Nos. 17-3508 & 18-2199

Appeal to the United States Court of Appeals for the Seventh Circuit

MARK RICHARDSON,
Plaintiff-Appellant,

v.

CHICAGO TRANSIT AUTHORITY,
Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Illinois – Eastern Division
Case No. 16-cv-3027
The Honorable Judge John Robert Blakey

BRIEF OF AMICUS CURIAE, ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL ON BEHALF OF DEFENDANT-APPELLEE, CHICAGO TRANSIT AUTHORITY, AND SUPPORTING AFFIRMANCE

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Illinois Association of Defense Trial Counsel (IADTC) is made up of Illinois attorneys who devote a substantial portion of their practice to the representation of business, corporate, insurance, professional, governmental, and other individual defendants in civil litigation. This includes the representation of companies in employment litigation and counseling. For over 50 years it has been the mission of the IADTC to ensure civil justice with integrity, civility, and professional competence. One of IADTC's core missions is to take positions on issues of significance to the defense bar.

The IADTC has a substantial interest in advocacy for its members' clients, which include a wide variety of corporations and other entities subject to the Americans with Disabilities Act (ADA). The precedent followed by the trial court is jeopardized by the arguments set forth in support of the appellant, while simultaneously failing to consider the untenable impact on employers throughout the state (and beyond, should other jurisdictions follow suit). Moreover, the trial court's decision in this case directly affects the interests of IADTC members who are called upon to assist companies in preventing claims under the ADA by creating policies, training employees, and counseling through the interactive process, as well as defending companies and their employees against claims once they are filed.

The IADTC submits that the decision of the district court in this case properly refused to expand the physical characteristic of obesity to constitute an impairment under the ADA and properly found that the Chicago Transit Authority did not regard Plaintiff-Appellant as disabled because obesity, in the absence of an underlying physiological cause, is not a disability. It is the IADTC's position that finding obesity to automatically constitute an ADA impairment would be impractical and likely impossible for employers to manage and would cause an unconscionable result for businesses. There is no clear-cut and agreed-upon medical definition of "obesity" or diagnosis that can be gleaned merely from a combination of two physical characteristics (height and weight). Such a holding would place a severe burden on employers in multiple ways, including vastly increasing the number of "impaired" and "disabled" employees in all companies, overwhelming employers engaging in the "interactive process" with obese employees, requiring burdensome and costly accommodations, and causing increased claims of discrimination by employees, to name a few of the burdens.

IADTC submits that its proposed brief will assist this Court in understanding the trial court's decision by providing a unique perspective and arguments on the issues raised in this case, none of which were addressed by Appellant or his Amici.

No counsel representing any party to the case authored the brief in whole or in part, nor did a party, a party's counsel, or any other person other than the amicus curiae contribute money intended to fund the preparation of this brief.

ARGUMENT

I. The Court Must First Consider Whether a Universally Accepted Definition of "Obesity" Exists Before Considering Whether "Obesity" is an ADA "Impairment."

A. Introduction

A "disability" is a physical or mental impairment that substantially limits one or more of the major life activities of an individual. 29 C.F.R. § 1630.2. A "physical or mental impairment" is a "physiological disorder or condition" affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory, cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin and endocrine. 29 C.F.R. 1630.2(h)(1). The final regulations to the ADAAA include in the definition of "major life activities" the very same conditions identified as affected "body systems" under the definition of physical impairments, i.e. neurological, musculoskeletal, cardiovascular, etc. 29 C.F.R. 1630.2(i)(1)(ii). Because the ADAAA recognizes major bodily functions as major life activities, it has become much easier for individuals with certain types of impairments to show they also have a disability. Appellant and his Amici (The Obesity Action Coalition and AARP) essentially ask this court to hold that an individual who is "obese" necessarily has a physiological disorder or condition that affects one or more

body systems, without any need for any medical evidence to support that conclusion. Appellant also would have this court find that if an individual with a particular height to weight ratio crosses an arguably arbitrary threshold, the person is, without further question, susceptible to being "regarded as" disabled as if they are in fact suffering from a limitation of one or more major life activities. Thus, Appellant is advocating for the elimination of the first step in analyzing whether an employee has a disability, which is determining if the employee has an impairment affecting one or more body systems. After that, an employee would be most of the way towards being defined as disabled simply by being overweight, and all of the way towards being able to be "regarded as" disabled.

