FILED
SUPREME COURT
STATE OF WASHINGTON
2/12/2019 4:42 PM
BY SUSAN L. CARLSON
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No. 96335-5
[Ninth Circuit No. 16-35205]

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

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 Washington, and BNSF RAILWAY COMPANY, a Delaware Corporation licensed to do business in the State of Washington,

Respondents.

ANSWER TO AMICUS BRIEFS

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INTRODUCTION

As a disease in its own right, obesity is a WLAD "condition." Obesity is a WLAD impairment, where it affects many enumerated body systems, including the respiratory, endocrine, cardiovascular, and musculoskeletal systems. It is a disability, where it is an "abnormal" accumulation of fat that is the basis of BNSF's discrimination against plaintiff Casey Taylor.

Like BNSF, the amici supporting it focus on "weight," not obesity. Weight is not at issue. BNSF rescinded Taylor's conditional offer of employment because it perceived him to have obesity.

Attempting to sow fear, amici argue that obesity and excess weight are common, so WLAD coverage might harm employers. Commonality is irrelevant. The WLAD's goal is to eliminate workplace discrimination regardless of its breadth.

Unable to answer the great weight of medical opinion that obesity is a disease, amici argue that Body Mass Index does not alone indicate obesity or ill health. That is irrelevant, where BMI is the standard BNSF used to discriminate against Taylor (and many others). Too, social stigmatization is not a reason to allow BNSF (and amici) to continue discriminating against people with obesity.

This Court should hold that obesity is a WLAD impairment.

STATEMENT OF FACTS

Five amici briefs have been filed in this case, representing a total of 10 amici. The four amici briefs supporting the Taylors' arguments are on behalf of Disability Rights Washington and the Obesity Action Coalition, (collectively "DRW"), the Washington Employment Lawyers Association ("WELA"), the Washington State Association for Justice Foundation ("WSAJF"), the American Association of Retired Persons, and the AARP Foundation (collectively "AARP"). The amici brief supporting BNSF's arguments is on behalf of the National Association of Manufacturers, the National Federation of Independent Business, the Association of Washington Business, and the Washington Policy Center (collectively "NAM").

The Taylors agree with the arguments put forward by DWR, WELA, WSAJF, and AARP, so respond only briefly herein. The bulk of the Taylors' reply addresses amici NAM.

Like BNSF, NAM attempts to make this case about weight, not obesity. NAM at 1, 5-6. While the Taylors address this in the argument section below, the following facts, that NAM ignores, bear repeating:

- After extending plaintiff Casey Taylor a conditional offer of employment, BNSF's medical examination vendor determined that Taylor's Body Mass Index ("BMI") was 41.3. ER 158, 285, 295, 300-11.

- Although Taylor passed BNSF's "physical capacities test," demonstrating that he met the physical demands of the position, BNSF rescinded the conditional offer of employment, citing the "significant health and safety risks associated with extreme obesity (Body Mass Index near or above 40) and uncertain status of knees and back." ER 136, 147, 242, 287, 340, 343, 345.

- Among other things, BNSF required Taylor to provide a sleep study, costing a few thousand dollars, if he wished to be considered further for the job. ER 137-38, 147.

- Taylor made clear that he was uninsured and could not afford the sleep study. ER 139.

- BNSF informed Taylor he was no longer being considered and apparently offered the position to someone else. ER 141-42.

Simply stated, BNSF did not rescind Taylor's offer and require him to obtain expensive medical testing due to his "weight," but because it diagnosed Taylor with "severe" or "morbid" obesity. ER 242, 340, 343, 345. This is consistent with BNSF's practice to not hire those with a BMI over 35. ER 139-41.

ARGUMENT

A. Whether or not a medical condition is common is irrelevant under the WLAD. (NAM at 1, 5-6).

NAM's lead argument is that this Court should adopt BNSF's position that a WLAD plaintiff must prove that his or her obesity has an underlying physiological cause, where otherwise ruling that obesity is a disability "would encompass 40 percent or more of the adult population based on weight and height alone …." NAM at 1. NAM then offers statistics that fail to differentiate excess weight and obesity to push the percentages higher. *Id*. at 5-6.[1] But as WELA correctly points out, the WLAD is unconcerned with commonality. WELA at 5.

The post-***McClarty*** WLAD defines "disability" as "the presence of a sensory, mental, or physical impairment that (i) Is medically cognizable or diagnosable; (ii) Exists as a record or history; or (iii) Is perceived to exist whether or not it exists in fact." RCW 49.60.040(7)(a); ***McClarty v. Totem Electric***, 157 Wn.2d 214, 137 P.3d 844 (2006). Commonality is irrelevant – a "disability

[1] It is irrelevant to the point of being misleading for NAM to even suggest that 70% of Americans have obesity "if any amount of weight over what is considered to be the 'normal' range is deemed to be obese." NAM at 6. Not even BNSF has ever suggested that any weight above "normal" is obesity.

exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated … .” RCW 49.60.040(7)(b). Indeed, it is anathema to the WLAD to suggest that coverage should be denied simply because many may need it.

