”).

The Compliance Manual does *not* suggest that any obesity labeled as “severe”—or that any potential synonym of “severe” such as “morbid”—constitutes an “impairment.” Instead, the agency recognized as the only exception to the normal rule that weight is not an impairment absent an underlying physiological disorder weight that meets the agency’s definition of “severe obesity”—weight that is more than 100% over norm weight. *See Watkins*, 463 F.3d at 441 (“The EEOC puts forth the argument that an impairment may be shown by either: weight problems caused by a physiological condition or morbid obesity (ie. ‘body weight more than 100% over the norm’), regardless of the cause.”). The Compliance Manual expressly confirms that limited nature of the exception by emphasizing that even when terms other than “severe obesity” are used what matters is “body weight more than 100% over the norm.” *EEOC Compliance Manual* § 902.2(c)(5) n.15 (referring to terms “morbid obesity” and “gross obesity” and emphasizing that those labels do not affect the agency’s stated exception).

What is more, the Ninth Circuit itself has actually confirmed and applied that very meaning of the Compliance Manual in a previous case. Although the panel that certified the question to this Court briefly mentions the Montana Supreme Court ruling on a certified question in *BNSF Railway Co. v. Feit*, 281 P.3d 225 (Mont. 2012), as holding that “[o]besity that is not the symptom of a physiological disorder or condition” may constitute an impairment “if the individual’s weight is outside ‘normal range’ and affects ‘one or more body systems,’” Panel Op., 15, that description too was incomplete. The panel left out that the Montana Supreme Court explained the meaning of “outside ‘normal range’” to be only weight that met the singular exception in the Compliance Manual—weight that was greater than 100% above norm weight. The Ninth Circuit confirmed exactly that view:

The analysis [of the Montana Supreme Court] described the types of obesity that the EEOC deems “extreme” enough to qualify as impairments under the ADA, and as it stands, “severe obesity” is the only weight deviation that the EEOC has expressly recognized as having met that threshold. *See id.* (“[S]evere obesity...is clearly an impairment.” (citation and internal quotation marks omitted)).

*Burlington N. Santa Fe Ry. Co. v. Feit*, 663 Fed. Appx. 504, 507, 2016 WL 5076040 (9th Cir. 2016); *see also id.* (“Feit argues that the district court erroneously relied on dicta in the Montana Supreme Court’s opinion to conclude that ‘more than 100% over the norm’ is a requirement of the standard for a cognizable ‘impairment.’”). Consequently, the Compliance Manual does not support the Taylors’ arguments about the federal regulations and would at most support a limited exception to the normal rule for weight that is more than twice the norm weight.

In any event, no decision by this Court has ever deferred to either the EEOC Compliance Manual or an EEOC amicus brief as providing the correct interpretation of the WLAD. To the contrary, “It is well settled in Washington that the Legislature may not constitutionally attempt to adopt future federal law by statute.” *Diversified Inv. Partnership v. Department of Social and Health Services*, 113 Wn.2d 19, 24-25, 775 P.2d 947, 950 (1989). Especially after “obesity” became in recent years a major concern of public-health officials and then of political policymakers, EEOC lawyers have tried various approaches

to shoehorning the public-health issue into the anti-discrimination framework that the EEOC oversees, despite the agency’s original and workable solution to when a physical characteristic like weight can be an “impairment.” Those efforts have included adopting a tortured grammatical construction of the original guidance and mischaracterizing the circumstances and meaning of the withdrawal of a section of the Compliance Manual. Panel Op., 11. But this Court presumes that the legislature intends to enact only constitutionally permissible statutes. The legislature adopted the EEOC’s solution to the problem of when a physical trait can be an impairment as it was—and as it was understood by the federal courts— in 2007. Consequently, neither the EEOC’s recent litigation theories (eleven years after the legislature enacted the WLAD provision at issue) nor the amendments to the ADA made in the ADAAA on unrelated issues may be retroactively read into the WLAD.

**5. The characterizations of obesity by the AMA and public health organizations in different contexts do not control the resolution of the legal issue.**

Equally untenable is the Taylors' argument that the legislature intended the WLAD definition of impairment to depend on the views of individual doctors, of trade organizations like the American Medical Association, or of governmental or private bodies devoted to public health. Taylor Brief, 11-14, 19.

Adopting the broadest possible view of what counts as a "disease" aligns the professional concerns of doctors with their interests.

Doctor organizations in particular have recently argued that gun violence,<sup>22</sup> online gaming,<sup>23</sup> and alcohol consumption<sup>24</sup> are proper subjects for medical advice and treatment, to name just a few examples.

For organizations and bodies whose mission is public health, the “disease” characterization is useful metaphorical shorthand for unhealthy *correlations*: smoking, guns, drugs, social media, gaming, and alcohol consumption have all been associated with unhealthy outcomes equivalent to the unhealthy outcomes caused by actual physio-

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<sup>22</sup> See <https://www.nbcnews.com/news//us-news/frustrated-american-medical-association-adopts-sweeping-policies-cut-gun-violence-n882681> (“We as physicians are the witnesses to the human toll of this *disease*.”) (emphasis added). The federal government’s Centers for *Disease* Control and Prevention has likewise recently published a report on gun violence. See <https://www.cdc.gov/mmwr/volumes/67/wr/mm6744a3.htm>.

<sup>23</sup> See [http://www.who.int/substance-abuse/activities/gaming\\_disorders/en/](http://www.who.int/substance-abuse/activities/gaming_disorders/en/) (“Gaming disorder...has been included in the draft of the 11th edition of the International Classification of *Diseases* (ICD-11.”) (emphasis added).

<sup>24</sup> See <https://www.cnn.com/2018/11/13/health/alcohol-use-screening-guidelines-usptsf-study/index.html> (“You can expect a ‘drinking checkup’ when you visit a doctor. All adults...should be screened for unhealthy alcohol use by their primary care physicians.”).

logical disorders (organic medical conditions). Describing their prevalence in society as an “epidemic” of a “disease” therefore helpfully focuses public and policymaker attention on the health risks and the need for public-health resources to address those risks.<sup>25</sup>

But the legislature’s perspective on the WLAD transcends what doctors believe is good for their patients. It likewise transcends what those concerned with public health believe are the best means of educating the public about health risks and attracting sufficient resources to combat those risks. The WLAD’s “purposes and mandates” are not public health. The meaning of the words “disease” and “epidemic” as used in the public-health context therefore has no legitimate bearing on whether the legislature intended the antidiscrimination norms established by the WLAD to cover “obesity.” Moreo-

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<sup>25</sup> Labeling obesity a “disease” is not new; the National Heart, Lung, and Blood Institute of the National Institutes of Health has long called it that, yet courts have likewise long said that it is not an impairment under the ADA. *See* [https://www.ncbi.nlm.nih.gov/books/NBK2003/pdf/Bookshelf\\_NBK2003.pdf](https://www.ncbi.nlm.nih.gov/books/NBK2003/pdf/Bookshelf_NBK2003.pdf), at xi.

ver, Washington’s strong nondelegation stance extends beyond adoption of future federal law: “The Legislature is prohibited from delegating its purely legislative functions.... These nondelegable powers include the power to enact, suspend, and repeal laws, and the power to declare general public policy.” *Diversified Inv. Partnership*, 113 Wn.2d at 24, 775 P.2d at 950. Legislators, not doctors or public-health groups, must decide the proper scope of the WLAD’s protections.

The legislature has added protected statuses to the WLAD—HIV and sexual orientation for example. RCW 49.60.172, 49.60.40(26). It could choose to add “obesity.” But one conclusion that surely must be drawn from this Court’s experience with definitions of “handicap” and “disability” is that the legislative branch is where decisions about a new protected status is properly and best made. That is particularly true with respect to a physical trait like body weight: the effects of making it a protected characteristic under the WLAD would be both far-reaching and unpredictable as a practical

matter, extending not just to the employment relationship but to every activity covered by the WLAD's nondiscrimination provisions.<sup>26</sup>

The United State Supreme Court often notes that Congress does not announce highly consequential decisions obscurely or by implication. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (observing that Congress is “highly unlikely” to make decisions of “economic and political significance” through “subtle device[s]” or in a “cryptic...fashion” (internal quotation marked omitted). This Court followed essentially the same interpretive principle in *Killian*: “Even under liberal construction of chapter 49.60, the court will not adopt a strained or unrealistic interpretation of the statutes in that chapter....the court would then be engaging in legislation.” *Killian*, 147 Wn.2d at 27, 50 P.3d at 643. Concluding that the legislature intended to make “obesity” a protected characteristic under the

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<sup>26</sup> RCW 49.60.030(1) (nondiscrimination right “includes, but is not limited to,” employment, public accommodations, real-estate transactions, credit transactions, and insurance transactions); *Marquis*, 130 Wn.2d at 107-112, 922 P.2d at 49-51 (nondiscrimination right extends to the contracting relationship).

WLAD by implied delegation to the EEOC, the American Medical Association, or the World Health Organization, or by the placement of a comma, would be a strained, unrealistic, and unlikely interpretation.

**E. The certified question presents a quintessentially legislative issue.**

Other reasons for caution—and deference to the legislature—also stem from the nature of weight as a continuous physical characteristic. First, as suggested above, drawing lines to characterize individuals on either or both tails of the weight or height bell curve as “abnormal,” “impaired, or “diseased” is essentially arbitrary and as such highly error-prone. Studies have found, for example, that anywhere from one-third to three-quarters of people classified as obese are metabolically healthy.<sup>27</sup> Meanwhile, about a quarter of non-overweight people are what is called the “lean unhealthy.”<sup>28</sup> Similarly, being

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<sup>27</sup> See <https://www.ncbi.nlm.nih.gov/pubmed/25040597>.

<sup>28</sup> See <https://www.ncbi.nlm.nih.gov/pmc/articles/pmc4731253>.

seven feet, six inches in height may be statistically outside “the normal range” even today, but it is neither by any definition a disease nor an impairment. Only the legislature has the time and resources to study whether effective line-drawing to make physical characteristics like weight or height a protected status under the WLAD is appropriate and practicable, where those lines should be drawn, and the consequences of doing so.

Second, defining a characteristic as an impairment, disability, disorder, or disease, although often helpful for those with the characteristic when they are seeking reimbursement for medical treatment or health-related benefits, can also be viewed as stigmatizing. Some persons and organizations today reject the use of terms like disorder, disability, or disease for “obesity.”<sup>29</sup> The World Health Organization this year removed being transgender from its list of medical disorders for precisely that reason:

Gender incongruence, meanwhile, has also been moved out of mental disorders in the ICD, into sexual health

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<sup>29</sup> See generally <https://haescommunity.com/> (“Health At Every Size”).

conditions. The rationale being that while evidence is now clear that it is not a mental disorder, and indeed classifying it in this can cause enormous stigma for people who are transgender, there remain significant health care needs that can best be met if the condition is coded under the ICD.<sup>30</sup>

*See Doe*, 121 Wn.2d at 17, 846 P.2d at 536 (“gender dysphoria is an abnormal, medically cognizable condition”); *cf. Gaylord v. Tacoma School Dist. No. 10*, 88 Wn.2d 286, 296 559 P.2d 1340, 1345 (1977)(“Homosexuality is not a disease...Only recently the Board of the American Psychiatric Association has stated: ‘homosexuality...by itself does not necessarily constitute a psychiatric disorder.’”).

Aside from the daunting practical difficulties, whether now is the time to brand “excessive” weight a disease and a disability for purposes of the state’s antidiscrimination law, when public attitudes are in flux about “obesity,” is in its essence a policy call properly left to the legislature.

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<sup>30</sup> <http://www.who.int/health-topics/international-classification-of-diseases>.

## CONCLUSION

Considering the text of the WLAD, the legislature’s adoption of a federal regulation addressing the issue raised by the certified question, and the HRC’s stated position on the topic, the Court should answer the certified question as follows: as a physical characteristic, body weight at any level—including “obesity”—can be an “impairment” under the WLAD only when the weight is both outside the statistically “normal” range and is the result of a physiological disorder.

