

FILED
SUPREME COURT
STATE OF WASHINGTON
12/21/2018 11:59 AM
BY SUSAN L. CARLSON
CLERK

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

IN THE SUPREME COURT OF 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.

REPLY BRIEF ON CERTIFIED QUESTION

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INTRODUCTION

As a disease itself, obesity is a WLAD “condition.” The condition of obesity is a WLAD impairment because it affects many enumerated body systems, including the respiratory, endocrine, cardiovascular, and musculoskeletal systems. No reasonable reading of the WLAD requires a physiological cause.

BNSF attempts to make the issue about “weight” – not the medical condition of obesity. Weight has never been the issue. BNSF rescinded Casey Taylor’s conditional offer of employment after diagnosing him with “severe” or “morbid” obesity, perceiving that condition to be an impairment. That is BNSF’s standard practice.

BNSF principally relies on an interpretation of EEOC guidance that the EEOC rejects. It insists the Legislature and Washington’s Human Rights Commission adopted that guidance (as BNSF interprets it) citing only one mention of it in testimony and a FAQ page stating that physical traits such as being short are not disabilities. There is no indication the Legislature intended to adopt this guidance, or any other federal law narrowly interpreting the ADA, to deny WLAD protection to many people with disabling disorders and conditions. Washington’s citizens deserve better.

This Court should hold that obesity is a WLAD impairment.

REPLY ARGUMENT

- A. BNSF largely ignores the certified question whose answer is: obesity is an impairment if it is a condition affecting one or more of the body systems enumerated in the WLAD definition of impairment.**

The certified question bears repeating as BNSF largely ignores it:

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

Taylor v. BNSF, 904 F.3d 846, 853 (9th Cir. Sept. 17, 2018). The district court’s ruling granting BNSF summary judgment provides the context framing this question: “under the WLAD, a plaintiff alleging disability discrimination on the basis of obesity must show that his or her obesity is caused by a physiological condition or disorder or that the defendant perceived the plaintiff’s obesity as having such a cause.” ER 23; *see also* ER 24-25. Thus, implicit in the certified question is: whether obesity must be caused by an underlying physiological disorder or condition to be a WLAD impairment.

The answer to the certified question is: for obesity to qualify as an impairment under the WLAD it must be a “condition” affecting one of the body systems enumerated in the WLAD:

... “impairment” includes, but is not limited to: 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; ...

RCW 49.60.040(7)(c)(i). The WLAD requires no more. BA 10-11.

In brief, obesity is a “condition,” where it is a disease in itself. BA App B at 1-2; see *infra* Argument C. Obesity affects (at least) the “musculoskeletal, ... respiratory, ... cardiovascular, [and] endocrine” systems: (1) where it is correlated with joint pain, sleep apnea, elevated blood pressure, and endocrine dysfunction; and (2) where its comorbidities include osteoporosis, cardiovascular disease, some cancers, and type 2 diabetes. Compare BA App. B at 1 with RCW 49.60.040(7)(c)(i); see *infra* Argument C. The condition of obesity need not have a physiological cause: (1) where obesity is a disease; (2) where cause is not a WLAD factor; and (3) where WLAD conditions (like cosmetic disfigurements and anatomical losses) need not be physiological, though obesity is. *Id.*

As applied to this perceived disability case, there is no question that BNSF perceived Casey Taylor as having severe or morbidly obesity, and as being impaired.¹ BA 8 (discussing *EEOC v.*

¹ Since this is a perceived-as claim, it is irrelevant whether Taylor actually has the condition or obesity.

BNSF, No. 16-35457, 2018 U.S. App. LEXIS 24534, at *18 (9th Cir. Aug. 29, 2018)). BNSF considers Body Mass Index (“BMI”) over 40 “severe” or “morbid” obesity, and diagnosed Taylor as having “severe” or “morbid” obesity. **Taylor**, 904 F.3d at 848; see also ER 136, 147, 164, 340, 343, 345. BNSF “treats a BMI over 40 as a ‘trigger’ for further screening in the employment process.” *Id.* Its chief medical officer opined that sleep apnea and diabetes were the “primary considerations for -- for this case,” amply demonstrating BNSF’s perception that morbid obesity affects at least the respiratory and endocrine systems. ER 164. The Ninth Circuit held that BNSF perceives an impairment 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. **EEOC**, 2018 U.S. App. LEXIS at *18.