In order for the Court to consider these issues, it must first accept a definition of "obesity," which as explained below, is not something upon which there is medical agreement, much less an accepted definition that a court or lay employers can use. One's height and one's weight are two discrete physical characteristics, which standing alone shed no light on an individual's abilities or limitations. Appellant and his Amici ask this Court to hold otherwise. This brief will not address the question of whether it is a personal choice for someone to become obese (particularly those who do not have an underlying medical cause for the obesity). Likewise, this brief does not address the issue of whether this individual Appellant had a disability in the form of some other medical

condition, or whether he was regarded as disabled.[1] Rather, this brief seeks to educate the Court on public policy considerations as seen from the perspective of employers in terms of the real-life impact on businesses throughout the country if the Court were to find that obesity is automatically an ADA impairment. Neither Appellant's brief nor the Amici briefs filed in support of Appellant in any way consider the potential impact on businesses, or the actual application of the ADA in the workplace. The IADTC offers this brief to fill that gap.

The IADTC does not dispute that a person whose obesity is caused by an underlying medical or physiological condition would likely be considered to have a disability. Likewise, IADTC does not dispute that if an employee has a specifically defined medical condition caused by obesity, such as hypertension or diabetes, and the medical condition itself causes an individual to be substantially limited in performing a major life activity, then that particular condition may meet the definition of "disability" regardless of the obesity being the cause. What IADTC is disputing is that a nearly 200 year old mathematical formula, originally created for economic purposes rather than to diagnose a specific medical condition, can or should be used to mechanically define an employee as impaired or allow an employee to be regarded as "disabled" under the ADA without requiring any further medical information or diagnosis.

[1] Appellant does not claim he was discriminated on the basis of any other medical condition. IADTC will also not refer to the mental impairment component of the ADA, as it is not at issue in the present appeal.

B. Origins and Flaws of BMI

The origins of the BMI (Body Mass Index) scale are almost 200 years old and had nothing to do with the study of obesity. In the 1830s, Belgian astronomer, mathematician, statistician and sociologist Adolphe Quetelet was interested in defining the characteristics of the "normal man" that fit into the bell-shaped curves with which he was obsessed. To that end, he devised a ratio of weight over height squared (W/H^2). Eknoyan G; *Adolphe Quetelet (1796–1874) – The Average Man and Indices of Obesity*, *Nephrology Dialysis Transplantation*, Volume 23, Issue 1, Pages 47–51 (January 2008), https://doi.org/10.1093/ndt/gfm517.

Almost 150 years later, in 1972, BMI would first enter the lexicon when physiology professor Ancel Keys published his "Indices of Relative Weight and Obesity." Keys A, Fidanza F, Karvonen MJ, Kimura N, Taylor HL, *Indices of Relative Weight and Obesity*, Journal of Chronic Diseases. Vol 25 (6), Pages 329–343 (July 1972) reprinted with permission in, *International Journal of Epidemiology*, Volume 43, Issue 3, Pages 655–665, 656 (June 2014) https://doi.org/10.1093/ije/dyu058. Keys examined which of the height-weight formulas matched up best to the subject's body-fat percentage and found that the best predictor was Quetelet's weight divided by height squared.[2] Keys renamed this number the Body Mass Index.

[2] While Keys would adopt Quetelet's formula for his BMI, he admitted that Quetelet did not actually advocate the ratio as the general measure of 'build' or of obesity. Quetelet simply noted that in young adults weight divided by height

When Keys adopted the BMI, he was interested in generally determining a preferable index for measuring the average relative obesity of "all populations at all times." However, Keys rejected the idea that BMI should be used for diagnosing and labeling individuals because it ignored variables such as a patient's gender or age, which affect how BMI relates to health. *See*, *e.g.*, Keys at 664.

Subsequent studies have validated Keys' concern about using BMI to diagnose individuals. BMI can be useful for measuring the obesity of large groups of adults. However, since BMI does not adequately distinguish fat from muscle and bone and does not account for age, gender, ethnicity and physical fitness it is an unreliable indicator for the body composition of an individual. Lukaski H, *Commentary: Body Mass Index Persists as a Sensible Beginning to Comprehensive Risk Assessment*, International Journal of Epidemiology, Volume 43, Issue 3, Pages 669–671 (June 2014), https://doi.org/10.1093/ije/dyu059.

C. Defining "Obesity" for Purposes of ADA Analysis Requires No Medical Information and Diagnosis Can be Performed by Anyone with a Calculator.