Dated: November 26, 2018.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that I caused to be filed and served on all counsel of record, a copy of this brief, on the 26th day of November, 2018.

s/Bryan P. Neal  
Bryan P. Neal

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## APPENDIX

- A. Except from: RCW 49.60.040
- B. Excerpt from: WAC 162-22-020
- C. Excerpts from: Human Rights Commission Guide to Disability and Washington State Nondiscrimination Laws
- D. Excerpts from regulations and interpretive guidance prior to effective date of Americans with Disabilities Act Amendments Act:  
29 C.F.R. § 1630.2(h) and § 1630.2(h) App. (2007)
- E. Excerpts from regulations and interpretive guidance adopted after effective date of Americans with Disabilities Act Amendments Act:  
29 C.F.R. § 1630.2(h) and § 1630.2(h) App. (2011)
- F. Excerpts from regulations and interpretive guidance adopted after effective date of Americans with Disabilities Act Amendments Act:  
29 C.F.R. § 1630.2(h) and § 1630.2(h) App. (2018)
- G. *Burlington N. Santa Fe Ry. Co. v. Feit*, 663 Fed. Appx. 504, 507, 2016 WL 5076040 (9th Cir. 2016)
- H. Excerpts from: EEOC Compliance Manual

RCW 49.60.040

<http://app.leg.wa.gov/rcw/default.aspx?cite=49.60.040>

(7)(a) "Disability" means the presence of a sensory, mental, or physical impairment that:

(i) Is medically cognizable or diagnosable; or

(ii) Exists as a record or history; or

(iii) Is perceived to exist whether or not it exists in fact.

(b) A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.

(c) For purposes of this definition, "impairment" includes, but is not limited to:

(i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or

(ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(d) Only for the purposes of qualifying for reasonable accommodation in employment, an impairment must be known or shown through an interactive process to exist in fact and:

(i) The impairment must have a substantially limiting effect upon the individual's ability to perform his or her job, the individual's ability to apply or be considered for a job, or the individual's access to equal benefits, privileges, or terms or conditions of employment; or

(ii) The employee must have put the employer on notice of the existence of an impairment, and medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect.

(e) For purposes of (d) of this subsection, a limitation is not substantial if it has only a trivial effect.

## **APPENDIX A**

**WAC 162-22-020**

<http://apps.leg.wa.gov/wac/default.aspx?cite=162-22-020>

**Definitions.**

In this chapter the following words are used in the meaning given, unless the context clearly indicates another meaning:

- (1) "Disability" is short for the statutory term "the presence of any sensory, mental, or physical disability," except when it appears as part of the full term.
- (2) "The presence of a sensory, mental, or physical disability" includes, but is not limited to, circumstances where a sensory, mental, or physical condition:
  - (a) Is medically cognizable or diagnosable;
  - (b) Exists as a record or history;
  - (c) Is perceived to exist whether or not it exists in fact.

A condition is a "sensory, mental, or physical disability" if it is an abnormality and is a reason why the person having the condition did not get or keep the job in question, or was denied equal pay for equal work, or was discriminated against in other terms and conditions of employment, or was denied equal treatment in other areas covered by the statutes. In other words, for enforcement purposes a person will be considered to be disabled by a sensory, mental, or physical condition if he or she is discriminated against because of the condition and the condition is abnormal.

## **APPENDIX B**

# WASHINGTON STATE HUMAN RIGHTS COMMISSION

## GUIDE TO DISABILITY and WASHINGTON STATE NONDISCRIMINATION LAWS

### **FREQUENTLY ASKED QUESTIONS AND ANSWERS**



**OLYMPIA HEADQUARTERS OFFICE**  
711 S. Capitol Way, Suite 402  
PO Box 42490  
Olympia, WA 98504-2490  
TEL: 360-753-6770 - FAX: 360-586-2282  
Toll Free: 1-800-233-3247  
TTY: 1-800-300-7525  
Se Habla Español  
[www.hum.wa.gov](http://www.hum.wa.gov)

## **APPENDIX C**

## WASHINGTON STATE HUMAN RIGHTS COMMISSION (WSHRC)

### GUIDE TO DISABILITY and WASHINGTON STATE NONDISCRIMINATION LAW

#### INTRODUCTION

In Washington State, the Legislature has enacted a broad definition of disability that increases protections for persons with medical, psychological, and other impairments. The Washington definition is different than the definition found in the Americans with Disabilities Act (ADA) – it is broader, covers more medical conditions, and is not restricted to a condition that substantially limits a major life activity. Temporary conditions, including pregnancy related disabilities, can be included under the protections.

This guide will answer questions about the definition of disability, the reasonable accommodation process, essential functions, undue hardship issues, the hiring process, guidance for employees with disabilities, and information for places of public accommodation.

If you need additional information, have additional questions, or wish to have training for your organization, please contact the WSHRC at 360-753-6770 or 800-233-3247 (TTY 800-300-7525). Additional information on this and other civil rights issues can be found on our website at [www.hum.wa.gov](http://www.hum.wa.gov). This document does not constitute legal advice; if you have a particular situation about which you need legal advice, you should contact your attorney.

## Frequently Asked Questions

### General Questions

#### **What is the definition of disability in the state of Washington?**

As of July 21, 2007, the definition of disability, found in RCW 49.60.040 is as follows:

(25) (a) "Disability" means the presence of a sensory, mental, or physical impairment that:

- (i) Is medically cognizable or diagnosable; or
- (ii) Exists as a record or history; or
- (iii) Is perceived to exist whether or not it exists in fact.

(b) A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.

(c) For purposes of this definition, "impairment" includes, but is not limited to:

- (i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or
- (ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

#### **Does this definition cover all uses of the word “disability,” including social services or benefits programs?**

No, it only changes the definition for purposes of nondiscrimination.

#### **How does this definition differ from the Americans with Disabilities Act (ADA or federal) definition?**

The Washington State definition is broader and covers a greater number of impairments and medical, mental, or psychological conditions. Temporary conditions are covered under the Washington State definition. Under the Washington State definition, there is no requirement that a condition must have an impact on a major life activity, or that the impact of the condition be substantially limiting.

### **What characteristics are not disabilities?**

Personality traits such as chronic tardiness or irritability are not in and of themselves disabilities (although they may be symptoms of disabilities). Physical traits such as being left handed or being short are not disabilities. (Though there are medical and genetic conditions that cause extreme short stature that are disabilities.) A normal pregnancy is not considered to be a disability, although pregnancy related medical conditions, such as gestational diabetes or hypertension, can sometimes be disabilities. Discrimination against a pregnant woman is prohibited under the Washington Law Against Discrimination as sex discrimination. Pregnancy and maternity discrimination are covered by other sections of the Washington Law Against Discrimination.

### **Is drug or alcohol addiction a disability?**

The use of illegal drugs is not protected. However if someone is recovering from drug addiction, they are considered to have a disability. Alcoholics are considered to have a disability. Behavior standards in the workplace and elsewhere continue to apply; nondiscrimination law is not an excuse for violent, threatening, or improper behavior anywhere. Please request the WSHRC's Questions and Answers on drug and alcohol addiction issues for more information.

### **What does it mean to have a "record of" a disability?**

This means that the person was previously diagnosed with having a disability, or that the person has a history of having a disability. An example of this is a person who had a heart condition, and had open heart surgery, but is currently having no heart problems. Because of this person's past medical record of heart problems, this person is protected under the law.

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**29 CFR Ch. XIV (7-1-07 Edition)**

it to a single life annuity (without ancillary benefits) commencing at the age of actual retirement. The appropriate conversion factor depends upon the age of retirement. In accordance with Rev. Rul. 76-47, 1976-2 C.B. 109, the following conversion factors shall be used with respect to the specified retirement ages:

Retirement age	Conversion factor per cent
65 through 66 .....	10
67 through 68 .....	11
69 .....	12

Example: An employee is scheduled to receive a pension from a defined benefit plan of \$50,000 per year. Over the years he has contributed \$150,000 to the plan, and at age 65 this amount, when contributions have been compounded at appropriate annual interest rates, is equal to \$240,000. In accordance with Rev. Rul. 76-47, 10 percent is an appropriate conversion factor. When the \$240,000 is multiplied by this conversion factor, the product is \$24,000, which represents that part of the \$50,000 annual pension payment which is attributable to employee contributions. The difference—\$26,000—represents the employer's contribution, which is too low to meet the test in the exemption.

(3) Contributions of prior employers. Amounts attributable to contributions of prior employers must be excluded.

(i) Current employer distinguished from prior employers. Under the section 12(c) exemption, for purposes of excluding contributions of prior employers, a prior employer is every previous employer of the employee except those previous employers which are members of a "controlled group of corporations" with, or "under common control" with, the employer which forces the employee to retire, as those terms are used in sections 414 (b) and 414(c) of the Internal Revenue Code, as modified by section 414(h) (26 U.S.C. 414(b), (c) and (h)).

(ii) Benefits attributable to current employer and to prior employers. Where the current employer maintains or contributes to a plan which is separate from plans maintained or contributed to by prior employers, the amount of the employee's benefit attributable to those prior employers can be readily determined. However, where the current employer maintains or contributes to the same plan as prior employers, the fol-

lowing rule shall apply. The benefit attributable to the current employer shall be the total benefit received by the employee, reduced by the benefit that the employee would have received from the plan if he or she had never worked for the current employer. For purposes of this calculation, it shall be assumed that all benefits have always been vested, even if benefits accrued as a result of service with a prior employer had not in fact been vested.

(4) Rollover contributions. Amounts attributable to rollover contributions must be excluded. For purposes of §1627.17(e), a rollover contribution (as defined in sections 402(a)(5), 403(a)(4), 408(d)(3) and 409(b)(3)(C) of the Internal Revenue Code) shall be treated as an employee contribution. These amounts have already been excluded as a result of the computations set forth in §1627.17(e)(2). Accordingly, no separate calculation is necessary to comply with this requirement.

(Sec. 12(c)(1) of the Age Discrimination In Employment Act of 1967, as amended by sec. 802(c)(1) of the Older Americans Act Amendments of 1984, Pub. L. 98-459, 98 Stat. 1792)

[44 FR 66797, Nov. 21, 1979, as amended at 50 FR 2544, Jan. 17, 1985; 53 FR 5973, Feb. 29, 1988]

**PART 1630—REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT**

- Sec.
- 1630.1 Purpose, applicability, and construction.
  - 1630.2 Definitions.
  - 1630.3 Exceptions to the definitions of "Disability" and "Qualified Individual with a Disability."
  - 1630.4 Discrimination prohibited.
  - 1630.5 Limiting, segregating, and classifying.
  - 1630.6 Contractual or other arrangements.
  - 1630.7 Standards, criteria, or methods of administration.
  - 1630.8 Relationship or association with an individual with a disability.
  - 1630.9 Not making reasonable accommodation.
  - 1630.10 Qualification standards, tests, and other selection criteria.
  - 1630.11 Administration of tests.
  - 1630.12 Retaliation and coercion.

## Equal Employment Opportunity Comm.

## § 1630.2

1630.13 Prohibited medical examinations and inquiries.

1630.14 Medical examinations and inquiries specifically permitted.

1630.15 Defenses.

1630.16 Specific activities permitted.

APPENDIX TO PART 1630—INTERPRETIVE GUIDANCE ON TITLE I OF THE AMERICANS WITH DISABILITIES ACT

AUTHORITY: 42 U.S.C. 12116.

SOURCE: 56 FR 35734, July 26, 1991, unless otherwise noted.

### § 1630.1 Purpose, applicability, and construction.

(a) Purpose. The purpose of this part is to implement title I of the Americans with Disabilities Act (42 U.S.C. 12101, et seq.) (ADA), requiring equal employment opportunities for qualified individuals with disabilities, and sections 3(2), 3(3), 501, 503, 506(e), 508, 510, and 511 of the ADA as those sections pertain to the employment of qualified individuals with disabilities.

(b) Applicability. This part applies to “covered entities” as defined at § 1630.2(b).

(c) Construction—(1) In general. Except as otherwise provided in this part, this part does not apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790–794a), or the regulations issued by Federal agencies pursuant to that title.

(2) Relationship to other laws. This part does not invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this part.

### § 1630.2 Definitions.

(a) Commission means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–4).

(b) Covered Entity means an employer, employment agency, labor organization, or joint labor management committee.

(c) Person, labor organization, employment agency, commerce and industry affecting commerce shall have the same meaning given those terms in section

701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(d) State means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

(e) Employer—(1) In general. The term employer means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, from July 26, 1992 through July 25, 1994, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year and any agent of such person.

(2) Exceptions. The term employer does not include—

(i) The United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) A bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

(f) Employee means an individual employed by an employer.

(g) Disability means, with respect to an individual—

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

(2) A record of such an impairment;

or

(3) Being regarded as having such an impairment.

(See § 1630.3 for exceptions to this definition).

**(h) Physical or mental impairment means:**

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(j) Substantially limits—(1) The term substantially limits means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of working—

(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of “working”:

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowl-

edge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

(k) Has a record of such impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(l) Is regarded as having such an impairment means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraph (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

(m) Qualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. (See §1630.3 for exceptions to this definition).

(n) Essential functions—(1) In general. The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term “essential functions” does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

drug tests of job applicants or employees to determine the illegal use of drugs or to make employment decisions based on such test results.