BNSF largely ignores the certified question. BR 5-25. BNSF begins by misstating the certified question as follows: “[h]ere the issue is whether under the WLAD body weight can be an “impairment.” BR 6. The issue is not “body weight,” but obesity, and under what circumstances, if any, obesity is a WLAD impairment. **Taylor**, 904 F.3d at 853.

BNSF then misstates the Taylors' answer as follows: 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 undisputed diseases or medical conditions." BR 6 (footnote omitted). The Taylors have never argued that *body weight* is a WLAD impairment nor do they rely on "doctors" opining that "weight" is correlated with unmentioned diseases. *Id.* Obesity is an impairment because it is itself a disease – a point BNSF never addresses head on. BA 11-12. Obesity is correlated with *other* diseases, including cardiovascular disease, endocrine dysfunction, and some cancers. BA 14; BA App. B at 1; ER 162, 164, 175-77.

BNSF next argues that since "[e]very human body has weight," weight is merely a characteristic or trait, distinguishable from "a disorder or abnormality." BR 7. This again evades the issue. Not every human body has excessive weight, or weight so excessive to be medically classified as obesity. BNSF accepts that "Obesity is an 'abnormal or excessive fat accumulation that presents a risk to health.'" BR 7-8 (quoting BA 11, quoting www.who.int/topics/obesity/en/). That is the point – obesity is not merely "body weight" – it is itself an "abnormal" condition that presents health risks. *Id.* It is a disease.

B. Answering the certified question is plainly within this Court's province.

BNSF does not contest that obesity is a disease. It argues instead that doctors and medical organizations that declare obesity a disease do so to serve the public health, where “the legislature’s perspective on the WLAD transcends what doctors believe is good for their patients.” BR 42-43. Based on that distinction, BNSF suggests it is not for this Court, but for the Legislature to engage in the “line-drawing” necessary to determine whether obesity should be protected by the WLAD. BR 43-46. Answering the certified question requires this Court to interpret the WLAD, which is squarely within this Court’s province. *Martini v. Boeing Co.*, 137 Wn.2d 357, 364, 971 P.2d 45 (1999).

The WLAD’s plain language contradicts BNSF’s argument that it is not for this Court to interpret the WLAD. When defining “impairment” in 2007, the Legislature considered that under federal law, many “conditions” were not disabilities, including: diabetes, epilepsy, multiple sclerosis, Parkinson’s, bipolar, ALS, and cancer. BA App. C at 13. Those who supported and opposed the WLAD amendments acknowledged concern about the limits of federal protections. *Id.* at 13-14. But the Legislature did not list any specific

disorders, diseases, abnormalities and conditions. Instead, the Legislature broadly defined “impairment” as including, without being limited to, physiological disorders, conditions, anatomical losses, and cosmetic disfigurements. That is, the Legislature left it to this Court to decide whether an individual disease fits within that definition.

Attempting to sow confusion, BNSF argues that classifying weight as obesity is arbitrary. BR 45. It is BNSF who classified Taylor as having morbid obesity based on his BMI and used that perception to “medically disqualify” him. ER 139-41; see *also* ER 147, 162, 164, 175-77, 340, 343, 345. That is BNSF’s standard practice. *Id.*

According to the World Health Organization (“WHO”), a BMI over 30 is generally considered obesity. BA 11. According to BNSF, a BMI over 40 is “morbid” obesity. ER 162.

In any event, the condition of obesity is a WLAD impairment when it affects one or more of the body systems enumerated in the WLAD. Here, BNSF perceived that Taylor has extreme obesity and perceived that extreme obesity affects the endocrine and respiratory systems, revoking Taylor’s conditional offer “due to significant health and safety risks associated with extreme obesity.” ER 136, 139-41, 147, 162, 164, 175-77, 340, 343, 345.

BNSF next argues that “defining a characteristic as an impairment, disability, disorder, or disease ... can also be viewed as stigmatizing.” BR 46. That is a logical fallacy. It is not stigmatizing in itself to say that the body has an abnormality or diminished function. BR 23. It is societal views about what it means to be impaired that may be stigmatizing.

But assuming *arguendo* that imperfect descriptors may be stigmatizing, that is no reason to deny WLAD protection. Such an argument is particularly troubling from BNSF who perceived Taylor as having morbid obesity, and perceived that condition as an impairment, regardless of how Taylor perceives himself.