While NAM’s focus on commonalty is the most egregious flaw in its argument, others merit correction. NAM opposes recognizing obesity as a WLAD impairment, where such a holding would allegedly “encompass” adult Americans “based on weight and height alone … .” NAM at 1. That is false – the certified question asks this Court whether and when obesity is a WLAD impairment, not whether and when BMI (a weight and height calculation) is a WLAD impairment. ***Taylor v. BNSF***, 904 F.3d 846, 853 (9th Cir. Sept. 17, 2018). BNSF chose to use BMI to diagnose Taylor as having severe obesity. ER 340, 343, 345. Although BMI is “quick and cheap … misclassification is somewhat common” and more accurate assessments exist. DRW at 5-6. Of course, whether Taylor actually has obesity is irrelevant, where BNSF plainly perceived him as having obesity, and Taylor pursued only a perceived disability claim. ER 356, 359; ***Taylor***, 904 F.3d at 847.

Equally untrue is NAM’s claim that recognizing obesity as a WLAD impairment would “encompass” people “regardless of

medical condition." NAM at 1. NAM ignores that obesity – a disease – *is* a medical condition. DRW at 3-5, 7-13. "[O]besity is a chronic, relapsing, multifactorial condition consistent with a disease." DWR at 3. Obesity includes changes at the cellular, hormonal, neurochemical, and organ levels. *Id*. It affects numerous organs "bi-directionally," meaning that it causes organ dysfunction that in turn exacerbates the obesity. *Id*. at 4. It leads to inflammation in appetite control centers in the hypothalamus, decreasing hunger and satiety signals. *Id*. at 5.

In short, the medical community widely recognizes that obesity is a disease in its own right (*id*. at 7-13):

- In 2017, twenty health organizations, including the American Academy of Family Physicians, the American Academy of Pediatrics, the Association of American Medical Colleges, and the Centers for Medicare and Medicaid Services, declared that the first step in treating patients with obesity is "a working knowledge of obesity as a disease."

- In a 2013 resolution, the American Medical Association declared that obesity is "a disease state with multiple pathophysiological aspects." Those medical associations in agreement include the American Association of Clinical Endocrinologists (AACE), the American College of Cardiology, the Endocrine Society, the American Society for Reproductive Medicine, the Society for Cardiovascular Angiography and Interventions, the American Urological Association, and the American College of Surgeons.

- In 2013, the American Heart Association, the American College of Cardiology and The Obesity Society jointly issued guidelines for treating obesity in adults, adopting the "Chronic Disease Management Model."

- In 2012, the AACE declared that "obesity is a disease with multiple pathophysiological aspects, including genetic, environmental, physiological, and psychological factors."

- In 2003, the World Health Organization recognized that obesity is "a disease in its own right."

- In 1998, a National Institutes of Health panel on the "Identification, Evaluation, and Treatment of Overweight and Obesity in Adults" recognized that obesity is "a complex multifactorial chronic disease" involving "the integration of social, behavioral, cultural, physiological, metabolic and genetic factors."

Finally, NAM's accommodation argument is unpersuasive. NAM at 7-9. NAM essentially argues that recognizing obesity as a WLAD impairment could lead to numerous accommodation claims "based on nothing more than the ratio between their height and weight." *Id*. That is false.

As WELA notes, the WLAD distinguishes between impairments for reasonable-accommodation claims, and disparate-treatment claims. WELA at 7-8. A WLAD impairment "includes, but is not limited to" physiological disorders; conditions, cosmetic disfigurements, or anatomical losses affecting an enumerated body system; and any "mental, developmental, traumatic, or

psychological disorder ….” RCW 49.60.040(7)(c). The WLAD includes additional requirements “[o]nly for the purposes of qualifying for reasonable accommodation in employment ….” RCW 49.60.040(7)(d). In a reasonable-accommodation case, an impairment must “exist in fact,” and “must have a substantially limiting effect upon the individual’s ability to perform his or her job ….” RCW 49.60.040(7)(d)(i).[2] In short, in a reasonable-accommodation case, a WLAD plaintiff would have to show that he or she has obesity and that it has a substantially limiting effect on job performance. RCW 49.60.040(7)(d). This is an effective safeguard against NAM’s parade of horribles.