(2) Transportation employees. This part does not encourage, prohibit, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to:

(i) Test employees of entities in, and applicants for, positions involving safety sensitive duties for the illegal use of drugs or for on-duty impairment by alcohol; and

(ii) Remove from safety-sensitive positions persons who test positive for illegal use of drugs or on-duty impairment by alcohol pursuant to paragraph (c)(2)(i) of this section.

(3) Confidentiality. Any information regarding the medical condition or history of any employee or applicant obtained from a test to determine the illegal use of drugs, except information regarding the illegal use of drugs, is subject to the requirements of § 1630.14(b) (2) and (3) of this part.

(d) Regulation of smoking. A covered entity may prohibit or impose restrictions on smoking in places of employment. Such restrictions do not violate any provision of this part.

(e) Infectious and communicable diseases; food handling jobs—(1) In general. Under title I of the ADA, section 103(d)(1), the Secretary of Health and Human Services is to prepare a list, to be updated annually, of infectious and communicable diseases which are transmitted through the handling of food. (Copies may be obtained from Center for Infectious Diseases, Centers for Disease Control, 1600 Clifton Road, NE., Mailstop C09, Atlanta, GA 30333.) If an individual with a disability is disabled by one of the infectious or communicable diseases included on this list, and if the risk of transmitting the disease associated with the handling of food cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling. However, if the individual with a disability is a current employee, the employer must consider whether he or she can be accommo-

dated by reassignment to a vacant position not involving food handling.

(2) Effect on State or other laws. This part does not preempt, modify, or amend any State, county, or local law, ordinance or regulation applicable to food handling which:

(i) Is in accordance with the list, referred to in paragraph (e)(1) of this section, of infectious or communicable diseases and the modes of transmissibility published by the Secretary of Health and Human Services; and

(ii) Is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, where that risk cannot be eliminated by reasonable accommodation.

(f) Health insurance, life insurance, and other benefit plans—(1) An insurer, hospital, or medical service company, health maintenance organization, or any agent or entity that administers benefit plans, or similar organizations may underwrite risks, classify risks, or administer such risks that are based on or not inconsistent with State law.

(2) A covered entity may establish, sponsor, observe or administer the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.

(3) A covered entity may establish, sponsor, observe, or administer the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

(4) The activities described in paragraphs (f) (1), (2), and (3) of this section are permitted unless these activities are being used as a subterfuge to evade the purposes of this part.

**APPENDIX TO PART 1630—INTERPRETIVE GUIDANCE ON TITLE I OF THE AMERICANS WITH DISABILITIES ACT**

BACKGROUND

The ADA is a Federal antidiscrimination statute designed to remove barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities.

Like the Civil Rights Act of 1964 that prohibits discrimination on the bases of race, color, religion, national origin, and sex, the

**Section 1630.2(h) Physical or Mental Impairment**

This term adopts the definition of the term “physical or mental impairment” found in the regulations implementing section 504 of the Rehabilitation Act at 34 CFR part 104. It defines physical or mental impairment as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of several body systems, or any mental or psychological disorder.

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. Similarly, the definition does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. Environmental, cultural, or economic disadvantages such as poverty, lack of education or a prison record are not impairments. Advanced age, in and of itself, is also not an impairment. However, various medical conditions commonly associated with age, such as hearing loss, osteoporosis, or arthritis would constitute impairments within the meaning of this part. See Senate Report at 22-23; House Labor Report at 51-52; House Judiciary Report at 28-29.

**Section 1630.2(i) Major Life Activities**

This term adopts the definition of the term “major life activities” found in the regulations implementing section 504 of the Rehabilitation Act at 34 CFR part 104. “Major life activities” are those basic activities that the average person in the general population can perform with little or no difficulty. Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive. For example, other major life activities include, but are not limited to, sitting, standing, lifting, reaching. See Senate Report at 22; House Labor Report at 52; House Judiciary Report at 28.

**Section 1630.2(j) Substantially Limits**

Determining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled. Many impairments do not impact an individual’s life to the degree that they

constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the individual’s major life activities. Multiple impairments that combine to substantially limit one or more of an individual’s major life activities also constitute a disability.

The ADA and this part, like the Rehabilitation Act of 1973, do not attempt a “laundry list” of impairments that are “disabilities.” The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.

Other impairments, however, such as HIV infection, are inherently substantially limiting.

On the other hand, temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza. Similarly, except in rare circumstances, obesity is not considered a disabling impairment.

An impairment that prevents an individual from performing a major life activity substantially limits that major life activity. For example, an individual whose legs are paralyzed is substantially limited in the major life activity of walking because he or she is unable, due to the impairment, to perform that major life activity.

Alternatively, an impairment is substantially limiting if it significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity as compared to the average person in the general population’s ability to perform that same major life activity. Thus, for example, an individual who, because of an impairment, can only walk for very brief periods of time would be substantially limited in the major life activity of walking.

Part 1630 notes several factors that should be considered in making the determination of whether an impairment is substantially limiting. These factors are (1) the nature and severity of the impairment, (2) the duration or expected duration of the impairment, and (3) the permanent or long term impact, or the expected permanent or long term impact of, or resulting from, the impairment. The term “duration,” as used in this context, refers to the length of time an impairment persists, while the term “impact” refers to the residual effects of an impairment. Thus, for

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**PART 1630—REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT**

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- 1630.1 Purpose, applicability, and construction.
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APPENDIX TO PART 1630—INTERPRETIVE GUIDANCE ON TITLE I OF THE AMERICANS WITH DISABILITIES ACT

AUTHORITY: 42 U.S.C. 12116 and 12205a of the Americans with Disabilities Act, as amended.

SOURCE: 56 FR 35734, July 26, 1991, unless otherwise noted.

**§ 1630.1 Purpose, applicability, and construction.**

(a) *Purpose.* The purpose of this part is to implement title I of the Americans with Disabilities Act (ADA), as amended by the ADA Amendments Act of 2008 (ADAAA or Amendments Act), 42 U.S.C. 12101, *et seq.*, requiring equal employment opportunities for individuals with disabilities. The ADA as amended, and these regulations, are intended to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities, and to provide clear, strong, consistent, enforceable standards addressing discrimination.

(b) *Applicability.* This part applies to “covered entities” as defined at § 1630.2(b).

(c) *Construction*—(1) In general. Except as otherwise provided in this part, this part does not apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790–794a, as amended), or the regulations issued by Federal agencies pursuant to that title.

(2) *Relationship to other laws.* This part does not invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than is afforded by this part.

(3) *State workers’ compensation laws and disability benefit programs.* Nothing in this part alters the standards for determining eligibility for benefits under State workers’ compensation laws or under State and Federal disability benefit programs.

(4) *Broad coverage.* The primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the Amendments Act’s purpose of reinstating a broad scope of protection under the ADA, the definition of “disability” in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. The question of whether an individual meets the definition of disability under this part should not demand extensive analysis.

[76 FR 16999, Mar. 25, 2011]

**§ 1630.2 Definitions.**

(a) *Commission* means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–4).

(b) *Covered Entity* means an employer, employment agency, labor organization, or joint labor management committee.

(c) *Person, labor organization, employment agency, commerce and industry affecting commerce* shall have the same meaning given those terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(d) *State* means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

(e) *Employer*—(1) *In general.* The term employer means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, from July 26, 1992 through July 25, 1994, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year and any agent of such person.

(2) *Exceptions.* The term employer does not include—

(i) The United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) A bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

(f) *Employee* means an individual employed by an employer.

(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 (1) 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.”

(2) An individual may establish coverage under any one or more of these

three prongs of the definition of disability, i.e., paragraphs (g)(1)(i) (the “actual disability” prong), (g)(1)(ii) (the “record of” prong), and/or (g)(1)(iii) (the “regarded as” prong) of this section.

(3) Where an individual is not challenging a covered entity’s failure to make reasonable accommodations and does not require a reasonable accommodation, it is generally unnecessary to proceed under the “actual disability” or “record of” prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation of coverage can be made solely under the “regarded as” prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. An individual may choose, however, to proceed under the “actual disability” and/or “record of” prong regardless of whether the individual is challenging a covered entity’s failure to make reasonable accommodations or requires a reasonable accommodation.

NOTE TO PARAGRAPH (G): See § 1630.3 for exceptions to this definition.

**(h) Physical or mental impairment means—**

(1) Any physiological 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; or

(2) Any mental or psychological disorder, such as an intellectual disability (formerly termed “mental retardation”), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) *Major life activities*—(1) *In general.* Major life activities include, but are not limited to:

(i) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating,

(i) Test employees of entities in, and applicants for, positions involving safety sensitive duties for the illegal use of drugs or for on-duty impairment by alcohol; and

(ii) Remove from safety-sensitive positions persons who test positive for illegal use of drugs or on-duty impairment by alcohol pursuant to paragraph (c)(2)(i) of this section.

(3) *Confidentiality.* Any information regarding the medical condition or history of any employee or applicant obtained from a test to determine the illegal use of drugs, except information regarding the illegal use of drugs, is subject to the requirements of §1630.14(b) (2) and (3) of this part.

(d) *Regulation of smoking.* A covered entity may prohibit or impose restrictions on smoking in places of employment. Such restrictions do not violate any provision of this part.

(e) *Infectious and communicable diseases; food handling jobs—(1) In general.* Under title I of the ADA, section 103(d)(1), the Secretary of Health and Human Services is to prepare a list, to be updated annually, of infectious and communicable diseases which are transmitted through the handling of food. (Copies may be obtained from Center for Infectious Diseases, Centers for Disease Control, 1600 Clifton Road, NE., Mailstop C09, Atlanta, GA 30333.) If an individual with a disability is disabled by one of the infectious or communicable diseases included on this list, and if the risk of transmitting the disease associated with the handling of food cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling. However, if the individual with a disability is a current employee, the employer must consider whether he or she can be accommodated by reassignment to a vacant position not involving food handling.

(2) *Effect on State or other laws.* This part does not preempt, modify, or amend any State, county, or local law, ordinance or regulation applicable to food handling which:

(i) Is in accordance with the list, referred to in paragraph (e)(1) of this section, of infectious or communicable diseases and the modes of trans-

missibility published by the Secretary of Health and Human Services; and

(ii) Is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, where that risk cannot be eliminated by reasonable accommodation.

(f) *Health insurance, life insurance, and other benefit plans—(1) An insurer, hospital, or medical service company, health maintenance organization, or any agent or entity that administers benefit plans, or similar organizations may underwrite risks, classify risks, or administer such risks that are based on or not inconsistent with State law.*

(2) A covered entity may establish, sponsor, observe or administer the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.

(3) A covered entity may establish, sponsor, observe, or administer the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

(4) The activities described in paragraphs (f) (1), (2), and (3) of this section are permitted unless these activities are being used as a subterfuge to evade the purposes of this part.

[56 FR 35734, July 26, 1991, 76 FR 17003, Mar. 25, 2011]

#### APPENDIX TO PART 1630—INTERPRETIVE GUIDANCE ON TITLE I OF THE AMERICANS WITH DISABILITIES ACT INTRODUCTION

The Americans with Disabilities Act (ADA) is a landmark piece of civil rights legislation signed into law on July 26, 1990, and amended effective January 1, 2009. See 42 U.S.C. 12101 *et seq.*, as amended. In passing the ADA, Congress recognized that “discrimination against individuals with disabilities continues to be a serious and pervasive social problem” and that the “continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.” 42 U.S.C. 12101(a)(2), (8). Discrimination on the basis of disability persists in critical areas such as housing, public accommodations, education,

discriminated against an employee, including whether an employer has fulfilled its obligations with respect to providing a “reasonable accommodation” to an individual with a disability; or whether an employee has met his or her responsibilities under the ADA with respect to engaging in the reasonable accommodation “interactive process.” ADAAA section 2(b)(5); See also 2008 Senate Statement of Managers at 4 (“[L]ower court cases have too often turned solely on the question of whether the plaintiff is an individual with a disability rather than the merits of discrimination claims, such as whether adverse decisions were impermissibly made by the employer on the basis of disability, reasonable accommodations were denied, or qualification standards were unlawfully discriminatory.”); 2008 House Judiciary Committee Report (criticizing pre-ADAAA court decisions which “prevented individuals that Congress unquestionably intended to cover from ever getting a chance to prove their case”). Accordingly, the threshold coverage question of whether an individual’s impairment is a disability under the ADA “should not demand extensive analysis.” ADAAA section 2(b)(5).

Section 1630.2(g)(2) provides that an individual may establish coverage under any one or more (or all three) of the prongs in the definition of disability. However, to be an individual with a disability, an individual is only required to satisfy one prong.