BNSF’s analogy to the WHO’s classification of transgenderism is inapt. BR 46-47. BNSF argues that the WHO “removed being transgender from its list of medical disorders” “precisely” to avoid stigmatization. *Id.* That is inaccurate. The WHO previously classified “gender incongruence” as a “mental [not medical] disorder,” but re-classified it in “sexual health conditions” because the “evidence is now clear that it is not a mental disorder.” BR 46-47 (quoting <http://www.who.int/health-topics/international-classification-of-diseases>). The WHO recognized that incorrectly classifying “gender incongruence” as a mental disorder may be

stigmatizing, while also recognizing that “there remain significant health care needs that can best be met if the condition is coded under the ICD.” *Id.*

Finally on this point, BNSF argues that now is not 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” BR 47. BNSF has fought all over the country to persuade courts that obesity is not a condition worthy of ADA protection. See *e.g. EEOC, supra; Morriss, infra, BNSF v. Feit*, 281 P.3d 225 (Mont 2012). Its “company policy” is not to hire people with a BMI over 35. ER 139-41. It commonly disqualifies applicants “for that reason alone.” ER 141. Now is the time.

C. Obesity is a WLAD impairment because it is a condition affecting one or more of the enumerated body systems.

1. Obesity is a condition affecting many body systems.

Obesity is a WLAD condition because it is a disease, as recognized by the American Medical Association (“AMA”), the WHO, the National Institutes of Health, the American Association of Clinical Endocrinologists, 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. BA 11-12. Recognizing that obesity is a disease is not unique to the medical field – the Food and Drug Administration, the Internal Revenue Service, and CIGNA agree. *Id.*

BNSF does not contest that obesity is widely recognized as a disease. BR 40-45. It instead invites the Court to ignore the above sources. *Id.* But BNSF also admits that “the medical context” is the WLAD’s “relevant context.” BR 23.

BNSF focuses on an appellate court holding that as used in the WLAD, condition “is generally perceived as a ‘particular mode of being[.]’” ***Rhodes v. Urm Stores, Inc.***, 95 Wn. App. 794, 799, 977 P.2d 651, *rev. denied*, 139 Wn.2d 1006 (1999). Its principal response is that “condition” so broadly defined captures all states of the body, including healthy ones. BR 26-28. That strained interpretation ignores the rest of the statute, as well as common sense.

Under the WLAD definition of impairment, a condition (like a physiological disorder, anatomical loss, or cosmetic disfigurement) is an impairment only if it affects one or more of the enumerated body systems. RCW 49.60.040(7)(c)(i). It is absurd to suggest that “all body weights” are conditions affecting a body system, such that “normal” weight that “positively” affects the body is an impairment.

BR 27-28. Impairment, as BNSF acknowledges, is an abnormality of, loss of, or lost function of, a body part, organ, or system. BR 23. To be a WLAD “impairment,” the condition must affect the body systems in a harmful way. *Id.*

Washington’s Human Rights Commission (“HRC”) definition BNSF relies on furthers the Taylors’ argument. BR 26-27. “A condition is a ‘sensory, mental, or physical disability’ if it is *an abnormality...*” BR 26 (quoting WAC § 162-22-020(2), emphasis BNSF). BNSF’s assertion that “[w]eight is not ‘an abnormality’” is entirely irrelevant. BR 26. The condition of *obesity* is an “abnormality” – it is an “abnormal or excessive fat accumulation that presents a risk to health.” www.who.int/topics/obesity/en/.

BNSF’s statutory-construction arguments are equally unpersuasive. BR 28-29. BNSF argues that if a condition is nothing more than a particular mode of being, it encompasses the remaining statutory terms: disorder, cosmetic disfigurement, or anatomical loss. *Id.* That is false. A mode of being plainly refers to the overall physical condition of the body. This is consistent with the definition of “condition” as a “usually defective state of health.” Merriam-Webster online dictionary, www.merriam-webster.com/. So defined, condition

is consistent with, but distinct from, the remaining terms in the statute that often involve only a part of the body.

But in any event, BNSF ignores the intent of the WLAD – to remedy disability discrimination. *Martini*, 137 Wn.2d at 364. To that end, this Court liberally construes the WLAD’s plain language. 137 Wn.2d at 364. Thus, it is irrelevant that there may be instances when a condition might also be a disorder, loss, or disfigurement. The point is to provide broad coverage.

