UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

Equal Employment Opportunity Commission,

Plaintiff,

v. **Case No. 3:02-cv-505**
Judge Thomas M. Rose

Watkins Motor Lines, Inc.,

Defendant.

ENTRY AND ORDER GRANTING OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION OF DENIAL OF SUMMARY JUDGMENT (DOC. 70)**, AND GRANTING DEFENDANT WATKINS MOTOR LINES MOTION FOR SUMMARY JUDGMENT,** (DOC. 35)**, AND TERMINATING CASE.**

Pending before the Court is a document entitled Defendant's Objections to Magistrate's Report and Recommendation of Denial of Summary Judgment. Doc. 70. Therein, Watkins Motor Lines, Incorporated requests that the Court reject a magistrate judge's report and recommendation and enter judgment in favor of Watkins Motor Lines. Because the Court believes that obesity, and especially non-physiologically caused obesity, is not an "impairment" covered by the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101, *et seq.*, and because, even if obesity is an impairment under the ADA, the Equal Employment Opportunity Commission has submitted evidence that there is a host of jobs types that Watkins regarded Stephen Grindle capable of performing, summary judgment in favor of Watkins Motor Lines is proper.

I. Factual Background

The Report and Recommendation ably describes the facts surrounding the medical leave necessitated by the injury to the approximately 450-pound Stephen Ginrdle when he fell from a ladder while working as a truck driver *cum* dock worker for Watkins Motor Lines; the difficulties Grindle encountered attempting to get medical clearance to return to work; and his ultimate dismissal from Watkins Motor Lines after Watkins determined that Grindle had failed to obtain a medical release to perform his job with Watkins within 180 days. The Court hereby adopts the Magistrate's description of the factual background of this case, except in so far as it conflates the various types of obesity and to the extent the analysis that follows contradicts it.

The events described by the magistrate led Grindle to register a complaint with the EEOC and the EEOC to file an action in the United States District Court on October 30, 2002, claiming Watkins had violated the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101, *et seq.* Doc. 1. On February 9, 2004, Watkins moved for summary judgment. Doc. 35. The magistrate to whom this action had been referred recommended denying the motion on June 15, 2004, doc. 64, a recommendation to which Watkins objected on July 2, 2004. Doc. 70.

II. Analysis

A. Standard of Review

This court reviews *de novo* those portions of the Report and Recommendation to which objections are made. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The court may accept, reject, or modify any or all of the magistrate judge's findings or recommendations. *Id.*

B. Summary Judgment Standards Analysis

The standard of review applicable to motions for summary judgment is established by Federal Rule of Civil Procedure 56 and associated case law. Rule 56 provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. 56(c). Alternatively, summary judgment is denied "[i]f there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Hancock v. Dodson*, 958 F.2d 1367, 1374 (6th Cir. 1992) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505 (1986)). Thus, summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548 (1986).

The party seeking summary judgment has the initial burden of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, admissions and affidavits which it believes demonstrate the absence of a genuine issue of material fact. *Id.*, at 323. The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S., at 250, 106 S. Ct. 2505 (quoting Fed. R. Civ. 56(e)).

Once the burden of production has shifted, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is not sufficient to "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348 (1986). Rule 56 "requires the nonmoving

party to go beyond the pleadings" and present some type of evidentiary material in support of its position. *Celotex Corp.*, 477 U.S., at 324, 106 S. Ct. 2548.

In determining whether a genuine issue of material fact exists, a court must assume as true the evidence of the nonmoving party and draw all reasonable inferences in the favor of that party. *Anderson*, 477 U.S., at 255, 106 S. Ct. 2505. If the parties present conflicting evidence, a court may not decide which evidence to believe by determining which parties' affiants are more credible. 10A Wright & Miller, *Federal Practice and Procedure*, § 2726. Rather, credibility determinations must be left to the fact-finder. *Id.*

Finally, in ruling on a motion for summary judgment, "[a] district court is not…obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim." *InterRoyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989). Thus, in determining whether a genuine issue of material fact exists on a particular issue, the court is entitled to rely upon the Rule 56 evidence specifically called to its attention by the parties. The analysis now turns to the merits of Defendants' motions for summary judgment.

C. Americans with Disabilities Act

As a general rule, the ADA prohibits employment discrimination against individuals who are disabled as defined by the statute. See 42 U.S.C. § 12112(a). The ADA also protects those "regarded as" suffering from a disability. See 42 U.S.C. § 12102(2)(C). While the Supreme Court has stated that success under the "regarded as" disabled theory of liability requires proof that "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities." *Sutton*, 527 U.S. at

489. While this seems straightforward, it needs to be read in light of the later statement in *Sutton*[1] that:

> By its terms, the ADA allows employers to prefer some physical attributes over others and to establish physical criteria. An employer runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded[2] as substantially limiting a major life activity. Accordingly, an employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment--such as one's height, build, or singing voice--are preferable to others, just as it is free to decide that some limiting, but not *substantially* limiting, impairments make individuals less than ideally suited for a job.