As §1630.2(g)(3) indicates, in many cases it may be unnecessary for an individual to resort to coverage under the “actual disability” or “record of” prongs. Where the need for a reasonable accommodation is not at issue—for example, where there is no question that the individual is “qualified” without a reasonable accommodation and is not seeking or has not sought a reasonable accommodation—it would not be necessary to determine whether the individual is substantially limited in a major life activity (under the actual disability prong) or has a record of a substantially limiting impairment (under the record of prong). Such claims could be evaluated solely under the “regarded as” prong of the definition. In fact, Congress expected the first and second prongs of the definition of disability “to be used only by people who are affirmatively seeking reasonable accommodations \* \* \*” and that “[a]ny individual who has been discriminated against because of an impairment—short of being granted a reasonable accommodation \* \* \*—should be bringing a claim under the third prong of the definition which will require no showing with regard to the severity of his or her impairment.” Joint Hoyer-Sensenbrenner Statement at 4. An individual may choose, however, to proceed under the “actual disability” and/or “record of” prong regardless of whether the individual is challenging a covered entity’s failure to make reasonable ac-

commodation or requires a reasonable accommodation.

To fully understand the meaning of the term “disability,” it is also necessary to understand what is meant by the terms “physical or mental impairment,” “major life activity,” “substantially limits,” “record of,” and “regarded as.” Each of these terms is discussed below.

#### Section 1630.2(h) Physical or Mental Impairment

Neither the original ADA nor the ADAAA provides a definition for the terms “physical or mental impairment.” However, the legislative history of the Amendments Act notes that Congress “expect[s] that the current regulatory definition of these terms, as promulgated by agencies such as the U.S. Equal Employment Opportunity Commission (EEOC), the Department of Justice (DOJ) and the Department of Education Office of Civil Rights (DOE OCR) will not change.” 2008 Senate Statement of Managers at 6. The definition of “physical or mental impairment” in the EEOC’s regulations remains based on the definition of the term “physical or mental impairment” found in the regulations implementing section 504 of the Rehabilitation Act at 34 CFR part 104. However, the definition in EEOC’s regulations adds additional body systems to those provided in the section 504 regulations and makes clear that the list is non-exhaustive.

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. However, a pregnancy-related impairment that substantially limits a major life activity is a disability under the first prong of the definition. Alternatively, a pregnancy-related impairment may constitute a “record of” a substantially limiting impairment,” or may be covered under the “regarded as” prong if it is the basis for a prohibited employment action and is not “transitory and minor.”

The definition of an impairment also does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. Environmental, cultural, or economic disadvantages such as poverty, lack of education, or a prison record are not impairments. Advanced age, in and of itself, is also not an impairment. However,

various medical conditions commonly associated with age, such as hearing loss, osteoporosis, or arthritis would constitute impairments within the meaning of this part. See 1989 Senate Report at 22-23; 1990 House Labor Report at 51-52; 1990 House Judiciary Report at 28-29.

#### Section 1630.2(i) Major Life Activities

The ADA provided significant new guidance and clarification on the subject of “major life activities.” As the legislative history of the Amendments Act explains, Congress anticipated that protection under the ADA would now extend to a wider range of cases, in part as a result of the expansion of the category of major life activities. See 2008 Senate Statement of Managers at 8 n.17.

For purposes of clarity, the Amendments Act provides an illustrative list of major life activities, including caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The ADA Amendments expressly made this statutory list of examples of major life activities non-exhaustive, and the regulations include sitting, reaching, and interacting with others as additional examples. Many of these major life activities listed in the ADA Amendments Act and the regulations already had been included in the EEOC’s 1991 now-superseded regulations implementing title I of the ADA and in sub-regulatory documents, and already were recognized by the courts.

The ADA as amended also explicitly defines “major life activities” to include the operation of “major bodily functions.” This was an important addition to the statute. This clarification was needed to ensure that the impact of an impairment on the operation of a major bodily function would not be overlooked or wrongly dismissed as falling outside the definition of “major life activities” under the ADA. 2008 House Judiciary Committee Report at 16; See also 2008 Senate Statement of Managers at 8 (“for the first time [in the ADA], the category of ‘major life activities’ is defined to include the operation of major bodily functions, thus better addressing chronic impairments that can be substantially limiting”).

The regulations include all of those major bodily functions identified in the ADA Amendments Act’s non-exhaustive list of examples and add a number of others that are consistent with the body systems listed in the regulations’ definition of “impairment” (at §1630.2(h)) and with the U.S. Department of Labor’s nondiscrimination and equal employment opportunity regulations implementing section 188 of the Workforce Investment Act of 1998, 29 U.S.C. 2801, *et seq.* Thus, special sense organs, skin, genitourinary, cardiovascular, hemic, lymphatic, and mus-

culoskeletal functions are major bodily functions not included in the statutory list of examples but included in §1630.2(i)(1)(ii). The Commission has added these examples to further illustrate the non-exhaustive list of major life activities, including major bodily functions, and to emphasize that the concept of major life activities is to be interpreted broadly consistent with the Amendments Act. The regulations also provide that the operation of a major bodily function may include the operation of an individual organ within a body system. This would include, for example, the operation of the kidney, liver, pancreas, or other organs.

The link between particular impairments and various major bodily functions should not be difficult to identify. Because impairments, by definition, affect the functioning of body systems, they will generally affect major bodily functions. For example, cancer affects an individual’s normal cell growth; diabetes affects the operation of the pancreas and also the function of the endocrine system; and Human Immunodeficiency Virus (HIV) infection affects the immune system. Likewise, sickle cell disease affects the functions of the hemic system, lymphedema affects lymphatic functions, and rheumatoid arthritis affects musculoskeletal functions.

In the legislative history of the ADA, Congress expressed its expectation that the statutory expansion of “major life activities” to include major bodily functions (along with other statutory changes) would lead to more expansive coverage. See 2008 Senate Statement of Managers at 8 n.17 (indicating that these changes will make it easier for individuals to show that they are eligible for the ADA’s protections under the first prong of the definition of disability). The House Education and Labor Committee explained that the inclusion of major bodily functions would “affect cases such as *U.S. v. Happy Time Day Care Ctr.* in which the courts struggled to analyze whether the impact of HIV infection substantially limits various major life activities of a five-year-old child, and recognizing, among other things, that ‘there is something inherently illogical about inquiring whether’ a five-year-old’s ability to procreate is substantially limited by his HIV infection; *Furnish v. SVI Sys., Inc.*, in which the court found that an individual with cirrhosis of the liver caused by Hepatitis B is not disabled because liver function—unlike eating, working, or reproducing—is not integral to one’s daily existence; and *Pimental v. Dartmouth-Hitchcock Clinic*, in which the court concluded that the plaintiff’s stage three breast cancer did not substantially limit her ability to care for herself, sleep, or concentrate. The Committee expects that the plaintiffs in each of these cases could establish a [substantial limitation] on major bodily functions that would qualify them for

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purposes of this calculation, it shall be assumed that all benefits have always been vested, even if benefits accrued as a result of service with a prior employer had not in fact been vested.

(4) *Rollover contributions.* Amounts attributable to rollover contributions must be excluded. For purposes of §1627.17(e), a rollover contribution (as defined in sections 402(a)(5), 403(a)(4), 408(d)(3) and 409(b)(3)(C) of the Internal Revenue Code) shall be treated as an employee contribution. These amounts have already been excluded as a result of the computations set forth in §1627.17(e)(2). Accordingly, no separate calculation is necessary to comply with this requirement.

(Sec. 12(c)(1) of the Age Discrimination In Employment Act of 1967, as amended by sec. 802(c)(1) of the Older Americans Act Amendments of 1984, Pub. L. 98-459, 98 Stat. 1792)

[44 FR 66797, Nov. 21, 1979, as amended at 50 FR 2544, Jan. 17, 1985; 53 FR 5973, Feb. 29, 1988]

### PART 1630—REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

Sec.

- 1630.1 Purpose, applicability, and construction.
- 1630.2 Definitions.
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APPENDIX TO PART 1630—INTERPRETIVE GUIDANCE ON TITLE I OF THE AMERICANS WITH DISABILITIES ACT

AUTHORITY: 42 U.S.C. 12116 and 12205a of the Americans with Disabilities Act, as amended.

SOURCE: 56 FR 35734, July 26, 1991, unless otherwise noted.

#### § 1630.1 Purpose, applicability, and construction.

(a) *Purpose.* The purpose of this part is to implement title I of the Americans with Disabilities Act (ADA), as amended by the ADA Amendments Act of 2008 (ADAAA or Amendments Act), 42 U.S.C. 12101, *et seq.*, requiring equal employment opportunities for individuals with disabilities. The ADA as amended, and these regulations, are intended to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities, and to provide clear, strong, consistent, enforceable standards addressing discrimination.

(b) *Applicability.* This part applies to “covered entities” as defined at §1630.2(b).

(c) *Construction—(1) In general.* Except as otherwise provided in this part, this part does not apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790–794a, as amended), or the regulations issued by Federal agencies pursuant to that title.

(2) *Relationship to other laws.* This part does not invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than is afforded by this part.

(3) *State workers’ compensation laws and disability benefit programs.* Nothing in this part alters the standards for determining eligibility for benefits under State workers’ compensation laws or under State and Federal disability benefit programs.

(4) *Broad coverage.* The primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the Amendments Act’s purpose of reinstating a broad scope of protection under the ADA, the definition of “disability” in this part shall be construed

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broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. The question of whether an individual meets the definition of disability under this part should not demand extensive analysis.

[76 FR 16999, Mar. 25, 2011]

§ 1630.2 Definitions.

(a) *Commission* means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–4).

(b) *Covered Entity* means an employer, employment agency, labor organization, or joint labor management committee.

(c) *Person, labor organization, employment agency, commerce and industry affecting commerce* shall have the same meaning given those terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(d) *State* means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

(e) *Employer*—(1) *In general.* The term employer means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, from July 26, 1992 through July 25, 1994, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year and any agent of such person.

(2) *Exceptions.* The term employer does not include—

(i) The United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) A bona fide private membership club (other than a labor organization)

that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

(f) *Employee* means an individual employed by an employer.

(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 (1) 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.”

(2) An individual may establish coverage under any one or more of these three prongs of the definition of disability, i.e., paragraphs (g)(1)(i) (the “actual disability” prong), (g)(1)(ii) (the “record of” prong), and/or (g)(1)(iii) (the “regarded as” prong) of this section.

(3) Where an individual is not challenging a covered entity’s failure to make reasonable accommodations and does not require a reasonable accommodation, it is generally unnecessary to proceed under the “actual disability” or “record of” prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation of coverage can be made solely under the “regarded as” prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. An individual may choose, however, to proceed under the “actual disability” and/or “record of” prong regardless of whether the individual is challenging a covered entity’s failure to make reasonable accommodations or requires a reasonable accommodation.

NOTE TO PARAGRAPH (g): See § 1630.3 for exceptions to this definition.

(h) *Physical or mental impairment means*—

(1) Any physiological 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; or

(2) Any mental or psychological disorder, such as an intellectual disability (formerly termed “mental retardation”), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) *Major life activities*—(1) *In general.* Major life activities include, but are not limited to:

(i) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working; and

(ii) The operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.

(2) In determining other examples of major life activities, the term “major” shall not be interpreted strictly to create a demanding standard for disability. ADAAA section 2(b)(4) (Findings and Purposes). Whether an activity is a “major life activity” is not determined by reference to whether it is of “central importance to daily life.”

(j) *Substantially limits*—(1) *Rules of construction.* The following rules of construction apply when determining whether an impairment substantially limits an individual in a major life activity:

(i) The term “substantially limits” shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the

ADA. “Substantially limits” is not meant to be a demanding standard.

(ii) An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

(iii) The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual’s impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment “substantially limits” a major life activity should not demand extensive analysis.

(iv) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term “substantially limits” shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for “substantially limits” applied prior to the ADAAA.

(v) The comparison of an individual’s performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

(vi) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(vii) An impairment that is episodic or in remission is a disability if it

(ii) Remove from safety-sensitive positions persons who test positive for illegal use of drugs or on-duty impairment by alcohol pursuant to paragraph (c)(2)(i) of this section.

(3) *Confidentiality.* Any information regarding the medical condition or history of any employee or applicant obtained from a test to determine the illegal use of drugs, except information regarding the illegal use of drugs, is subject to the requirements of §1630.14(b) (2) and (3) of this part.

(d) *Regulation of smoking.* A covered entity may prohibit or impose restrictions on smoking in places of employment. Such restrictions do not violate any provision of this part.