The condition of obesity is an impairment if it affects one or more of the body systems enumerated in the WLAD. RCW 49.60.040(7)(c)(i). BNSF does not disagree that obesity affects many of the enumerated body systems. BR 13-14. Nor could it, where its chief medical officer opined that extreme obesity is correlated with obstructive sleep apnea (respiratory system), diabetes (endocrine system), and heart disease (cardiovascular system). ER 162, 164, 175-77. Too, BNSF perceived Taylor as impaired by the condition of morbid obesity by rescinding his conditional offer when he could not afford costly medical testing. *EEOC*, 2018 U.S. App. LEXIS at *18.

In sum, the answer to the certified question is that obesity is a condition that is a WLAD impairment because it affects one or more of the body systems enumerated in the WLAD.

2. WLAD conditions (like cosmetic disfigurements and anatomical losses) need not be physiological or have a physiological cause.

The district court erred in ruling that WLAD plaintiffs must prove that “obesity is caused by a physiological condition or disorder or that the defendant perceived the plaintiff’s obesity as having such a cause.” ER 23. As addressed above, however, obesity is a disease, and a “condition” in its own right. Because it affects enumerated body systems, it is a WLAD impairment regardless of its cause. BNSF does not respond.

The WLAD is unconcerned with causation in any event. BA 15. Again, BNSF does not respond. The closest BNSF comes is acknowledging that because lung cancer is an impairment, it remains so even if caused by smoking. BR 11-12 n. 9. There are indeed many medical conditions that are no doubt impairments despite having behavioral factors, such as some cancers, asbestosis, type-2 diabetes, cardiac disease, and many more. While BNSF’s admission does not answer whether obesity is an impairment, it does mean that whether obesity is, in part, the result of behavior, is irrelevant.

Under the WLAD’s plain language, physiological modifies disorder only – not condition, cosmetic disfigurement, or anatomical loss. RCW 49.60.040(7)(c)(i); BA 16-17; see also *Taylor*, 904 F.3d

at 850. Since “physiological disorder” is separated from “condition” (and the remaining statutory terms) by a comma, the only reasonable reading of the WLAD is that physiological does not modify condition. BA 16-17.

BNSF argues that the comma separating physiological disorder from condition was in the federal definition of impairment until 2008 and that federal courts nonetheless required obesity to have an underlying physiological disorder to be an impairment. BR 21-22. BNSF argues that this Court must presume that the Washington Legislature was “aware of that federal law when it adopted the federal regulation.” BR 22 (citing *Health Ins. Pool v. Health Care Authority*, 129 Wn.2d 504, 510, 919 P.2d 62 (1996)). This too is inaccurate.

Health Insurance Pool is inapposite. At issue there was RCW 48.41.030(13), defining “member” as used in the Health Insurance Coverage Access Act, to include certain entities “as soon as authorized by federal law.” 129 Wn.2d at 510. Having concluded that the “federal law” expressly referred to is ERISA, this Court held that the reference to federal law indicated the Legislature knew the type of plans subject to ERISA. *Id.* That is, this Court presumes the Legislature is familiar with “existing *statutes* relevant to the subject

upon which it is acting.” *Id.* (citing ***Martin v. Triol***, 121 Wn.2d 135, 148, 847 P.2d 471 (1993), emphasis supplied)).

There is no dispute that in amending the WLAD, the Legislature was familiar with the ADA. But being familiar with the ADA does not suggest a familiarity with, much less agreement with, every case involving the federal definition of impairment. While this Court will presume that the Legislature is familiar with Washington cases interpreting Washington statutes, particularly recent cases, BNSF offers no support for the proffered presumption that the Legislature is familiar with ten-plus year-old cases from other Circuits interpreting a federal statute. See ***Woodson v. State***, 95 Wn. 2d 257, 262, 623 P.2d 683 (1980).²

Equally unpersuasive is that the Legislature intended to adopt EEOC guidance, or rather, BNSF’s interpretation of EEOC guidance. BR 14-16. The distinction is crucial. The EEOC interprets its guidance on the definition of impairment in a manner favorable to the Taylors. ***Taylor***, 2018 U.S. App. LEXIS at *9-11. Thus, when BNSF argues that the Legislature intended to be bound by EEOC guidance, what it really means is that the Legislature intended to be bound by an

² And as addressed below, the pre-2007 federal landscape was not nearly as clear as BNSF suggests.

interpretation of EEOC guidance at odds with the EEOC's own interpretation. That is meritless.

