

ADA Not Violated By Refusal To Hire Due To Risk Of Future Disability

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On October 29, 2019, the Seventh Circuit Court of Appeals held in *Shell v. Burlington Northern Santa Fe Railway Company* that the Americans with Disabilities Act's (ADA) definition of "disability" is not met "where an employer regards an applicant as not presently having a disability but at high risk of developing one."

Ronald Shell (Shell) applied for a position with Burlington Northern Santa Fe Railway Company (BNSF) that required the operation of heavy equipment, which BNSF considers a "safety-sensitive" position. After extending Shell a conditional offer of employment, BNSF refused to hire Shell after a medical evaluation indicated that his body-mass index (BMI) exceeded 40.

BNSF does not hire applicants with a BMI of 40 or greater – *i.e.*, class III obesity – for safety-sensitive positions, reasoning that persons with class III obesity have a higher risk of developing certain conditions that can result in sudden incapacitation, like sleep apnea, diabetes, and heart disease.

Shell challenged BNSF's refusal to hire him under the ADA, alleging that BNSF discriminated against him because of a perceived disability. The issue that reached the Seventh Circuit was "whether the ADA's 'regarded as' prong covers a situation where an employer views an applicant as at risk for developing a qualifying impairment in the future."

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The Seventh Circuit answered that question in the negative because the ADA's "regarded as" prong defines disability as "being regarded as having [a physical or mental] impairment." The Court determined that "[h]aving' means presently and continuously. It does not include something in the past that has ended or something that is yet to come."

While the medical conditions that BNSF feared Shell would develop – sleep apnea, diabetes, and heart disease – qualify as impairments under the ADA, because Shell did not presently have those impairments and BNSF did not perceive him to presently have those impairments, the ADA did not apply.

In short, if an employer in the Seventh Circuit (Illinois, Wisconsin, and Indiana) perceives a prospective employee to be presently healthy, with only a potential to become ill or disabled in the future, the employer may refuse the applicant based on the perceived risk of future ADA-qualifying impairments. Employers should keep in mind, however, that obesity itself may still qualify as an impairment under the ADA if the obesity is caused by an underlying physiological disorder or condition.