(e) *Infectious and communicable diseases; food handling jobs—(1) In general.* Under title I of the ADA, section 103(d)(1), the Secretary of Health and Human Services is to prepare a list, to be updated annually, of infectious and communicable diseases which are transmitted through the handling of food. (Copies may be obtained from Center for Infectious Diseases, Centers for Disease Control, 1600 Clifton Road, NE., Mailstop C09, Atlanta, GA 30333.) If an individual with a disability is disabled by one of the infectious or communicable diseases included on this list, and if the risk of transmitting the disease associated with the handling of food cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling. However, if the individual with a disability is a current employee, the employer must consider whether he or she can be accommodated by reassignment to a vacant position not involving food handling.

(2) *Effect on State or other laws.* This part does not preempt, modify, or amend any State, county, or local law, ordinance or regulation applicable to food handling which:

(i) Is in accordance with the list, referred to in paragraph (e)(1) of this section, of infectious or communicable diseases and the modes of transmissibility published by the Secretary of Health and Human Services; and

(ii) Is designed to protect the public health from individuals who pose a significant risk to the health or safety of

others, where that risk cannot be eliminated by reasonable accommodation.

(f) *Health insurance, life insurance, and other benefit plans—(1)* An insurer, hospital, or medical service company, health maintenance organization, or any agent or entity that administers benefit plans, or similar organizations may underwrite risks, classify risks, or administer such risks that are based on or not inconsistent with State law.

(2) A covered entity may establish, sponsor, observe or administer the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.

(3) A covered entity may establish, sponsor, observe, or administer the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

(4) The activities described in paragraphs (f) (1), (2), and (3) of this section are permitted unless these activities are being used as a subterfuge to evade the purposes of this part.

[56 FR 35734, July 26, 1991, 76 FR 17003, Mar. 25, 2011]

**APPENDIX TO PART 1630—INTERPRETIVE GUIDANCE ON TITLE I OF THE AMERICANS WITH DISABILITIES ACT**

INTRODUCTION

The Americans with Disabilities Act (ADA) is a landmark piece of civil rights legislation signed into law on July 26, 1990, and amended effective January 1, 2009. See 42 U.S.C. 12101 *et seq.*, as amended. In passing the ADA, Congress recognized that “discrimination against individuals with disabilities continues to be a serious and pervasive social problem” and that the “continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.” 42 U.S.C. 12101(a)(2), (8). Discrimination on the basis of disability persists in critical areas such as housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, access to public services, and employment. 42 U.S.C. 12101(a)(3). Accordingly, the ADA prohibits discrimination in a wide range of

discriminated against an employee, including whether an employer has fulfilled its obligations with respect to providing a “reasonable accommodation” to an individual with a disability; or whether an employee has met his or her responsibilities under the ADA with respect to engaging in the reasonable accommodation “interactive process.” ADAAA section 2(b)(5); See also 2008 Senate Statement of Managers at 4 (“[L]ower court cases have too often turned solely on the question of whether the plaintiff is an individual with a disability rather than the merits of discrimination claims, such as whether adverse decisions were impermissibly made by the employer on the basis of disability, reasonable accommodations were denied, or qualification standards were unlawfully discriminatory.”); 2008 House Judiciary Committee Report (criticizing pre-ADAAA court decisions which “prevented individuals that Congress unquestionably intended to cover from ever getting a chance to prove their case”). Accordingly, the threshold coverage question of whether an individual’s impairment is a disability under the ADA “should not demand extensive analysis.” ADAAA section 2(b)(5).

Section 1630.2(g)(2) provides that an individual may establish coverage under any one or more (or all three) of the prongs in the definition of disability. However, to be an individual with a disability, an individual is only required to satisfy one prong.

As §1630.2(g)(3) indicates, in many cases it may be unnecessary for an individual to resort to coverage under the “actual disability” or “record of” prongs. Where the need for a reasonable accommodation is not at issue—for example, where there is no question that the individual is “qualified” without a reasonable accommodation and is not seeking or has not sought a reasonable accommodation—it would not be necessary to determine whether the individual is substantially limited in a major life activity (under the actual disability prong) or has a record of a substantially limiting impairment (under the record of prong). Such claims could be evaluated solely under the “regarded as” prong of the definition. In fact, Congress expected the first and second prongs of the definition of disability “to be used only by people who are affirmatively seeking reasonable accommodations \* \* \*” and that “[a]ny individual who has been discriminated against because of an impairment—short of being granted a reasonable accommodation \* \* \*—should be bringing a claim under the third prong of the definition which will require no showing with regard to the severity of his or her impairment.” Joint Hoyer-Sensenbrenner Statement at 4. An individual may choose, however, to proceed under the “actual disability” and/or “record of” prong regardless of whether the individual is challenging a covered entity’s fail-

ure to make reasonable accommodation or requires a reasonable accommodation.

To fully understand the meaning of the term “disability,” it is also necessary to understand what is meant by the terms “physical or mental impairment,” “major life activity,” “substantially limits,” “record of,” and “regarded as.” Each of these terms is discussed below.

#### Section 1630.2(h) Physical or Mental Impairment

Neither the original ADA nor the ADAAA provides a definition for the terms “physical or mental impairment.” However, the legislative history of the Amendments Act notes that Congress “expect[s] that the current regulatory definition of these terms, as promulgated by agencies such as the U.S. Equal Employment Opportunity Commission (EEOC), the Department of Justice (DOJ) and the Department of Education Office of Civil Rights (DOE OCR) will not change.” 2008 Senate Statement of Managers at 6. The definition of “physical or mental impairment” in the EEOC’s regulations remains based on the definition of the term “physical or mental impairment” found in the regulations implementing section 504 of the Rehabilitation Act at 34 CFR part 104. However, the definition in EEOC’s regulations adds additional body systems to those provided in the section 504 regulations and makes clear that the list is non-exhaustive.

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. However, a pregnancy-related impairment that substantially limits a major life activity is a disability under the first prong of the definition. Alternatively, a pregnancy-related impairment may constitute a “record of” a substantially limiting impairment,” or may be covered under the “regarded as” prong if it is the basis for a prohibited employment action and is not “transitory and minor.”

The definition of an impairment also does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. Environmental, cultural, or economic disadvantages such as poverty, lack of education, or a prison record are not impairments. Advanced age, in and of itself, is also not an impairment. However,

various medical conditions commonly associated with age, such as hearing loss, osteoporosis, or arthritis would constitute impairments within the meaning of this part. See 1989 Senate Report at 22-23; 1990 House Labor Report at 51-52; 1990 House Judiciary Report at 28-29.

#### Section 1630.2(i) Major Life Activities

The ADAAA provided significant new guidance and clarification on the subject of “major life activities.” As the legislative history of the Amendments Act explains, Congress anticipated that protection under the ADA would now extend to a wider range of cases, in part as a result of the expansion of the category of major life activities. See 2008 Senate Statement of Managers at 8 n.17.

For purposes of clarity, the Amendments Act provides an illustrative list of major life activities, including caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The ADA Amendments expressly made this statutory list of examples of major life activities non-exhaustive, and the regulations include sitting, reaching, and interacting with others as additional examples. Many of these major life activities listed in the ADA Amendments Act and the regulations already had been included in the EEOC’s 1991 now-superseded regulations implementing title I of the ADA and in sub-regulatory documents, and already were recognized by the courts.

The ADA as amended also explicitly defines “major life activities” to include the operation of “major bodily functions.” This was an important addition to the statute. This clarification was needed to ensure that the impact of an impairment on the operation of a major bodily function would not be overlooked or wrongly dismissed as falling outside the definition of “major life activities” under the ADA. 2008 House Judiciary Committee Report at 16; See also 2008 Senate Statement of Managers at 8 (“for the first time [in the ADAAA], the category of ‘major life activities’ is defined to include the operation of major bodily functions, thus better addressing chronic impairments that can be substantially limiting”).

The regulations include all of those major bodily functions identified in the ADA Amendments Act’s non-exhaustive list of examples and add a number of others that are consistent with the body systems listed in the regulations’ definition of “impairment” (at §1630.2(h)) and with the U.S. Department of Labor’s nondiscrimination and equal employment opportunity regulations implementing section 188 of the Workforce Investment Act of 1998, 29 U.S.C. 2801, *et seq.* Thus, special sense organs, skin, genitourinary, cardiovascular, hemic, lymphatic, and mus-

culoskeletal functions are major bodily functions not included in the statutory list of examples but included in §1630.2(i)(1)(ii). The Commission has added these examples to further illustrate the non-exhaustive list of major life activities, including major bodily functions, and to emphasize that the concept of major life activities is to be interpreted broadly consistent with the Amendments Act. The regulations also provide that the operation of a major bodily function may include the operation of an individual organ within a body system. This would include, for example, the operation of the kidney, liver, pancreas, or other organs.

The link between particular impairments and various major bodily functions should not be difficult to identify. Because impairments, by definition, affect the functioning of body systems, they will generally affect major bodily functions. For example, cancer affects an individual’s normal cell growth; diabetes affects the operation of the pancreas and also the function of the endocrine system; and Human Immunodeficiency Virus (HIV) infection affects the immune system. Likewise, sickle cell disease affects the functions of the hemic system, lymphedema affects lymphatic functions, and rheumatoid arthritis affects musculoskeletal functions.

In the legislative history of the ADAAA, Congress expressed its expectation that the statutory expansion of “major life activities” to include major bodily functions (along with other statutory changes) would lead to more expansive coverage. See 2008 Senate Statement of Managers at 8 n.17 (indicating that these changes will make it easier for individuals to show that they are eligible for the ADA’s protections under the first prong of the definition of disability). The House Education and Labor Committee explained that the inclusion of major bodily functions would “affect cases such as *U.S. v. Happy Time Day Care Ctr.* in which the courts struggled to analyze whether the impact of HIV infection substantially limits various major life activities of a five-year-old child, and recognizing, among other things, that ‘there is something inherently illogical about inquiring whether’ a five-year-old’s ability to procreate is substantially limited by his HIV infection; *Furnish v. SVI Sys., Inc.*, in which the court found that an individual with cirrhosis of the liver caused by Hepatitis B is not disabled because liver function—unlike eating, working, or reproducing—is not integral to one’s daily existence;” and *Pimental v. Dartmouth-Hitchcock Clinic*, in which the court concluded that the plaintiff’s stage three breast cancer did not substantially limit her ability to care for herself, sleep, or concentrate. The Committee expects that the plaintiffs in each of these cases could establish a [substantial limitation] on major bodily functions that would qualify them for protection under the ADA.”

663 Fed.Appx. 504

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3. United States Court of Appeals, Ninth Circuit.

BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY, Plaintiff–Counter–Defendant–Appellee,

v.

Eric FEIT, Defendant–Counter–Plaintiff–Appellant. Burlington Northern Santa Fe Railway Company, Plaintiff–Counter–Defendant–Appellant,

v.

Eric Feit, Defendant–Counter–Plaintiff–Appellee.

No. 14–35283, No. 14–35301

|

Submitted September 1, 2016 \*\* Seattle, Washington

|

SEPTEMBER 20, 2016

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Synopsis

Background: Railroad sought judicial review of administrative determination that rescinding offer of employment to applicant based on obesity violated the Montana Human Rights Act. After the Montana Supreme Court, 365 Mont. 359, 281 P.3d 225, answered certified question, the United States District Court for the District of Montana resolved case in favor of railroad. Applicant appealed and railroad filed protective cross appeal.

[Holding:] The Court of Appeals, Donald W. Molloy, Senior District Judge, held that the district court appropriately concluded that the Montana Supreme Court would rely on Equal Employment Opportunity Commission's (EEOC's) guidance that severe obesity, defined as more than 100% over norm, is only weight

deviation to qualify as impairment under Americans with Disabilities Act (ADA).

Affirmed.

West Headnotes (3)

[1] Civil Rights

Particular conditions, limitations, and impairments

In suit under Montana Human Rights Act challenging administrative ruling that applicant was not hired due to disability discrimination based on his body mass index, district court appropriately concluded that the Montana Supreme Court would rely on Equal Employment Opportunity Commission's (EEOC's) guidance that severe obesity, defined as more than 100% over norm, is only weight deviation to qualify as impairment under Americans with Disabilities Act (ADA). 29 C.F.R. § 1630.2(h) (1); Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.; MCA 49–2–101.

Cases that cite this headnote

[2] Federal Courts

Defenses

Applicant's claim that railroad was collaterally estopped from challenging administrative determination that it violated Montana Human Rights Act had to be rejected where applicant never clearly identified the issue in district court that he now claimed railroad was estopped from litigating. MCA 49-2-101.

Cases that cite this headnote

[3] Federal Courts

Amending, modifying, or vacating judgment or order; proceedings after judgment

APPENDIX G

Any abuse of discretion by the district court in dismissing applicant's cross-petition for relief from Montana Human Rights Commission's revised, adverse determination that applicant's obesity was not an impairment under Montana Human Rights Act was harmless, where the court had correctly sustained denial of relief to applicant by the Commission, albeit while also remanding for entry of formal order to that effect. MCA 49-2-101.