Despite the obvious shortcomings of the BMI scale in defining the health of an individual, as acknowledged by Appellant in his brief (pp. 6 and 23), the only current definition of "obesity" the courts and legislature have to rely upon is based on BMI. Defining "obesity" more accurately requires medical analysis far

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squared (W/H^2) was more stable than W/H^3 or W/H with increasing height. Keys at 663.

beyond the capabilities of the courts, legislature, or employers. The Obesity Action Coalition and joining entities (collectively "OAC"), in its amicus brief proposes that obesity "is not merely a physical descriptor, a lifestyle choice, or a risk factor for other diseases – *it is a disease in and of itself.*"[Emphasis added] (OAC Brief, p. 15). It then lists out in great detail all of the significant physical effects on the body's cardiovascular, musculoskeletal, lymphatic, and endocrine systems that can occur in obese individuals (OAC Brief, pp. 23-24). Thus, OAC concludes that all obese people suffer from ADA impairments, with no further analysis (OAC Brief, pp. 22-24).

AARP, in its Amicus Curiae brief, cites to a Mayo Clinic article found at: https://www.mayoclinic.org/diseases-conditions/obesity/symptoms-causes/syc-20375742 for the definition of "obesity," though it has not fully or accurately quoted the article by suggesting the article states obesity is "usually" diagnosed when body mass index is 30 or higher (AARP Brief, p. 9). In fact, the article does not contain the word "usually" and instead simply states "Obesity is diagnosed when your body mass index (BMI) is 30 or higher." The article further states that "BMI is a reasonable estimate of body fat. However, BMI doesn't directly measure body fat, so some people, such as muscular athletes, may have a BMI in the obese category even though they don't have excess body fat. Ask your doctor if your BMI is a problem." Thus, Mayo Clinic recognizes that defining "obesity" and determining whether it is a problem (e.g. causes an impairment of

a bodily function or major life activity) is not as simple as the mathematical formula that an employer would be expected to use.

Although OAC's brief recognizes that BMI is used for "initial screening" for obesity, it further recognizes that for the purpose of defining employees as obese, significant additional testing would be available, but seemingly only where "misclassification is presumed" (OAC Brief, p. 12). OAC also admits that "misclassification is somewhat common" (OAC Brief, p. 12). In other words, unless there is a question of misclassification, such as a very muscular person with low fat mass or a "frail person with decreased lean mass (muscle, bone)" but elevated fat mass, there would be no need to look beyond the BMI formula to define obesity.

IADTC does not presume to second guess medical experts on matters within their expertise. It is merely pointing out that even OAC and AARP, who have held themselves out in their Amicus briefs as authorities on the subject, concede that there is no universally accepted definition of "obese," and there is no overall agreement that all individuals with a BMI of 30 or more have actual impairments of their body systems or substantial limitations on their major life activities. Despite what Appellant and his Amici surmise, no one single or simple medical diagnosis can be gleaned merely from one's height and weight. Yet, they still ask the Court to find that all obese individuals have ADA impairments, with the desire to find that obese individuals are either disabled or can be "regarded as" disabled under the ADA.

Congress expressed its intent "that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis," ADA AMENDMENTS ACT OF 2008, 110 P.L. 325, 122 Stat. 3553, 3554, Sec. 2(b)(5)). Arguably, however, the only way a Court could define obesity for employment purposes that would not require "extensive analysis" is through use of BMI. A more definitive and accurate definition would require comprehensive medical testing and individualized evaluation. AARP points out that persons with obesity are "especially likely" to have health problems related to their weight (AARP Brief, p. 9). AARP, along with Appellant and OAC, also argue that a mere perception of impairment, as long as the impairment is projected to last six months or more, is sufficient to support a "regarded as" claim (AARP Brief, p. 9; Appellant Brief, p. 25; OAC Brief, pp. 14-15). With these points in mind, finding obesity to be an ADA impairment, in Appellant's analysis, would also likely mean that it would be found to be an ADA disability (either as an actual disability or by being regarded as disabled), such that all nominally "obese" individuals would be afforded the full protections of the ADA. Therefore, what Appellant and Amici are asking the court to do is to rely on a mathematical equation based on two physical characteristics to determine whether a particular person is disabled or can be regarded as disabled as a matter of law. The Court should decline this over-inclusive and unsound definition of "obese."