Sutton v. United Air Lines, Inc., 527 U.S. 471, 490-91, 119 S. Ct. 2139, 2150 (1999). Thus, the ADA protects individuals regarded as having an impairment that substantially limits a major life activity when, in fact, the individual is perfectly able to meet the job's duties. *Ross*, 237 F.3d at 706; see also *Francis v. City of Meriden*, 129 F.3d 281, 286 (2nd Cir. 1997) ("To be considered disabled under the "regarded as" prong of the statutes, therefore, a plaintiff must allege that the employer regarded the employee to be suffering from an impairment within the meaning of the statutes, not just that the employer believed the employee to be somehow disabled."). The EEOC asserts that, in the instant case, Grindle was not actually disabled, but that Watkins perceived him as having an impairment that substantially limits a major life activity.

The first inquiry under an ADA claim is whether a disability as defined by the statute is at issue. The ADA defines "disability" as "(A) a physical or mental impairment that substantially limits one or more major life activity of such individual; (B) a record of such an impairment, or (C)

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[1] *Sutton* was not primarily concerned with whether the impairment at issue, severe myopia, was one that merited protection under the "regarded as" prong, but whether one should consider the plaintiff in his corrected or uncorrected state.

[2] Note the Court did not write "it regards," but "is regarded."

being regarded as having such an impairment." 42 U.S.C. § 12102(2)(A)-(C). What the statute does not do is list the impairments that substantially limit major life activities. This Court must determine whether obesity, especially obesity that is not alleged to be related to a physiological cause, is a physical impairment that limits a major life activity.

The magistrate, citing EEOC regulations, determined that obesity is covered by the ADA. See Doc. 64, at A. The EEOC has bifurcated this analysis into a two-step process, first asking whether a condition is an impairment, then asking whether the impairment substantially limits a major life activity. See 29 C.F.R. §§1630.2(h)&(j) and 29 C.F.R. Pt. 1630, Appx. §§ 1630.2(j)&(k). Utilizing the EEOC interpretation of impairment, the magistrate concluded that obesity is an impairment. If one reads into the analysis of which impairments substantially limit major life activities, one notes that, even if obesity is considered an impairment, the EEOC does not normally consider it one that would be disabling: "Similarly, except in rare circumstances, obesity is not considered a disabling impairment." 29 C.F.R. Pt. 1630, App. Section 1630.2(j).

This shows up the contradiction of the EEOC interpretation that one may violate the ADA by discriminating against an individual regarded as having a disability when "[t]he individual [has] an impairment which is not substantially limiting but is perceived by the employer…as constituting a substantially limiting impairment…." 29 C.F.R. Pt. 1630, Appx. § 1630.2(*l*). In effect, this interpretation abolishes the ADA statutory limitation of its reach to those suffering from or regarded as suffering from "a physical or mental impairment that substantially limits one or more major life activity of such individual," 42 U.S.C. 12102, and extends its protections to anyone suffering from any impairment if the employer misperceives the impairment as substantially limiting a major life activity. If the EEOC is correct, the ADA incongruously forbids an employer from discriminating

against someone, if for example, they think the person obese and think that obesity affects a major life activity; but allows them to discriminate if they think the person is obese and just do not like the sight of 450-pound people. Reframing this example with the impairments that courts have held are covered by the ADA "regarded as" prong, such as epilepsy or blindness, shows the damage the EEOC reading would do to the ADA.

The Court further notes that "no specific governmental agency has been given authority to interpret the term 'disability'" in the ADA. *Lane v. Bell County Bd. of Educ.*, 72 Fed. Appx. 389, 395, (6th Cir. 2003) (quoting *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 480, 119 S. Ct. 2139 (1999). No controlling precedent has yet determined the deference to be afforded to these regulations. *Id.* Since issuing its opinion in *Sutton*, the Supreme Court further clarified that not all agency interpretations merit *Chevron* deference. See *United States v. Mead Corp.*, 533 U.S. 218, 121 S. Ct. 2164, 2171 (2001). Pertinently, the *Mead* Court warned that "where statutory circumstances indicate no intent to delegate general authority to make rules with force of law, or where such authority was not invoked," a court must review agency interpretations under a less tolerant standard. *Id.* at 2177 (directing, in such circumstances, resort to the rule of *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161 (1944)). The Court in *Mead* reaffirmed the holding of *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161 (1944), that "[t]he weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Mead*, 533 U.S. at 228, 121 S. Ct. 2164 (quoting *Skidmore*, 323 U.S. at 140, 65 S. Ct. 161); see also *Ammex, Inc. v. United States*, 367 F.3d 530, 535 (6th Cir. 2004).