Neither does the legislative history “confirm[]” the intent to adopt the EEOC guidance. BR 14 n.11. BNSF references testimony on the proposed substitute House Bill noting only that the EEOC issued guidance addressing impairments. *Id.* That testimony does not signal agreement with the guidance, which – as interpreted by the EEOC – is favorable to the Taylors in any event.

Nor did the HRC adopt what BNSF coins “the EEOC’s original physiological-result solution.” BR 15-16. Here, BNSF cites an HRC FAQ page answering, “What characteristics are not disabilities?” The answer:

... 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.) ...

The HRC does not legislate through its FAQ page. But in any event, far from being substantively “identical” to the EEOC guidance, HRC’s FAQ answer does not address when a physical characteristic may be an impairment. Nor does it remotely answer the question on certification – under what circumstances *obesity* may be an impairment. At most, the HRC answer suggests that merely being

overweight is not a disability, just as merely being short is not a disability. The Taylors have never claimed otherwise.

BNSF's attempt to impose federal law on the WLAD ignores that the WLAD definition of impairment is more expansive than the federal definition. While the federal definition of impairment is exhaustive, the WLAD makes clear that WLAD impairments *include but are not limited to* physiological disorders, conditions, cosmetic disfigurements, and anatomical losses. RCW 49.60.040(7)(c)(i). As BNSF acknowledges, this phrase expands the definition of impairment to include things that are not physiological disorders, conditions, cosmetic disfigurements, or anatomical losses. BR 23. In this way, the WLAD provides broader coverage than the ADA. See *e.g.*, **Kumar**, 180 Wn.2d at 498-99; **Martini**, 137 Wn.2d at 364.

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). BNSF's principal response to **Clipse** is that that “is an unremarkable statement.” BR 30-31. BNSF ignores why **Clipse** is remarkable – it is entirely

unconcerned with whether conditions are physiological or physiologically caused.

Clipse, like Taylor, brought a perceived disability claim. **Clipse**, 189 Wn. App. at 792. Clipse met his WLAD burden by demonstrating that the employer had changing and inconsistent reasons for electing not to hire him, and, upon learning that he took methadone, commented that he needed to get “cleaned up” and might “relapse.” *Id.* at 794. He was not required to prove that the unnamed condition the employer perceived was physiological or physiologically caused.

Finally, BNSF does not answer the Taylors’ argument that even if WLAD conditions must be physiological, obesity *is* physiological. BA 18-19. Obesity is “a multi-metabolic and hormonal disease state including [among other things] impaired functioning of appetite dysregulation, ... endocrine dysfunction including elevated leptin levels and insulin resistance, ... blood pressure elevation, ... and systemic and adipose tissue inflammation.” BA App. B at 1. Obesity is plainly related to bodily function and activity. BA 18-19.

In sum, as a disease in its own right, obesity is a condition. The condition of obesity is an impairment because it affects numerous enumerated body systems, including: musculoskeletal,

respiratory, cardiovascular, and endocrine. While obesity need not be physiological, it is.

D. This Court should reject the federal cases the district court relied on.

While this Court will look to ADA cases, they are not binding. **Kumar**, 180 Wn.2d at 491. When this Court departs from federal law in this area, “it has almost always ruled that the WLAD provides greater employee protections than its federal counterparts.” 180 Wn.2d at 491. In keeping with its usual practice, this Court should reject the few federal cases denying ADA protection to persons discriminated against on the basis of their obesity, and offer greater WLAD protection. *Id.*

That the WLAD impairment definition differs from the federal definition is reason alone to reject the federal cases BNSF relies on. *Supra*, Argument § A. Too, these cases are inapposite and inconsistent with the WLAD.

Aside from this matter, three of the four Circuits addressing obesity as an ADA disability predate the ADA. See **EEOC v. Watkins Motor Lines, Inc.**, 463 F.3d 436 (6th Cir. 2006); **Andrews v. Ohio**, 104 F.3d 803 (6th Cir. 1997); **Francis v. City of Meriden**, 129 F.3d 281 (2nd Cir. 1997); **Cook v. R.I. Dep’t of Mental Health**,

Retardation & Hosps., 10 F.3d 17 (1st Cir. 1993). No uniform approach emerges from these cases.