Further complicating the issue, Appellant wavers back and forth in his brief between the concepts of "obesity," "extreme obesity" and other variations of obesity. Tellingly, he never makes it clear on which definition he is seeking to base the determination of an automatic finding of "impairment" under the ADA. In Section III.A. of his brief (Appellant Brief, pp. 17-18), Appellant provides a grammatical analysis in his attempt to read the EEOC's Interpretive Guidance on the concept of weight being a physical characteristic in a way that asks the Court to find that an employee suffers an impairment if his weight is not within the "normal" range, which would be a BMI over 25,[3] which as described below in Section II.A. of this brief, would define nearly three-quarters of the American population as having an ADA impairment. This analysis is then inconsistent with Appellant's reference to EEOC determinations that refer to "extreme obesity" and "severe obesity" in Section III.B. (Appellant Brief, pp. 19-20), and to the lower court cases he cited from other jurisdictions referring to "severe" or "morbid" obesity, found in Section III.C. (Appellant Brief, pp. 21-22). In fact, it is impossible to determine exactly what Appellant is asking the Court to find in terms of being obese and therefore impaired. A BMI of more than 25 (i.e. above "normal"), or 30 or more (i.e. "obese")? A weight double a person's "normal" weight? Triple? Does the obesity need to be "extreme," "morbid," or "severe," to

[3] On the BMI scale, a BMI of 18.5 to 24.9 is considered a "normal" weight, 25.0-29.9 is considered "overweight," and 30 and over is considered "obese" in varying categories. https://academic.oup.com/ije/article/43/3/669/2949548

constitute an ADA impairment and/or disability, and what are the exact medical definitions of those terms?[4]

Thus, one obvious problem with using a physical characteristic such as weight as part of a mathematical formula to define a physical impairment and therefore, according to Appellant and his Amici, a disability (either having an actual disability or being "regarded as" disabled), without any further specific medical information as to that individual, is that there is no entirely accurate or agreed upon formula that can or should be applied in all cases. There is no universally accepted definition of "obese" like there is for cancer, hypertension, and Parkinson's disease, and not all obese individuals suffer any physical impairments. Appellant's continual mixing of the terms throughout his brief reveals that struggle and indeed, demonstrates the difficulty employers will have understanding their obligations. Diabetes, hypertension, deafness and blindness, cancer, and Multiple Sclerosis, as examples, all have definitions and criteria generally accepted in the medical community. If an employee is diagnosed with one of these conditions, he has an impairment of one or more body systems, and will likely be considered substantially limited in one or more major life activities and therefore, be disabled under the ADA. But what a "normal" weight is

[4] IADTC also notes that obesity can be a transient condition. People of a "normal" weight relative to their height can become obese simply by gaining some weight. Likewise, people who have a BMI of 30 or more (with or without some of the commonly associated medical conditions) can lose weight and no longer be considered "obese," but may or may not still have some of those associated medical conditions.

compared to "above normal," "overweight," "obese," "morbidly obese," "severely obese," or "extremely obese," is not specifically defined in the same way, and does not affect everyone in the same way. Therefore, those distinct terms should not be treated the same as other actual medical conditions. Moreover, those ailments are diagnosed by medical professionals, while obesity defined by the BMI scale can be calculated by anyone with grade school level math skills instead of medical expertise.

Appellant and his Amici ask this Court to apparently use its own judgment to come up with an accepted definition of a medical condition, despite chastising the trial court for having done just that (AARP Brief, pp. 10-11). AARP argues that the trial court inappropriately rendered its own expert "medical judgment" when it held that extreme obesity is not an impairment under the ADA. It then criticized the trial court for faulting Appellant for not presenting his own expert testimony demonstrating impairment, something AARP argues is not required post-ADAAA (AARP Brief, pp. 10-11). Yet, these two arguments side-by-side show exactly the struggle employers would face from such a simplistic holding that someone whose BMI exceeds some arbitrary number is obese and thus physically impaired and therefore, disabled, which requires no "medical judgment" at all. If it is not for a court to determine whether a particular condition is a physical impairment, and if an employee is not required to demonstrate that he has an actual impairment outside the combination of his height and weight, then the only party left in the equation is the employer, who

would then be forced to proceed with the employee under the irrebuttable presumption that there exists an actual impairment (even when there may not be one). It should never be the role of an employer to have to determine if there exists a physical impairment, but this is what would be required should the Court conclude that obesity, in and of itself, is an impairment.