Cases that cite this headnote

Appeal from the United States District Court for the District of Montana, D.C. Nos. 6:10-cv-00054-DWM, 6:11-cv-00001-DWM.

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Before: SCHROEDER, McKEOWN, and DAVIS,\*\*\*  
Circuit Judges.

\*\*\* The Honorable Andre M. Davis, Senior Circuit Judge for the U.S. Court of Appeals for the Fourth Circuit, sitting by designation.

**MEMORANDUM \***

\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Donald W. Molloy, Senior District Judge, Presiding

Appellant Eric Feit appeals several district court orders, including orders denying summary judgment, in these diversity of citizenship actions originating as a petition

for judicial review under the Montana Human Rights Act (“Human Rights Act” or “the Act”). Appellee Burlington Northern Santa Fe Railway Company (“BNSF”) timely filed a protective cross-appeal. Having carefully reviewed the contentions of the parties, we affirm.

1. We begin with an overview of the legal and procedural background of this case. The Human Rights Act prohibits an employer from refusing to employ a person on the basis of a “physical or mental disability.” Mont. Code Ann. § 49-2-303(1)(a). A “physical or mental disability” is defined as “a physical or mental impairment that substantially limits one or more of a person's major life activities.” *Id.* § 49-2-101(19)(a)(i). This definition encompasses both actual and perceived impairments. *See id.* § 49-2-101(19)(a)(iii) (including “a condition regarded as such an impairment”).

“Impairment” is not defined in the Act or elsewhere in the Montana Code. But a regulation implementing the closest federal analogue, the Americans with Disabilities Act (“ADA”), defines a “physical or mental impairment” as “[a]ny physiological disorder or condition ... affecting one or more body systems” outlined in the regulation. 29 C.F.R. § 1630.2(h)(1).

The present case arises against this backdrop. BNSF rescinded a conditional offer of employment to Feit as a conductor trainee based on the “significant health and safety risks associated with [his] extreme obesity,” which BNSF determined solely from Feit's body mass index. Feit sought relief before the Montana Department of Labor and Industry, which determined that BNSF had violated the Act. The Montana Human Rights Commission affirmed an award of substantial damages in favor of Feit.

BNSF sought judicial review of the administrative determination in the United States District Court for the District of Montana, proceeding on the basis of diversity of citizenship. *See BNSF Ry. Co. v. O'Dea*, 572 F.3d 785, 791 (9th Cir. 2009) (affirming the cognizability of such actions). The central issue was whether obesity was an “impairment” under state law. To resolve this dispute over statutory interpretation, the district court certified the following question to the Montana Supreme Court:

Is obesity that is not the symptom of a physiological [disorder] a “physical or mental impairment” as

it is used in the Montana Code Annotated § 49-2-101(19)(a)?

*BNSF Ry. Co. v. Feit*, 365 Mont. 359, 281 P.3d 225, 226 (2012). The Montana Supreme Court answered the certified question with a qualified “yes.”

**\*507** In light of the response to the certified question, the district court twice remanded the case to the agency for additional factual findings and legal conclusions to determine whether Feit's obesity constituted an impairment under the newly delineated standard. Following the second remand, the agency unambiguously concluded that Feit's weight was within the normal range and thus his obesity “could not be considered an impairment.”

Feit filed a cross-petition in the district court to challenge the revised, adverse determination. BNSF moved to strike the cross-petition as procedurally improper. The district court granted BNSF's motion and remanded to the agency to enter final judgment. Before any further action could be taken, Feit filed his notice of appeal, and BNSF then filed notice of the cross-appeal.

**[1] 2.** We now address the contentions that Feit raises on appeal. Feit argues that the district court erroneously relied on *dicta* in the Montana Supreme Court's opinion to conclude that “more than 100% over the norm” is a requirement of the standard for a cognizable “impairment.” We review *de novo* a district court's interpretation of state law. *Diaz v. Kubler Corp.*, 785 F.3d 1326, 1329 (9th Cir. 2015).

The district court articulated the controlling legal standard adopted by the Montana Supreme Court as follows: “[O]besity may be an impairment if: (1) the person's body weight is more than 100% over the norm and (2) the obesity affects one or more body systems.” At issue here is a portion of the Montana Supreme Court's analysis in which the court relied on the Equal Employment Opportunity Commission's (“EEOC”) interpretation of the federal regulation defining “physical or mental impairment” under the ADA. The Montana Supreme Court observed that, although the EEOC does not view normal weight deviations as impairments under the ADA, it does view “extreme” deviations, such as “severe obesity,” as impairments if they affect one or more body systems. *Feit*, 281 P.3d at 229–30 (citations and internal quotation marks omitted). The court noted that the EEOC

has defined “severe obesity” as having a “body weight more than 100% over the norm.” *Id.* at 230 (citation and internal quotation marks omitted).

That analysis provided a limiting principle to the Montana Supreme Court's determination. The analysis described the types of obesity that the EEOC deems “extreme” enough to qualify as impairments under the ADA, and as it stands, “severe obesity” is the only weight deviation that the EEOC has expressly recognized as having met that threshold. *See id.* (“[S]evere obesity ... is clearly an impairment.” (citation and internal quotation marks omitted)).

Because Montana courts often use regulations implementing analogous federal statutes as guidance, *Butterfield v. Sidney Pub. Sch.*, 306 Mont. 179, 32 P.3d 1243, 1245–46 (2001), and afford great weight to an agency's interpretation of its own regulations, *see Easy v. State of Mont. Dep't of Nat. Res. & Conservation*, 231 Mont. 306, 752 P.2d 746, 748 (1988) (citation omitted), the district court appropriately concluded that the Montana Supreme Court would rely on the EEOC's lone guidance to issue the most robust answer. We discern no error in the district court's decision to rely on this portion of the Montana Supreme Court's opinion in delineating the standard.

**[2] 3.** Feit also argues that collateral estoppel precluded BNSF from challenging the initial determination that BNSF had violated the Act. Although this contention **\*508** is not entirely clear, he apparently contends that, because BNSF had been found liable in several disability cases decided before the Montana Supreme Court definitively interpreted the term “impairment” in the Act, he should have prevailed before the district court on preclusion principles. This contention must be rejected because, in the district court, Feit never clearly identified the issue that he now claims BNSF is estopped from litigating.

**[3] 4.** Finally, Feit argues that the district court erred when it granted BNSF's motion to strike his cross-petition. We review the ruling on a motion to strike for abuse of discretion. *Meritage Homes of Nev., Inc. v. F.D.I.C.*, 753 F.3d 819, 823 (9th Cir. 2014). We conclude that the district court correctly sustained the denial of relief to Feit by the agency (albeit while also remanding for the entry of a formal order to that effect). Accordingly,

any abuse of discretion by the district court in dismissing the cross-petition would amount to harmless error. *See Tritchler v. Cty. of Lake*, 358 F.3d 1150, 1154 (9th Cir. 2004) (citation omitted).

5. Because we affirm the judgment of the district court resolving the case in favor of BNSF, we need not, and do not, address the claims asserted in BNSF's protective cross-appeal.<sup>1</sup>

1 We deny the motion to strike the cross-appellant's reply brief.

**AFFIRMED.**

**All Citations**

663 Fed.Appx. 504, 2016 A.D. Cases 309,230

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## Vol. 2, Sec. 902 — Definition of the Term “Disability”

### 902.1 Introduction and Summary

(a) **General** — Title I of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-17 (Supp. IV 1992) [hereinafter ADA or Act], prohibits employment discrimination on the basis of disability.<sup>1</sup> The ADA protects a qualified individual with a “disability” from discrimination in job application procedures; hiring; advancement; discharge; compensation; job training; and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a). To be protected by the ADA, a person must meet the definition of the term “qualified individual with a disability” as defined by the Act and implementing regulations.<sup>2</sup> This Compliance Manual section discusses the ADA definition of the term “disability.”<sup>3</sup> The definition of the term “qualified individual with a disability” and the appropriate analysis for determining whether a person meets that definition will be discussed in a separate forthcoming Compliance Manual section.

A major part of the inquiry in an ADA charge often will be the determination of whether the charging party is protected by the Act. This determination frequently requires more extensive analysis than does the determination of whether a person is protected by other nondiscrimination statutes. For example, it is generally clear whether a person is of a particular race, national origin, age, or sex that is alleged to be the basis of discrimination. By contrast, it often is less clear whether a person’s physical or mental condition constitutes an impairment of sufficient degree to establish that the person meets the statutory definition of an individual with a “disability.”

<sup>1</sup> The ADA uses the terms “disability” and “individual with a disability” rather than the terms “handicap” and “handicapped person” or “individual with handicaps.” The use of these terms “represents an effort by [Congress] to make use of up-to-date, currently accepted terminology.” The change in phraseology does not reflect a change in definition or substance. S. Rep. No. 116, 101st Cong., 1st Sess. 21 (1989) [hereinafter Senate Report]; H.R. Rep. No. 485 pt. 2, 101st Cong., 2d Sess. 50–51 (1990) [hereinafter House Education and Labor Report].

<sup>2</sup> The ADA also protects individuals from discrimination on the basis of their relationship or association with a person with a disability. 42 U.S.C. § 12112(b)(4); 29 C.F.R. § 1630.8; *see also* Senate Report at 30; House Education and Labor Report at 61–62; H.R. Rep. No. 485 pt. 3, 101st Cong., 2d Sess. 38–39 (1990) [hereinafter House Judiciary Report]. Further, the Act prohibits retaliation or coercion against individuals because they have opposed any act that the ADA makes unlawful, have participated in the enforcement process, or have encouraged others to exercise their rights secured by the ADA. 42 U.S.C. § 12203; 29 C.F.R. § 1630.12; *see also* Senate Report at 86; House Education and Labor Report at 138; House Judiciary Report at 72.

<sup>3</sup> The Rehabilitation Act Amendments of 1992 amended the Rehabilitation Act of 1973, 29 U.S.C. §§ 701–97 (1988 & Supp. IV 1992), to apply the substantive standards of Title I of the ADA to sections 501, 503, and 504 of the Rehabilitation Act for non-affirmative action employment discrimination cases. Pub. L. No. 102–569, 106 Stat. 4344 at 4424, 4428 (1992) (codified at 29 U.S.C. §§ 791(g), 793(d), 794(d) (Supp. IV 1992)). (Sections 501, 503, and 504 of the Rehabilitation Act prohibit federal agencies, federal contractors, and programs receiving federal financial assistance from discriminating on the basis of disability.) The ADA definition of the term “disability,” therefore, also applies to those sections of the Rehabilitation Act.

The definition of “disability” under the ADA reflects the intent of Congress to prohibit the specific forms of discrimination that persons with disabilities face. While individuals with disabilities may experience the types of discrimination that confront other groups, they also may encounter unique forms of discrimination because of the nature of their disabilities and the effect that their present, past, or perceived conditions have on other persons. The purpose of the ADA is to eliminate discrimination that confronts individuals with disabilities.

Since the definition of the term “disability” under the ADA is tailored to the purpose of eliminating discrimination prohibited by the ADA, it may differ from the definition of “disability” in other laws drafted for other purposes. For example, the definition of a “disabled veteran” is not the same as the definition of an individual with a disability under the ADA.<sup>4</sup> Similarly, an individual might be eligible for disability retirement but not be an individual with a disability under the ADA. Conversely, a person who meets the ADA definition of “disability” might not meet the requirements for disability retirement.

(b) **Statutory Definition** — With respect to an individual, the term “disability” means

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

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12102(2); *see also* 29 C.F.R. § 1630.2(g). A person must meet the requirements of at least one of these three criteria to be an individual with a disability under the Act.

The first part of the definition covers persons who actually have physical or mental impairments that substantially limit one or more major life activities. The focus under the first part is on the individual, to determine if (s)he has a substantially limiting impairment. To fall under the first part of the definition, a person must establish three elements:

(1) that (s)he has a physical or mental impairment

(2) that substantially limits

(3) one or more major life activities.

The second and third parts of the definition cover persons who may not have an impairment that substantially limits a major life activity but who have a history of, or have been misclassified as having, such a substantially limiting impairment, or who are perceived as having such a substantially limiting impairment. The focus under the second and third parts is on the reactions of other persons to a history of an impairment or to a perceived impairment. A history or perception of an impairment that substantially limits a major life activity is a “disability.” These parts of the definition reflect a recognition by Congress that stereotyped assumptions about what constitutes a disability and unfounded concerns about

<sup>4</sup> The Vietnam Era Veterans Readjustment Assistance Act of 1974 defines a disabled veteran as

(A) a veteran who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Secretary, or (B) a person who was discharged or released from active duty because of a service-connected disability.

38 U.S.C. § 4211(3) (Supp. III 1991).

the limitations of individuals with disabilities form major discriminatory barriers, not only to those persons presently disabled, but also to those persons either previously disabled, misclassified as previously disabled, or mistakenly perceived to be disabled. To combat the effects of these prevalent misperceptions, the definition of an individual with a disability precludes discrimination against persons who are treated as if they have a substantially limiting impairment, even if in fact they have no such current incapacity.

(c) **Summary** — To determine whether a charging party is protected by the ADA, the EEOC investigator initially should determine why the charging party believes that the respondent has discriminated against him/her on the basis of disability. The charging party's response usually will provide the investigator with a starting point for analysis by identifying the type of condition at issue. For example, if the charging party replies that the respondent refused to hire him/her because it learned that the charging party had received psychiatric treatment, then the investigator will know to investigate whether the charging party has, has a record of, or is regarded as having a psychiatric disability. (Of course, further investigation may reveal other disabilities that may constitute the reason for the challenged employment action.)

The investigator then should determine whether the charging party meets the first part of the definition of "disability"; that is, the investigator should determine whether the charging party actually has a physical or mental impairment that substantially limits a major life activity. In that regard, the investigator should determine whether the charging party's condition is an impairment. *See* § 902.2, *infra*. If the condition is an impairment, then the investigator should determine whether the charging party's impairment substantially limits a major life activity other than working. *See* § 902.4(c)(1), *infra*. If the impairment does not, then the investigator should determine whether the charging party is substantially limited in the ability to work. *See* § 902.4(c)(2), *infra*.

If the charging party does not meet the first part of the definition of "disability," or if the investigator after attempting an analysis is unsure whether the charging party meets the first part, then the investigator should determine whether the charging party meets the second or third part of the definition. *See* §§ 902.7, .8 *infra*. With respect to the second part, the investigator should determine whether the charging party has a history of, *see* § 902.7(b), *infra*, or has been misclassified as having, *see* § 902.7(c), *infra*, an impairment that substantially limited a major life activity. With respect to the third part, the investigator should determine whether the charging party is regarded as having an impairment that substantially limits a major life activity. In that regard, the investigator should determine whether the charging party (1) has an impairment that does not substantially limit a major life activity but that is regarded as being substantially limiting, *see* § 902.8(c), *infra*, (2) has an impairment that is substantially limiting only as a result of the attitudes of others, *see* § 902.8(d), *infra*, or (3) has no impairment but is regarded as having a substantially limiting impairment, *see* § 902.8(e), *infra*.

## 902.2 Impairment

(a) **General** — The person claiming to be an individual with a disability as defined by the first part of the definition must have an actual impairment. If the person does not have an impairment, (s)he does not meet the requirements of the first part of the definition of disability. Under the second and third parts of the definition, the person must have a record of a

substantially limiting impairment or be regarded as having a substantially limiting impairment.<sup>5</sup>

A person has a disability only if his/her limitations are, were, or are regarded as being the result of an impairment. It is essential, therefore, to distinguish between conditions that are impairments and those that are not impairments. Not everything that restricts a person's major life activities is an impairment. For example, a person may be having financial problems that significantly restrict what that person does in life. Financial problems or other economic disadvantages, however, are not impairments under the ADA. Accordingly, the person in that situation does not have a "disability" as that term is defined by the ADA. On the other hand, an individual may be unable to cope with everyday stress because (s)he has bipolar disorder. Bipolar disorder is an impairment. In that situation, the analysis proceeds to whether the individual's impairment substantially limits a major life activity.

(b) **Regulatory Definition** — A physical or mental impairment means

(1) [a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) [a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h); *see also* S. Rep. No. 116, 101st Cong., 1st Sess. 22 (1989) [hereinafter Senate Report]; H.R. Rep. No. 485 pt. 2, 101st Cong., 2d Sess. 51 (1990) [hereinafter House Education and Labor Report]; H.R. Rep. No. 485 pt. 3, 101st Cong., 2d Sess. 28 (1990) [hereinafter House Judiciary Report].

This regulatory definition does not set forth an exclusive list of specific impairments covered by the ADA. Instead, the definition describes the type of condition that constitutes an impairment.

The first step in investigating whether a charging party has a disability is investigating whether (s)he has an impairment, has a record of an impairment, or is regarded as having an impairment. In many cases, it is obvious that a condition is an impairment. In other cases, however, it is not obvious. When it is unclear whether a charging party has an impairment, the investigator should ask the charging party for medical documentation that describes his/her condition. Medical documentation that describes the charging party's condition or that contains a diagnosis of the condition will help to determine if the charging party has an impairment.<sup>6</sup> In addition, the inves-

<sup>5</sup> This section frequently refers to the term "impairment" in the present tense. These references are not meant to imply that the determination of whether a condition is an impairment is relevant only to whether an individual meets the first part of the definition of "disability," i.e., actually has a physical or mental impairment that substantially limits a major life activity. This determination also is relevant to whether an individual has a record of such an impairment or is regarded as having such an impairment.

The determination of whether a condition constitutes an impairment should be made without regard to mitigating measures. *See* § 902.5, *infra*.

<sup>6</sup> A diagnosis is relevant to determining whether a charging party has an impairment. It is important to remember, however, that a diagnosis may be insufficient to determine if the charging party

tigator should ask the respondent to provide copies of relevant medical documentation concerning the charging party's condition that the respondent has in his/her possession. Such documentation should include the results of any medical examination conducted or ordered by the respondent as well as copies of medical documentation that the charging party provided to the respondent. If the investigator requests the information directly from a third party, rather than from the charging party or the respondent, then the investigator first should obtain a signed medical release from the charging party and should submit the release with the request. Other information, such as the charging party's description of his/her condition or statements from the charging party's friends, family, or co-workers, also may be relevant to determining whether the charging party has an impairment.

**(c) Conditions That Are Not Impairments**

**(1) Statutory and Legislative History Exceptions**

— The statute and the legislative history specifically state that certain conditions are not impairments under the ADA.<sup>7</sup> The term "impairment" does not include homosexuality and bisexuality. 42 U.S.C. § 12211(a); *see also* 29 C.F.R. § 1630.3(e); H.R. Rep. No. 596, 101st Cong., 2d Sess. 88 (1990) [hereinafter Conference Report]; House Education and Labor Report at 142; House Judiciary Report at 75. Further, environmental, cultural, and economic disadvantages such as a prison record or a lack of education are not impairments. Senate Report at 22; House Education and Labor Report at 51–52; House Judiciary Report at 28. In addition, age, by itself, is not an impairment. *See* Senate Report at 22; House Education and Labor Report at 52; House Judiciary Report at 28. A person who has a medical condition (such as hearing loss, osteoporosis,<sup>8</sup> or arthritis) often associated with age has an impairment on the basis of the medical condition. A person does not have an impairment, however, simply because (s)he is advanced in years. 29 C.F.R. pt. 1630 app. § 1630.2(h).

*Example 1* — CP has been unemployed for two years. Although she has actively sought work, CP has not been able to find a job. CP asserts that employers will not hire her because she is a convicted felon who served three years in prison for armed robbery. CP argues that her prison record is a disability because it prevents her from getting a job. CP, however, does not have a disability because she does not have a physical or mental impairment as defined by the ADA. A prison record is not an impairment for ADA purposes.

*Example 2* — CP applies for a job as a cashier at his neighborhood supermarket. The store manager speaks with CP briefly and then asks CP to fill out a written job application form. CP does not complete the form because he cannot read it. CP, who has the equivalent of a second-grade education, was never taught to read. CP does not

has a disability. An impairment rises to the level of a disability when it substantially limits one or more major life activities. The investigator, therefore, also should obtain available medical or other documentation that describes the extent to which the impairment limits the charging party's major life activities. *See* §§ 902.3, 902.4, *infra*.

<sup>7</sup> The statute also specifies that certain conditions, even though they may be impairments, are not disabilities covered by the ADA. *See* § 902.6, *infra*.

<sup>8</sup> Osteoporosis is a "[r]eduction in the quantity of bone or atrophy of skeletal tissue." Stedman's Medical Dictionary 1110 (25th ed. 1990).

have a physical or mental impairment as defined by the ADA. A lack of education is not an impairment for ADA purposes.

*Example 3* — Same as Example 2, above, except CP cannot read because he has a severe form of dyslexia. CP has an impairment as defined by the ADA. Dyslexia, a learning disability, is an impairment for ADA purposes.

*Example 4* — CP, who is sixty-three, has osteoporosis. The osteoporosis, a reduction in bone quantity, is an impairment as defined by the ADA. CP's age, sixty-three, is not a physical or mental impairment as defined by the ADA.

**(2) Physical Characteristics** — Simple physical characteristics are not impairments under the ADA. For example, a person cannot claim to be impaired because of blue eyes or black hair. Senate Report at 22; House Education and Labor Report at 51; House Judiciary Report at 28. Similarly, a person does not have an impairment because (s)he is left-handed. *de la Torres v. Bolger*, 781 F.2d 1134, 39 EPD ¶ 35,883, 1 AD Cas. (BNA) 852 [39 FEP Cases 1795] (5th Cir. 1986).<sup>9</sup>

Further, a characteristic predisposition to illness or disease is not an impairment. 29 C.F.R. pt. 1630 app. § 1630.2(h). A person may be predisposed to developing an illness or a disease because of factors such as environmental, economic, cultural, or social conditions. This predisposition does not amount to an impairment.

**(3) Pregnancy** — Because pregnancy is not the result of a physiological disorder, it is not an impairment. 29 C.F.R. pt. 1630 app. § 1630.2(h); *see also* *Byerly v. Herr Foods, Inc.*, 61 EPD ¶ 42,226, 2 AD Cas. (BNA) 666 (E.D. Pa. 1993). Complications resulting from pregnancy, however, are impairments.<sup>10</sup>

*Example 1* — CP is in the third trimester of her pregnancy. Her pregnancy has proceeded well, and she has developed no complications. CP does not have an impairment. Pregnancy, by itself, is not an impairment.

*Example 2* — Same as Example 1, above, except CP has developed hypertension. CP has an impairment, hypertension. (Remember that the mere presence of an impairment does not automatically mean that CP has a disability. Whether the hypertension rises to the level of a disability will turn on whether the impairment substantially limits, or is regarded as substantially limiting, a major life activity.)

**(4) Common Personality Traits** — Like physical characteristics, common personality traits also are not impairments. In *Daley v. Koch*, 892 F.2d 212, 214, 52 EPD ¶ 39,534 at 60,471, 1 AD Cas. (BNA) 1549, 1550 [51 FEP Cases 1077] (2d

<sup>9</sup> The ADA definition of "disability" is similar to the definition of "individual with a disability" that has been applied to Title V of the Rehabilitation Act of 1973, 29 U.S.C. § 706(8)(B), (C) (Supp. IV 1992). *See* Senate Report at 21; House Education and Labor Report at 50; House Judiciary Report at 27. Since both Acts use the same three-part definition, this manual section draws on case law applying the Rehabilitation Act where appropriate.

<sup>10</sup> Although other statutes may use the term "disability" when referring to pregnancy, pregnancy is not a "disability" for purposes of the ADA. Note, however, that allegations of employment discrimination based on pregnancy are covered by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. The appropriate analysis for assessing a charge of pregnancy-based employment discrimination is discussed in a separate Compliance Manual section. *See* § 626, *supra*.

Cir. 1989), a psychological profile of an applicant for a police officer position determined that the applicant "showed 'poor judgment, irresponsible behavior and poor impulse control' " but did not have "any particular psychological disease or disorder." The court ruled that the applicant's personality traits did not constitute an impairment 892 F.2d at 215, 52 EPD at 60,473, 1 AD Cas. at 1551.

*Example 1* — CP is a lawyer who is impatient with her co-workers and her boss. She often loses her temper, frequently shouts at her subordinates, and publicly questions her boss's directions. Her colleagues think that she is rude and arrogant, and they find it difficult to get along with her. CP does not have an impairment. Personality traits, such as impatience, a quick temper, and arrogance, in and of themselves are not impairments.

*Example 2* — Same as Example 1, above, except CP's behavior results from bipolar disorder. CP has an impairment, bipolar disorder.<sup>11</sup>

*Example 3* — CP is an account manager who is in charge of developing a major advertising campaign for his firm's biggest client. Although he used to be easy going and relaxed in the office, CP has become very irritable at work. He has twice lost his temper with his assistant, and he recently engaged in a shouting match with one of his superiors. CP has consulted a psychiatrist, who diagnosed a recurrence of the post-traumatic stress disorder for which CP was treated several years ago. CP has an impairment. CP's post-traumatic stress disorder, a mental disorder, is a mental impairment.<sup>12</sup>

(5) **Normal Deviations in Height, Weight, or Strength** — Similarly, normal deviations in height, weight, or strength that are not the result of a physiological disorder are not impairments.<sup>13</sup> 29 C.F.R. pt. 1630 app. § 1630.2(h); *see also Jasnay v. United States Postal Service*, 755 F.2d 1244, 1249,

36 EPD ¶ 35,070 at 36,835, 1 AD Cas. (BNA) 706, 709 [37 FEP Cases 210] (6th Cir. 1985). At extremes, however, such deviations may constitute impairments. Further, some individuals may have underlying physical disorders that affect their height, weight, or strength.

(i) For example, a four foot, ten inch tall woman who was denied employment as an automotive production worker because the employer thought she was too small to do the work does not have an impairment. *See American Motors Corp. v. Wisconsin Labor and Industry Review Commission*, 119 Wis. 2d 706, 350 N.W.2d 120, 36 EPD ¶ 34,936, 1 AD Cas. (BNA) 611 [47 FEP Cases 1325] (1984) (interpreting state law). The woman's height was below the norm, but her small stature was not so extreme as to constitute an impairment and was not the result of a defect, disorder, or other physical abnormality. On the other hand, a four feet, five inches tall man with achondroplastic dwarfism<sup>14</sup> does have an impairment. *See Dealer v. Tisch*, 660 F. Supp. 1418, 1425, 43 EPD ¶ 37,280 at 48,207, 1 AD Cas. (BNA) 1086, 1092 [43 FEP Cases 1662] (D. Conn. 1987). The man's stature was the result of an underlying disorder, achondroplastic dwarfism, which is an impairment.

(ii) Being overweight, in and of itself, generally is not an impairment. *See* 29 C.F.R. pt. 1630 app. § 1630.2(h) (noting that weight that is "within 'normal' range and not the result of a physiological disorder" is not an impairment); *see also id.* § 1630.2(j) (noting that, "except in rare circumstances, obesity is not considered a disabling impairment"). Thus, for example, a flight attendant who, because of avid body building (which resulted in a low percentage of body fat and a high percentage of muscle), exceeds the airline's weight guidelines does not have an impairment. *See Tudyman v. United Airlines*, 608 F. Supp. 739, 746, 38 EPD ¶ 35,674 at 40,015, 1 AD Cas. (BNA) 664, 669 [38 FEP Cases 732] (C.D. Cal. 1984). Similarly, a mildly overweight flight attendant who has not been clinically diagnosed as having any medical anomaly does not have an impairment. *Underwood v. Trans World Airlines*, 710 F. Supp. 78, 83-84, 51 EPD ¶ 39,297 at 59,106-07 [49 FEP Cases 1725] (S.D.N.Y. 1989) (plaintiff's state action preempted by federal law where plaintiff failed to establish that being mildly overweight brought her within class protected by state human rights law with broad definition of disability).

On the other hand, severe obesity,<sup>15</sup> which has been defined as body weight more than 100% over the norm, *see The Merck Manual of Diagnosis and Therapy* 981 (Robert Berkow ed., 16th ed. 1992) is clearly an impairment. *See Cook v. Rhode Island Dept of Mental Health, Retardation and Hosp.*, 10 F.3d 17, 63 EPD ¶ 42,673, 2 AD Cas. (BNA) 1476 (1st Cir. 1993). In addition, a person with obesity may have an under-

<sup>11</sup> Note, however, that CP's employer does not have to excuse CP's misconduct, even if the misconduct results from an impairment that rises to the level of a disability, if it does not excuse similar misconduct from its other employees. *See* 56 Fed. Reg. 35,733 (1990) (referring to revisions that "clarify that employers may hold all employees, disabled (including those disabled by alcoholism or drug addiction) and nondisabled, to the same performance and conduct standards").

<sup>12</sup> As in Example 2, CP's employer does not have to excuse CP's misconduct, even if the misconduct results from an impairment that rises to the level of a disability, if it does not excuse similar misconduct from its other employees. *See* 56 Fed. Reg. 35,733 (1990) (referring to revisions that "clarify that employers may hold all employees, disabled (including those disabled by alcoholism or drug addiction) and nondisabled, to the same performance and conduct standards").

<sup>13</sup> Note, however, that persons who have normal deviations in height or weight may allege that height or weight standards violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. *See Dothard v. Rawlinson*, 433 U.S. 321, 14 EPD ¶ 7,632 [15 FEP Cases 10] (1977) (minimum height/weight requirement for correctional counselor position had adverse impact on women and was not job related and consistent with business necessity); *Gerdorn v. Continental Airlines*, 692 F.2d 602, 30 EPD ¶ 33,156 [30 FEP Cases 235] (9th Cir. 1982) (en banc), *cert. dismissed*, 460 U.S. 1074 (1983) (maximum weight standards that were applied to exclusively female position of flight hostess constituted disparate treatment based on sex where no such weight policy was applied to similar but exclusively male position of director of passenger service).

<sup>14</sup> "Achondroplastic dwarfism is a growth disorder that affects all four extremities and results in short limbs and short stature." *Dealer v. Tisch*, 660 F. Supp. 1418, 1419, 43 EPD ¶ 37,280 at 48,202, 1 AD Cas. (BNA) at 1086 [43 FEP Cases 1662] (D. Conn. 1987).

<sup>15</sup> Investigators should be aware that medical experts sometimes use the term "morbid obesity" or "gross obesity" to mean the same thing as "severe obesity," i.e., body weight more than 100% over the norm.

The term "obesity" has been defined as "[t]he excessive accumulation of body fat. Except for heavily muscled persons, a body weight 20% over that in standard height-weight tables is arbitrarily considered obesity." *The Merck Manual of Diagnosis and Therapy* 981 (Robert Berkow ed., 16th ed. 1992).

lying or resultant physiological disorder, such as hypertension or a thyroid disorder. A physiological disorder is an impairment. *See* 29 C.F.R. § 1630.2(h).<sup>16</sup>

(6) **Persons with One of These Conditions and an Impairment** — A person who has one or more of these characteristics or traits also may have other conditions that are physical or mental impairments. *See* Senate Report at 22; House Education and Labor Report at 52; House Judiciary Report at 28. Thus, a left-handed individual who has a heart condition has an impairment. Although left-handedness is not an impairment, heart disease is an impairment.

(d) **Contagion** — A contagious disease is an impairment.<sup>17</sup> The contagious nature of the disease does not, by itself, remove that condition from the protection of the ADA. In *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 42 EPD ¶ 36,791, 1 AD Cas. (BNA) 1026 (1987), the United States Supreme Court considered the case of an elementary school teacher who had been discharged because she had experienced a recurrence of tuberculosis. The Supreme Court found that the tuberculosis, which had affected the teacher's respiratory system, constituted an impairment. 480 U.S. at 281, 42 EPD at 45,635, 1 AD Cas. at 1029. In so doing, the Court rejected the argument that the contagious effects of a condition (i.e., the effects of the condition on others) could be distinguished from the effects of the condition on the carrier. 480 U.S. at 282, 42 EPD at 45,636, 1 AD Cas. at 1029-30.

The legislative history to the ADA expressly provides that infection with the Human Immunodeficiency Virus (HIV) is an impairment under the Act. Senate Report at 22; House Education and Labor Report at 51; House Judiciary Report at 28. Thus, for the purposes of the ADA, an individual with HIV infection has an impairment.<sup>18</sup>

(e) **Voluntariness** Voluntariness is irrelevant when determining whether a condition constitutes an impairment. For example, an individual who develops lung cancer as a result of smoking has an impairment, notwithstanding the fact that some apparently volitional act of the individual may have caused the impairment. The cause of a condition has no effect on whether that condition is an impairment. *See* House Judi-

ciary Report at 29 (noting that "[t]he cause of a disability is always irrelevant to the determination of disability"); *see also Cook v. Rhode Island Dept of Mental Health, Retardation and Hosp.*, 10 F3d 17, 63 EPD ¶ 42,673, 2 AD Cas. (BNA) 1476 (1st Cir. 1993). Further, the voluntary use of a prosthetic device or other mitigating measure to correct or to lessen the effects of a condition also has no bearing on whether that condition is an impairment. *See* § 902.5, *infra*.

### 902.3 Major Life Activities

(a) **General** — For an impairment to rise to the level of a disability, it must substantially limit, have previously substantially limited, or be perceived as substantially limiting, one or more of a person's major life activities. There has been little controversy about what constitutes a major life activity. In most cases, courts have simply stated that an impaired activity is a major life activity. In general, major life activities "are those basic activities that the average person in the general population can perform with little or no difficulty." 29 C.F.R. pt. 1630 app. § 1630.2(i)

(b) **Regulatory Definition** — Commission regulations define the term "major life activities" to mean "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i); *see also* Senate Report at 22; House Education and Labor Report at 52; House Judiciary Report at 28.

This list is not an exhaustive list of all major life activities. Instead, it is representative of the types of activities that are major life activities. Specific activities that are similar to the listed activities in terms of their impact on an individual's functioning, as compared to the average person, also may be major life activities. Thus, as the interpretive appendix to the regulations notes, "other major life activities include, but are not limited to, sitting, standing, lifting, [and] reaching." 29 C.F.R. pt. 1630 app. § 1630.2(i). Mental and emotional processes such as thinking, concentrating, and interacting with others are other examples of major life activities.<sup>19</sup>

(c) **Judicial Interpretations** — Courts interpreting the Rehabilitation Act of 1973 also have found that other activities constitute major life activities. Such major life activities include sitting and standing, *Oesterling v. Walters*, 760 F.2d 859, 861, 36 EPD ¶ 35,201 at 37,485, 1 AD Cas. (BNA) 722, 723 [37 FEP Cases 865] (8th Cir. 1985); and reading, *Pridemore v. Rural Legal Aid Society*, 625 F. Supp. 1180, 1183-84, 40 EPD ¶ 36,184 at 42,659, 2 AD Cas. (BNA) 382, 384 (S.D. Ohio 1985) (mild cerebral palsy affected, but did not substantially limit, plaintiff's ability to read); *see also DiPompo v. West Point Military Academy*, 708 F. Supp. 540, 549, 50 EPD ¶ 39,182 at 58,435 [49 FEP Cases 586] (S.D.N.Y. 1989).

### 902.4 Substantially Limits

(a) **General** — Unlike the term "major life activities," the term "substantially limits" frequently requires extensive analysis. The term "substantially limits" is a comparative term that implies a degree of severity and duration. The primary focus here is on the extent to which an impairment restricts one or more of an individual's major life activities. A

<sup>19</sup> Note, however, that an individual is not substantially limited in a major life activity unless (s)he is unable to perform the activity or is significantly restricted in performing the activity as compared to the average person in the general population. *See* 29 C.F.R. § 1630.2(j); *see also* § 902.4, *infra*.

<sup>16</sup> The mere presence of an impairment does not automatically mean that an individual has a disability. Whether severe obesity rises to the level of a disability will turn on whether the obesity substantially limits, has substantially limited, or is regarded as substantially limiting, a major life activity. "[E]xcept in rare circumstances, obesity is not considered a disabling impairment." 29 C.F.R. pt. 1630 app. § 1630.2(j).

<sup>17</sup> The fact that a contagious disease is an impairment does not automatically mean that it is a disability. To be a disability, an impairment must substantially limit (or have substantially limited or be regarded as substantially limiting) one or more major life activities. *See* 42 U.S.C. § 12102(2); *see also* 29 C.F.R. § 1630.2(g).

<sup>18</sup> An individual who has HIV infection, including asymptomatic HIV infection, has a disability covered under the ADA. *See* § 902.4(c)(1), *infra*; *see also Doe v. Kohn Nast & Graf*, 862 F. Supp. 1310, 1321, 3 AD Cas. (BNA) 879, 885 (E.D. Pa. 1994); *Doe v. District of Columbia*, 796 F. Supp. 559, 59 EPD ¶ 41,656, 2 AD Cas. (BNA) 197 [59 FEP Cases 363] (D.D.C. 1992); Senate Report at 22; House Education and Labor Report at 52; House Judiciary Report at 28 n.18; Memorandum from Douglas W. Kmiec, Acting Assistant Attorney General, to Arthur B. Culvahouse, Jr., Counsel to President Reagan, 8 Fair Empl. Prac. Manual (BNA) No. 641, at 405:1 (Sept. 27, 1988); Federal Contract Compliance Manual App. 6D, 8 Fair Empl. Prac. Manual (BNA) No. 694, at 405:352 (Dec. 23, 1988).

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