

## WHAT DISABILITIES DOES THE ADA COVER?

*By: Melissa M. Tetreau, Associate, Workplace Law Practice*

To answer the title's question, the ADA covers only **current** disabilities – at least according to the Seventh Circuit (covering Illinois, Indiana, and Wisconsin). To many of us, this seems like the obvious answer. However, Ronald Shell, an applicant for employment at Burlington Northern Santa Fe Railway Company (BNSF), thought otherwise.

Shell applied to work as an intermodal equipment operator with BSNF, where he would operate cranes and work around other heavy equipment. Due to these job responsibilities, BNSF classifies this position as "safety sensitive." BNSF requires all applicants to safety sensitive positions to undergo a medical examination after receiving a conditional offer of employment.

Shell was treated no differently. After BNSF extending him a conditional offer of employment, it sent him for a medical examination. The examination revealed that Shell, who is 5'10" and 331 pounds, had a BMI of 47.5.

Why does this matter? BNSF had a policy of not hiring applicants for safety sensitive positions who had a BMI of 40 or higher. Its reasoning was that individuals with a BMI of 40 or higher are at a substantially higher risk of developing certain medical conditions, such as sleep apnea, heart disease, and diabetes. BNSF believed that a safety sensitive employee with a BMI of 40+ could experience a health issue and lose consciousness at any moment, including while operating heavy machinery. In other words, they were concerned about a future sudden onset of a condition that could pose a safety risk.

As a result of Shell's BMI, BNSF rescinded its offer. Unsurprisingly, Shell sued for discrimination on the basis of a perceived disability under the ADA. Individuals who have no disability but who are perceived to be disabled are also protected by the ADA. BNSF's attempts to have the perceived disability claim dismissed before trial were denied. While the trial court agreed that Shell's current obesity was not a disability under the ADA, it permitted a trial on the issue of whether BNSF regarded Shell as having allegedly obesity-related disabilities (e.g. sleep apnea, heart disease, and diabetes). BSNF appealed.

The Seventh Circuit Court of Appeals reversed the judgment because BSNF did not regard Shell as having an "actual or perceived disability." The Court noted that the ADA protects those who are "being regarded as having [a physical or mental] impairment" 42 U.S.C. 12102(1)(C). The Court emphasized the statutory requirement of *having*. A disability "does not include something in the past that has ended or something yet to come."<sup>1</sup> Although this case is not binding on any courts in Michigan, the decision is in line with other courts who have addressed the issue.

<sup>1</sup>*Shell v. Burlington Northern Santa Fe Railway Company*, No. 19-1030 (CA 7, Oct. 29, 2019).



ABOUT THE AUTHOR  
**MELISSA M. TETREAU**

*Melissa M. Tetreau counsels employers on compliance with state and federal labor and employment laws, represents them in connection with employment disputes, and assists employers and individuals in connection with immigration matters.*

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GROUP**

<b>AARON D. GRAVES</b>   <i>Chair</i> 313.392.1075 agraves@bodmanlaw.com	<b>JOHN T. BELOW</b> 248-743-6035 jbelow@bodmanlaw.com	<b>JOHN C. CASHEN</b> 248.743.6077 jcashen@bodmanlaw.com
<b>GARY S. FEALK</b> 248-743-6060 gfealk@bodmanlaw.com	<b>STEVEN J. FISHMAN</b> 248.743.6070 sfishman@bodmanlaw.com	<b>JOHN DAVID GARDINER</b> 616.205.3123 jgardiner@bodmanlaw.com
<b>DONALD H. SCHARG</b> 248.743.6024 dscharg@bodmanlaw.com	<b>BRENT R. SCOTT</b> 616.205.3317 bscott@bodmanlaw.com	<b>REBECCA C. SEGUIN-SKRABUCHA</b> 313.393.7594 rseguin-skrabucha@bodmanlaw.com
<b>MELISSA M. TETREAU</b> 248.743.6078 mtetreau@bodmanlaw.com	<b>DAVID B. WALTERS</b> 248.743.6052 dwalters@bodmanlaw.com	<b>KAREN L. PIPER</b>   <i>Of Counsel</i> 248.743.6025 kpiiper@bodmanlaw.com