Concluding that someone who has a BMI of 30 or more is physically impaired, which is what Appellant and his Amici are requesting, is arguably no different than concluding that a person who is fair skinned with light colored eyes and hair (all physical characteristics) is also impaired as a matter of law because he might develop skin cancer. Although there may be a greater risk for the skin cancer in those with the physical characteristics of being fair skinned with light eyes and hair than in someone with black or brown skin, not all fair-skinned individuals will develop skin cancer. Likewise, not all people with a BMI of 30 or more have impairments of their body systems or substantial limitations of major life activities. Appellant and his Amici discuss various medical conditions that may be caused by obesity; however, they have not presented any evidence to support the concept that all obese people do, in fact, suffer from at least some medical conditions that would be considered to be impairments under the ADA.

Every human is different, eats different foods, engages in differing amounts of physical activity, and has differing family genetics. Some who are obese will be healthy, and some will not. Many who are of a "normal" or "ideal" weight

will have the very same conditions often found in obese individuals such as diabetes, high blood pressure, or sleep apnea. Just as one cannot conclude that all people of a "normal" weight will be healthy, unimpaired, and non-disabled, the Court should not also conclude that those who are "obese" always experience substantial impairments of their bodily functions or limitations on major life activities as compared to most people in the general population, which is inherent in the definition of "disabled" under the ADA, and is precisely what Appellant and his Amici are asking the Court to do. Although higher BMI may be associated with a higher health risk, it is just that, a risk. It is neither a fact nor is it destiny. The same EEOC Interpretive Guidance upon which Appellant and his Amici rely specifically states: "The definition [of "impairment"], likewise, does not include characteristic predisposition to illness or disease." 29 CFR 1630.2(h). Taken to its next logical step, the definition Appellant and his Amici are pushing for would mean that a high proportion of NFL football players (and many other elite athletes) are obese and therefore physically impaired. OAC even recognizes that "[n]ot everyone who appears to have excess weight has the disease of obesity" (OAC Brief, p. 26). Yet, if the Court defines obesity as an impairment without an underlying physiological cause or a specific physical impairment identified, this is precisely what employers will be required to determine.

Therefore, IADTC urges the Court to conclude that obesity without a physiological cause is not an ADA impairment, and therefore does not, on its

own, afford protection as an ADA disability. Instead, one who is obese, no matter what definition is being used, must be required to go through the same processes and procedures as those with other medical conditions to reasonably allow an employer to make a determination if they suffer from a disability under the ADA, by presenting medical evidence (if requested) of the specific impairment(s) involved and the resulting functional limitations, rather than just being defined as having a physical impairment based on math.

Under the ADA, an employer is permitted to ask an individual for documentation from a licensed medical provider when the individual requests an accommodation. 29 C.F.R. Pt. 1630, App. § 1630.9; EEOC Enforcement Guidance No. 915.002, 7/27/00, "*Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA.*" That requested information would include confirmation that the employee does, in fact, have an impairment, and then be used to assist the employer in understanding the nature of the disability, the functional limitations caused by the disability, and the types of accommodations that may be needed. Defining an impairment based on nothing more than height and weight deprives an employer of the ability to request that a licensed medical provider supply the employer with information confirming the existence of an actual physical impairment. All an employee would seemingly have to do is inform an employer that he has a BMI of 30 or more, which defines the employee as "obese" and therefore impaired under the

ADA, and thus ends the ability of the employer to ask for medical documentation to confirm a physical impairment.

II. Consideration of the Number of Potential Employees at Issue Shows that Congress Never Intended the ADA to Provide Automatic Protection for Obese Individuals.

A. The Number of Overweight or Obese Employees is Likely to Overburden Employers and Lead to Unintended Mistakes.

If the Court accepts Appellant and his Amici's argument and overturns the district court's ruling, the sheer number of employees who would suddenly be considered physically impaired and therefore potentially disabled under Appellant's argument, would vastly increase overnight. The increase in impaired employees is likely to place such a burden on employers that mistakes would be inevitable, which would also increase claims under the ADA.

According to a study in the Journal of the American Medical Association (JAMA), in 2008, the obesity rate among adult Americans was estimated at 32.2% for men and 35.5% for women. Flegal KM, Carroll MD, Ogden CL, Curtin LR, *Prevalence and Trends in Obesity Among US Adults, 1999-2008,* JAMA 303(3): 235 (January 20, 2010), https://jamanetwork.com/journals/jama/fullarticle/185235. These results were confirmed by a National Center for Health Statistics (NCHS) study at the CDC in 2010. *Prevalence of Overweight, Obesity, and Extreme Obesity Among Adults: United States, Trends 1960–1962 Through 2007–2008* (June 2010), https://www.cdc.gov/nchs/data/hestat/obesity_adult_07_08/obesity_adult_07_08.pdf. In 2014, a NCHS/CDC study showed that more than one-third (36.5%)