B. NAM’s arguments against the great weight of the medical community miss the point. (NAM at 9-15).

NAM argues at some length that BMI alone is not an accurate indicator of obesity or ill health. NAM at 9-13. Taylor has never claimed otherwise. It is BNSF, not Taylor, who perceived Taylor as having severe obesity based on nothing other than his BMI. ER 10, 135, 158-60, 285, 295. It is BNSF, not Taylor, who

[2] Alternatively, the employee must give notice the impairment exists and provide medical documentation establishing that it is reasonably likely “that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect.” RCW 49.60.040(7)(d)(ii).

assumed Taylor's BMI indicates poor health. ER 136, 147, 164, 340, 343, 345; *see also* ***EEOC v. BNSF***, 902 F.3d 916, 924 (9th Cir. Sept 12, 2018) (holding that BNSF perceives a job applicant as impaired where, as here, it requires applicants to obtain additional medical testing in the post-conditional offer phase, revoking the offer when the applicant cannot afford it). Taylor attempted to counter BNSF's assertion, but BNSF was uninterested. ER 140, 227-28, 285, 323, 325.

NAM next joins BNSF's argument that recognizing obesity as a WLAD impairment is, essentially, bad for people with obesity. NAM at 13-15; BR 46. What is bad for people with obesity is that employers like BNSF regularly discriminate against them. ER 139-41. BNSF has a "company policy" not to hire people with a BMI over 35, commonly disqualifying applicants "for that reason alone." *Id*. It is ironic at best that NAM and BNSF profess concern for people with obesity. They should not be permitted to raise the threat of stigmatization as a smokescreen for their discrimination.

C. In amending the WLAD in 2007, the Legislature did not intend to adopt the ADA, but to repudiate this Court's *McClarty* decision. (NAM at 7).

In a single paragraph, NAM argues that the 2007 WLAD amendments intended to follow the ADA. NAM at 7. As WELA

correctly states, the "last thing the Legislature intended to do was to adopt the restrictive interpretation of 'disability' under then-existing federal law." WELA at 13.

Before the 2007 amendments, the WLAD did not define disability. ***Hale v. Wellpinit Sch. Dist. No. 49***, 165 Wn.2d 494, 500, 198 P.3d 1021 (2009). In 1975, the controlling WAC provided that "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." WAC 162-22-020 (1975) (emphasis added). That is, any abnormal "condition" that formed the basis of discrimination was a disability.

In 1993, three years after Congress enacted the ADA, the Washington Legislature rejected the ADA definition of "disability." WELA at 3; House Bill Report HB 1300 at pp.1-2; House Bill Report SB 5474 at p. 2 (Apr. 17, 1993). In 2000, this Court modified the HRC definition of disability for reasonable-accommodation cases only, maintaining the HRC definition for all other WLAD claims. WELA at 4; ***Hale***, 165 Wn.2d at 501 (addressing ***Pulcino v. Federal Express Corp.***, 141 Wn.2d 629, 641, 9 P.3d 787 (2000)). After this Court's ***McClarty*** decision overruled ***Pulcino***, invalidated WAC 162-22-020, and adopted the ADA definition of disability, the

Legislature adopted the WLAD's current definition of disability and impairment, and "specifically rejected the definition of 'disability' adopted in ***McClarty***…." WELA at 5; ***Hale***, 165 Wn.2d at 501.

Far from adopting the ADA, the WLAD definition of impairment is more expansive than the federal definition. Although the federal definition of impairment is exhaustive, under the WLAD impairments include *but are not limited to* physiological disorders, conditions, cosmetic disfigurements, and anatomical losses. RCW 49.60.040(7)(c)(i). In this way, the WLAD provides broader coverage than the ADA. *See e.g.*, ***Kumar v. Gate Gourmet, Inc.***, 180 Wn.2d 481, 498-99, 325 P.3d 193 (2014); ***Martini v. Boeing Co.***, 137 Wn.2d 357, 364, 971 P.2d 45 (1999). Consistent with ***Kumar*** and ***Martini***, the Court of appeals broadly ruled that "under the plain language of the statute, any mental or physical condition may be a disability." ***Clipse v. Commercial Driver Servs., Inc.***, 189 Wn. App. 776, 793, 358 P.3d 464 (2015), *rev. denied*, 185 Wn.2d 1017 (2016).

Further, the current version of WAC 162-22-020 plainly provides that a "condition" is a disability if: (1) it is abnormal; and (2) it is a reason the person was discriminated against:

> 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.

WAC 162-22-020(2). Thus, obesity is a disability because it is an "abnormal or excessive fat accumulation that presents a risk to health." www.who.int/topics/obesity/en/. Too, there is no question that the source of BNSF's discrimination is its perception that Taylor has morbid or severe obesity.

In short, like BNSF, NAM offers no persuasive analysis for narrowly interpreting the WLAD in line with the ADA. This Court should decline to do so, and broadly construe the WLAD to protect Washington's citizens from employers like BNSF who routinely discriminate based on a widely-recognized disease.

CONCLUSION

Obesity, a disease in its own right, is a health condition under the WLAD. Since it affects numerous body systems, it is an impairment. Since it is an abnormal condition that is the basis of BNSF's discrimination, it is a disability. Nothing more is required. This Court should hold that obesity is a WLAD impairment.

RESPECTFULLY SUBMITTED this 12th day of February 2019.

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February 12, 2019 - 4:42 PM

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