In ***Andrews*** and ***Watkins***, the Sixth Circuit held that weight outside the normal range is an ADA impairment only if it has an underlying physiological cause. ***Andrews*** 104 F.3d at 809-10; ***Watkins***, 463 F.3d at 442-43. In facts substantially similar to those in ***Andrews***, the Second Circuit held that while disciplining an employee for “failing to meet a general weight standard” does not violate the ADA, “a cause of action may lie against an employer who discriminates against an employee on the basis of the perception that the employee is morbidly obese ... *or* suffers from a weight condition that is the symptom of a physiological disorder.” ***Francis***, 129 F.3d at 285-86 (emphasis added). And in ***Cook***, the First Circuit affirmed a plaintiff’s verdict where plaintiff presented expert testimony that morbid obesity is a physiological disorder affecting one or more body systems, without rendering a holding on the interpretation of impairment. 10 F.3d at 23-25.

In short, these cases are not nearly as helpful to BNSF as it suggests. BR 17-20. But the ADAAA renders these cases inapposite in any event.

The purpose of the 2008 ADA amendments was to correct the federal courts whose decisions “narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect.” ADAAA, Pub. L. No. 110-325, § 2(a)(4)-(5), 112 Stat. 3553 (2008). Consistent with the ADAAA’s express purpose “to make it easier for people with disabilities to obtain protection under the ADA,” Congress directed the courts to broadly construe the term “disability” to provide “expansive coverage to the maximum extent permitted by the terms of the ADA.” 29 C.F.R. § 1630.1(c)(4). The point: whether an individual’s impairment is a disability under the ADA “should not demand extensive analysis.” ADAAA, Pub. L. No. 110-325 at §2(a)(5); 29 C.F.R. § 1630.1(c)(4).

BNSF argues that since Congress amended the definition of disability, but not impairment, pre-ADAAA cases determining whether an impairment exists still apply. BR 31-34. But whether an ADA (or WLAD) plaintiff has a disability turns on whether he has an impairment. 29 C.F.R. § 1630.1(c)(4); RCW 49.60.040(7)(c)(1). Thus, courts cannot follow Congress’ mandate to broadly construe the term “disability” to provide “expansive coverage,” while simultaneously narrowly construing “impairment” to limit coverage.

29 C.F.R. § 1630.1(c)(4). Doing so is an end run around Congress' express directive. Thus, pre-ADAAA cases are inapposite.

The only post-ADAAA Circuit case BNSF relies on is inconsistent with the broad coverage the WLAD provides. BR 18 (citing **Morriss v. BNSF**, 817 F.3d 1104, 1108 (8th Cir. 2016)). The Legislature amended the WLAD to define impairment against the backdrop of significant concerns that the federal courts were too narrowly interpreting the ADA to deny coverage for obvious and debilitating conditions. BA App. C at 13. This definition must be interpreted in the context of the WLAD's purpose and this Court's history – to eliminate workplace discrimination, and to that end, to depart from the federal law and provide greater coverage where necessary.

Morriss does the opposite, requiring not only that obesity be physiological, but that it have a physiological cause. **Morriss**, 817 F.3d at 1112; see also **Watkins Motor Lines**, 463 F.3d at 442-43; **Francis**, 129 F.3d at 286. Simply stated, nothing in the WLAD suggests that a plaintiff must prove a condition's physiologically caused to gain WLAD protection. And **Morriss** simply cannot be reconciled with the fact that obesity is a disease in its own right.

This Court should reject **Morriss** and its pre-ADAAA predecessors as plainly at odds with the WLAD's goals.

CONCLUSION

Obesity, a disease in its own right, is a health condition affecting numerous body systems. Nothing more is required for WLAD protection. This Court should hold that obesity is a WLAD impairment.

RESPECTFULLY SUBMITTED this 21st day of December 2018.

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December 21, 2018 - 11:59 AM

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Filed with Court: Supreme Court
Appellate Court Case Number: 96335-5
Appellate Court Case Title: Casey Taylor, et al. v. Burlington Northern Railroad Holdings, Inc., et al.

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