of U.S. adults (those 20 and older) were obese. CDC NCHS Data Brief, No. 219, *Prevalence of Obesity Among Adults and Youth: United States, 2011–2014* (November 2015), https://www.cdc.gov/nchs/data/databriefs/db219.pdf. A NCHS/CDW follow-up to that study showed this number to be 39.6% (37.9% for men and 41.1% for women) as of 2015-16. CDC NCHS Data Brief, No. 288, *Prevalence of Obesity Among Adults and Youth: United States, 2015–2016* (October 2017), https://www.cdc.gov/nchs/data/databriefs/db288.pdf. This brief will reference the rough statistic of one-third; however, this number is clearly increasing year to year and could even be 40% currently. Moreover, certain professions have even higher rates of obesity, particularly sedentary jobs.[5] Further, for the purpose of arguments made above responding to Appellant's attempt to define a weight-based disability under the ADA as "weight outside the normal range – no matter how far outside that range," (Appellant Br. p. 18) it must also be noted that statistically, a NCHS/CDC study showed that just over 70% of US adults have a BMI over 25.0. *Prevalence of Overweight, Obesity, and Extreme Obesity Among Adults Aged 20 and Over: United States, 1960–1962 Through 2013–2014* (July 2016), https://www.cdc.gov/nchs/data/hestat/obesity_adult_13_14/obesity_adult_1

[5] For instance, in the trucking industry, it is estimated that 86 percent of the estimated 3.2 million truck drivers in the United States are overweight or obese. Abby Ellin, *A Hard Turn: Better Health on the Highway*, N.Y. Times, November 21, 2011 at D1, (https://www.nytimes.com/2011/11/22/health/a-hard-turn-truck-drivers-try-steering-from-bad-diets.html).

3_14.pdf. Based on these statistics, the number of "impaired" employees would simply be unmanageable for employers.

Thus, in addition to the fact that it does not make medical sense to conclude that anyone with a BMI of 30 or more in fact has a resulting medical condition that impairs one or more body function, there are many potential unworkable and unintended legal burdens on employers. It is doubtful that Congress intended to provide definitions for the ADA that would lead to more than two-thirds of the country's workforce being deemed to have ADA impairments should the Court accept Appellant's definition of impaird as anything outside the "normal" weight range (BMI 25 or above), or even one-third or more should the Court follow prior appellate court holdings defining "obese" as BMI of 30 or more.

If an impairment under the ADA is essentially defined by someone's BMI (i.e. height and weight), then the burden also seemingly falls on the employer to simply look at an employee and estimate BMI, or force the employee to divulge his height and weight, so that the employer knows if the employee might have an ADA impairment and therefore may need an accommodation. An employer is on notice of a disability if an employee's symptoms are "so obviously" manifestations of an underlying disability that it would be reasonable to infer than an employer actually knew of the disability. *Hedberg v. Indiana Bell Tel. Co. Inc.*, 47 F.3d 928, 934 (7th Cir. 1995). If obesity is an impairment in and of itself, the burden will then be on an employer to assume that an obese employee may

be in need of an accommodation, particularly if the employee is struggling in any way to perform his job. Is an employer supposed to look at an employee who "obviously" has a BMI of 30 or more and then tell the employee that it is beginning the interactive process? (Or, if Appellant's argument is accepted, this would apply to a BMI of 25 or higher because Appellant wishes to define disability based on weight merely being outside the "normal" range.)

Likewise, is an employer supposed to ask the employee to get on a scale so weight and height can be measured and BMI can be calculated? This is the direction employers would be headed if obesity, with nothing more from a medical standpoint, is defined as a physical impairment under the ADA, as Appellant and his Amici request. An automatic definition of an impairment based on an old mathematical formula rather than medical or physiological evidence will require employers to make judgments about employees and their potential need for accommodation, which is the exact opposite result that Appellant and his Amici would want to occur in terms of biases and stigmatization of obese individuals.

Even if an employer was not ultimately required to make assumptions about an employee's medical condition based on observation of height and weight and inquire further, there will be nothing stopping an employee from making that claim that he had an obvious disability and need for accommodation. Moreover, even when the burden is on the employee to start the interactive process by requesting an accommodation, all the employee would have to do is tell the

employer his BMI is 30 or more (or potentially 25 or more if considering the above "normal" standard Appellant is pushing for) and the interactive process must begin there, skipping the employer's right or ability to inquire further into the nature of the impairment. The high BMI of 30 or more itself would be the impairment of a bodily function in Appellant's estimation, which is frequently synonymous with a limitation on a major life activity, and the only part of the process left would be the employer having to consider whatever the employee asks for and determining if it is reasonable or not.

Finally, the huge influx of "disabled" employees with a new definition of impairment for obese individuals, and thus need to engage in the interactive process with them, will take away valuable time and resources available to employers to deal with and accommodate those who, without question, have disabilities. Employers could simply become overwhelmed in engaging in the interactive process. Having to treat a large portion of their workforce as having an ADA impairment will no doubt lead to mistakes being made in how employers interact with employees under the ADA.

B. Increased "Regarded As" Disabled Claims Will Occur When Defining All Obese Employees As Being Impaired.

In addition to the great burden that would be placed on employers to engage in the interactive process and provide accommodation for a large portion of their workforce, likely yielding a significant increase in claims when employers are perceived to fall short, defining "obesity" as an impairment based only on height

and weight will open the floodgates for claims of "regarded as" disabled when there is a failure to hire, or promote, or some other employment action involving an obese individual. Automatically defining obese employees as having an ADA impairment is asking for employers to regard them as disabled. In fact, this is precisely what Appellant and his Amici are arguing should happen. With the burden on employers to inquire further if they are on notice that an employee obviously needs an accommodation for a disability (which would occur when an employee's BMI is obviously 30 or greater), employees would have new bases to claim that their employer regarded them as disabled simply because they were overweight. Thus, an innocent act of attempting to comply with the law (by engaging in the interactive process when an employer has knowledge that an employee may have an impairment and need an accommodation) will likely lead to claims by employees unhappy about having been asked about their weight, or by employees who assume that an employer treated them differently because of their weight. A new found definition of being impaired based only on size will force employers to make all sorts of judgments about employees and their abilities and limitations, which is exactly what Appellant and his Amici do not want. Likewise, in situations where the employer does not make a specific inquiry, the result could also be claims by employees who argue that it was obvious that they were obese and therefore the employer should have known they may need an accommodation and should therefore have engaged in the

interactive process. Thus, employees may also try and blame their employers for not regarding them as disabled.

C. Requiring Employers to Deal With "Impaired" Employees Without Adequate Medical and Other Information Will Make the Interactive Process Unworkable.

It will be difficult and perhaps even impossible for an employer to determine how to accommodate a person's disability without any medical information or even information of what the impairment actually is. Appellant and his Amici are essentially requesting a conclusion that as long as a person's height is X and weight is Y, yielding a BMI of 30 or more, that person has an ADA impairment, regardless of whether there are any actual resulting impairments of body systems. What exactly does the interactive process look like when an employer is faced with accommodating job limitations based only on size?

The interactive process can be burdensome to employers, often requiring them to have multiple communications with employees (frequently on difficult subjects), and also allowing employers to obtain further information and documentation from medical providers. The process can be time consuming and lengthy (not to mention costly if, for instance, the employer needs to seek legal advice or uses a third-party administrator to assist); however, it is generally tolerable to employers because ultimately, employers are entitled to very specific information from employees and/or their medical providers regarding the relevant medical issues and impairments. It is also tolerable because there are a limited number of individuals in most industries that are truly disabled. To

suddenly increase the number of employees for whom the interactive process must begin to one-third (or more) of the workforce would be overly burdensome, and not seemingly intended by statute. That, coupled with the lack of information about actual impairment, and instead merely needing to presume a physical impairment based on a mathematical formula, would render the interactive process impractical and nearly impossible in many cases.

OAC's amicus brief argues that recognizing obesity as a condition that can be an ADA impairment does not mean that *all* individuals with obesity will be afforded protection by the ADA (OAC Brief, pp. 12-13 (emphasis in original)). OAC appears to be arguing that not all ADA impairments are ADA disabilities because an impairment needs to "substantially limit one or more major life activities" in order to be considered an ADA disability. However, this argument is disingenuous. Appellant himself is asking for a finding of an ADA impairment merely because he is obese (based on the BMI definition), and for a finding that this "alone" is sufficient for him to establish that he meets the definition of disabled under the ADA (Appellant Brief, p. 23). Appellant does not, however, identify any physical limitations for which he would be requesting accommodation and claims he is able to drive a bus with no issues. Thus, it would seem even Appellant does not consider himself to be "impaired" under the ADA, yet he and his Amici still ask the court to find him to be impaired and therefore disabled. He is demanding ADA protection merely because he is obese (both as to the physical nature and as to be "regarded as" disabled), which is

opposite OAC's argument that not all individuals with obesity will be afforded protection under the ADA.

Moreover, contrary to OAC's claim, all employees with an impairment are afforded protection under the ADA, not only under the "regarded as" prong, but also because an employer is required to engage in the interactive process to determine if there is a reasonable accommodation that can be provided that would allow the employee to perform the essential functions of the job. 29 C.F.R. § 1630.2 (o)(1) (West 2018). Even when the end result of the interactive process yields the conclusion that the employee is not a qualified person with a disability because there was no reasonable accommodation that would allow the employee to perform the essential functions of the job, that employee was still afforded *protection* under the ADA simply because he had an impairment. The protection was, at its minimum, the entitlement to engage in the interactive process. This is a process that would be required in all situations in which an employee has a BMI of 30 or more if the Court were to rule that obesity is an ADA impairment on its own.

Employees who happen to be obese are afforded all the same protections as any other employee who qualifies as disabled based on medical (or mental health) conditions. It is not as if the denial by the Court of an automatic finding of impairment when BMI is 30 or more changes anything for the obese employee. It simply puts them on the same footing as every other employee who claims to have an impairment of a bodily system and/or limitation of a major life activity.

D. An Increase in the Number of Employees Considered Disabled Will Also Burden Employers With Significant Cost Increases to Accommodate.

A finding that more obese employees may need to be accommodated simply because of their height to weight ratio will also lead to a much greater burden on employers in terms of the potential need to implement costly accommodations that would not necessarily be required with the current status of obesity not being, in and of itself, an ADA impairment. Merely going through the process of evaluating accommodations can be costly. The standard for proving that an accommodation would create an "undue hardship" is very high, where employers are expected to pay for accommodations unless it would practically put the company out of business. *See Vande Zande v. State of Wis. Dept. of Admin*, 44 F.3d 538, 542-5 (7th Cir. 1995) (explaining the intricacies of reasonable accommodation and undue hardships and financial factors *inter alia* under the ADA). Undue hardship generally means "significant difficulty or expense incurred by" an employer when considering factors such as the nature and cost of the accommodation when compared to the overall financial resources of the employer. 29 CFR 1630.2(p)(1) and (2). For instance, a hospital with a budget of $1.7 billion was required to pay $120,000 for an interpreter for an employee, even where there was evidence that two nurses would need to be terminated to cover the added expense. *Searls v. Johns Hopkins Hosp.*, 158 F. Supp. 3d 427 (D. Md. 2016).

These examples of accommodations have been found to be required based on the current state of the law, with obesity not automatically being defined as an impairment without medical evidence of what the impairment is (and whether there is, in fact, an impairment present). The burden on employers to provide employees with accommodations will increase with every additional employee automatically defined as being physically impaired. Will employers be required to retrofit bus seats to accommodate more weight, or move accelerator or brake pedals or door buttons around? What about stronger office furniture, machinery, ladders, and other equipment? Will an employee who drives a company car for work be entitled to a larger model to accommodate having a BMI of 30 or more? Will an employer have to buy first class or two coach plane tickets in order to accommodate an obese employee traveling for work?

All of these examples are based on nothing more than a person's physical size, rather than any actual impairment such as the ability to climb into the cab of the machinery, operate certain equipment, climb up a ladder or stairs, walk throughout a job site, or stand on one's feet. This is precisely the problem with identifying a disability based on nothing more than a person's size and possible risk of medical issues rather than looking at the actual physical and physiological problems themselves. Even if a requested accommodation is ultimately deemed to be unreasonable by a court, this will not occur before the employer is forced to expend time, money and other resources litigating the claim.

CONCLUSION

WHEREFORE, Amicus Curiae, ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL, respectfully urges this Court to affirm the District Court's order granting Defendant's motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)

The undersigned, counsel of record for the Amicus Curiae, ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL, furnishes the following in compliance with F.R.A.P. Rule 32(a)(7)(c):

I hereby certify that this brief conforms to the rules contained in F.R.A.P. Rule 32(a)(7)(c) for a brief produced with a proportionally spaced font. The length of this brief is 6,956 words.

Dated: December 28, 2018

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PROOF OF SERVICE

Kimberly A. Ross, one of the attorneys for the Amicus Curiae, ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL, under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. Counsel certifies that on December 28, 2018, the foregoing Amicus Curiae Brief was electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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