Other courts have ruled that the ADA does not cover obesity. See *Whaley v. Southwest Student Transp. L.C.*, 2002 WL 999382, *3 (N.D. Tex. 2002), gathering cases:

> obesity is not a disability, a physical or mental impairment that substantially limits a major life activity. See *Johnson v. Baylor Univ.*, 129 F.3d 607 (5th Cir.1997) (affirming grant of summary judgment where plaintiff claimed protection for chronic obesity under the ADA); *Andrews v. Ohio*, 104 F.3d 803, 810 (6th Cir. 1997) (holding that obesity does not equal an impairment and to hold otherwise would debase the ADA's protections for those that are truly handicapped); *Francis v. City of Meriden*, 129 F.3d 281 (2d Cir. 1997) (holding plaintiff's obesity claim does not fall within the meaning of the ADA); *Torcasio v. Murray*, 57 F.3d 1340, 1354 (4th Cir. 1995) (reviewing case law finding obesity not covered by the ADA).

2002 WL 999382, *3. These pre-*Sutton* cases are all the more persuasive today, due to the fact that they were decided prior to the Supreme Court's questioning of the deference to be accorded to EEOC regulations concerning the ADA. This Court agrees that the ADA does not normally protect the obese, even under a "regarded as" theory, and speculates that the rare circumstance where obesity is a disabling impairment is where it has a physiological cause. To extend the ADA to the instant case would demean "[t]he purpose of the 'regarded as' prong[, which] is to provide a cause of action to individuals 'rejected from a job because of the "myths, fears and stereotypes" associated with disabilities.'" *Ross v. Campbell Soup Co.*, 237 F.3d 701, 708 (6th Cir. 2001) (citing *Sutton*, 527 U.S. at 489, 119 S. Ct. 2139; and quoting 29 C.F.R. pt. 1630, Appx. § 1630.2(*l*)).

D. Whether Watkins Considered Grindle Substantially Limited in a Major Life Activity

Assuming, *arguendo*, that obesity is an "impairment that substantially limits one or more major life activity," Plaintiff would still have the burden of proving that Defendant considered him unable to work in a broad class of jobs. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491, 119 S. Ct. 2139 (1999). "The inability to perform a single, particular job does not constitute a

substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i). The regulations identify other factors as probative of whether an individual is substantially limited in the major life activity of working: the geographic area to which the individual has reasonable access and "the number and type of jobs utilizing similar training, knowledge, skills or abilities, within the geographical area, from which the individual is also disqualified." 29 C.F.R. 1630.2(j)(3)(ii)(A), (B). The Supreme Court has explained:

> To be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.

Sutton v. United Air Lines, Inc., 527 U.S. 471, 490-92, 119 S. Ct. 2139, 2150-51 (1999).

In the instant case, The EEOC has presented evidence of an expert witness that purports to show that Watkins considered Grindle unable to perform a large class of jobs. The EEOC expert achieves this conclusion by conflating two aspects of the job Grindle held with Watkins: one, that of driver, for which there is no evidence that Watkins believed Grindle incapable of performing, and another, that of dock worker, for which there is admissible evidence that could lead a jury to believe that Watkins believed Grindle was incapable of performing due to his obesity. Dr. Lawrence's letter, as the Magistrate notes, admits that Grindle "meets DOT standards" to drive a truck. The only evidence is that Watkins perceived Grindle as capable of performing as a truck driver, but had concerns about his ability to perform as a dock worker.

The EEOC expert found 3,060 Hand Freight Mover jobs in the Dayton area, 4,210 Heavy Truck Drivers jobs, and 1,190 Industrial Truck Driver positions. Inexplicably, the expert concluded

from this that there were approximately 8,000 jobs Grindle was considered incapable of performing, when the most of the evidence would support is that Watkins considered Grindle incapable of performing the 3,060 Hand Freight Mover jobs. Having been certified as passing DOT standards, it appears that, even if Watkins perceived Grindle as unable to perform the dockworker aspects of its position, it perceived Grindle as capable of performing the Heavy and Industrial Truck Driver jobs. It defies the powers of even the logic of discrimination to conclude that an obese person who passes DOT standards is not capable of driving a truck.

III. Conclusion

The Court's analysis of the motion for summary judgment on the applicability of the ADA to non-physiologically caused obesity, and the further ruling that the EEOC expert effectively testified that Watkins perceived Grindle as capable of performing 6,270 jobs, and incapable of performing only 3,060, does away with the need to rule on Watkins Motor Lines' motion for summary judgment on the basis of laches. Because the ADA does not normally apply to obesity, and because the uncontested evidence is that Watkins perceived Grindle as capable of performing a wide range of jobs, Defendant's Objections to Magistrate's Report and Recommendation of Denial of Summary Judgment, Doc. 70, and Defendant Watkins Motor Lines Motion for Summary Judgment, Doc. 35, are **GRANTED**. Wherefore, the captioned cause is hereby **TERMINATED** upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

DONE and **ORDERED** in Dayton, Ohio, this Friday, December 10, 2004.

s/Thomas M. Rose
THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE