IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	:	
Plaintiff,	:	Case No. 3:02cv00505
vs.	:	District Judge Thomas M. Rose
	:	Magistrate Judge Sharon L. Ovington
WATKINS MOTOR LINES,	:	
Defendant.	:	

REPORT AND RECOMMENDATION[1]

I. INTRODUCTION

The Equal Employment Opportunity Commission ("EEOC") brings this action claiming that Defendant Watkins Motor Lines discriminated against a former employee, Stephen Grindle, in violation of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§12101, et seq. The EEOC alleged that Watkins violated the ADA by "refusing to allow Stephen Grindle to return to his truck driver job by keeping him on 'safety hold' and ultimately discharging him on July 22, 1996 because of his perceived disability, morbid obesity." (Doc. #1 at 3).

This matter is before the Court upon Watkins' Motion for Summary Judgment (Doc. #35), the EEOC's Memorandum and Supplemental Memorandum in Opposition (Doc. #s 40,

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[1] Attached hereto is a NOTICE to the parties regarding objections to this Report and Recommendation.

41), Watkins' Reply (Doc. #49), the EEOC's Surreply (Doc. #53), and the record as a whole.

II. FACTUAL BACKGROUND

A. Mr. Grindle's Employment, his Weight, and his Injury

Mr. Grindle began working for Watkins in 1990.

In 1995 Mr. Grindle's work as a truck driver required driving as well as loading and unloading work. *See* Koppenhofer Depo., Exhibit 2. Mr. Grindle's written job description states that a driver must be capable of obtaining a commercial driver's license and must meet Department of Transportation ("DOT") physical requirements to safely operate a motor vehicle. *Id*. The job description also details many needed skills and emphasizes, "This is a strenuous position which requires ability to sit, stand, climb, bend, crouch, push, pull, lift.... Must also be capable of repetitive heavy lifting for long periods of time. Must be capable of climbing into a trailer to retrieve freight or load it without damaging the freight or trailer...." *Id*.

It is undisputed that Mr. Grindle received good job performance evaluations throughout his employment with Watkins.

When Mr. Grindle was hired by Watkins in 1990, he weighed 345 pounds. (Doc. #35 at 63 and Exh. 1). According to Mr. Grindle's medical records from Watkins, his weight fluctuated to 338 pounds in August 1991, over 350 pounds in August 1992, 370 pounds in June 1993, 370 pounds in May 1994, and 395 pounds in May 1995. (Doc. #35, Exh. 1). Mr. Grindle maintains that these weights were only estimates because Watkins did not have a scale that would register his weight. (Doc #35 at 75). According to Mr. Grindle, Watkins' "scale only went to 300." (Doc. #35 at 73).

Between 1995 and 1996, Mr. Grindle weighed 422 pounds. (Doc. #35 at 74). Mr.

Grindle acknowledged during his deposition that during his employment with Watkins no doctor ever told him that his weight was due to a physiological, psychological, or psychiatric problem while he worked at Watkins. (Doc. #35 at 78). Mr. Grindle's weight did not inhibit him from performing his job, taking care of himself, or taking care of his loved ones. (Doc. #35 at 148).

Mr. Grindle testified that in 1996, Dr. Lawrence had told him that he would be confined to a wheelchair within one year due to his weight. (Grindle Depo. at 4-5).

In November 1995 Mr. Grindle injured himself at work when one of the rungs to a ladder he was on broke. To save himself from falling backwards, Mr. Grindle caught himself, and in doing so, he injured his knee. As a result of his injury, Mr. Grindle began a leave of absence from Watkins on January 22, 1996.

B. Mr. Grindle's Leave of Absence and Dr. Zancan

It is undisputed that Watkins refused to permit Mr. Grindle to return to work after his leave of absence began, despite his desire to return to work approximately five-and-one half months after beginning his leave. Watkins asserts that under its leave-of-absence policy, any employee who remains on a leave of absence in excess of 180 days is terminated.

Because Mr. Grindle began his leave of absence on January 22, 1996, Watkins' policy required him to return to work on or before July 22, 1996. Mr. Grindle's personal physician, Walter L. Zancan, M.D. released Mr. Grindle to return to work without restrictions on June 25, 1996. (Jennings' Depo., Exh. 7). Dr. Zancan did so by way of a brief note that did not contain any explanation. *Id*.

Despite the release from Dr. Zancan, Watkins insisted that Mr. Grindle see another

physician. One of Watkins' safety managers,[2] Michael Koppenhofer, testified that in mid-1996 he received a phone call from William Jennings concerning Mr. Grindle's work release. Jennings was Watkins' regional safety manager where Mr. Grindle worked. Jennings informed Koppenhofer that Mr. Grindle's personal physician Dr. Zancan had not completed a "return-to-work job demands release." (Koppenhofer Depo. at 46). Koppenhofer explains:

> [I]t's a document that goes out to the treating physician. In many cases we found in the past the treating physicians do not understand what truck drivers do and what their job consists of. And it's something we send to the treating physician and they review and say, 'Yes, this driver can do this. He's released to return to work.'

Id.

Koppenhofer told Jennings that Mr. Grindle had to obtain a "job demands evaluation and if Dr. Zancan won't do it, send him [Mr. Grindle] to the industrial clinic ... and request that it be done there." (Koppenhofer Depo. at 47). Jennings sent Mr. Grindle to the Industrial Medical Center, where, on June 25, 1996, Walter R. Lawrence, M.D. examined him.

C. Dr. Lawrence's Examination and Letter

On June 26, 1996, Dr. Lawrence wrote to Watkins stating his opinion that Mr. Grindle could not safely perform the requirements of his job as a truck driver. (Doc. #35, Exh. 28 at 3). Dr. Lawrence began his explanation by stating, "On physical examination, the most notable item is that the patient weighs 450.5 lbs." *Id*. at 1. Dr. Lawrence found that Mr. Grindle had a limited range of motion "as he only flexes to 70 degrees and extends to 5 degrees...," and that he "can squat and 'duck walk' but after four steps is short of breath." *Id*. Dr. Lawrence listed his

[2] In 1996 Koppenhofer held a management-level position with Watkins in the area of safety training. *See* Koppenhofer Depo. at 10-11; Jennings Depo. at 24.

diagnostic impression of Mr. Grindle as follows:

1) Status gross exogenous obesity;

2) Recovering knee surgery, left knee;

3) Recovering strep throat.

Id. Dr. Lawrence also wrote the following:

> When questioned about his job requirements, which are quite stringent, a description was provided by Jenkins, [Watkins'] safety coordinator, the patient states, 'people here are amazed at how easily I get up into a cab and move around the dock.' 'I can easily do the work a person half my size and weight.' While this patient denies any disability, it is a concern, from both a physical and practical standpoint, as to his welfare. In his present job description, 70% of his work is to be at the dock and the surrounding environment, while the remainder is driving with frequent stop and go deliveries requiring frequent climbing in and out of the cab. This has to place an increased cardiovascular burden on this patient, as well as the stress which may precipitate diabetes in a patient this size.

Id. at 2.

In the next two paragraphs of the letter, Dr. Lawrence expressed his concern about Mr. Grindle's weight in an unusual manner. This began when Dr. Lawrence wrote, "based on a risk evaluation, that this patient needs to lose 200+ pounds. The military has, long ago, adopted a weight standard for performance as well as for safety reasons for its personnel." *Id*. Dr. Lawrence continued in this vein:

> It is not infrequent that professional athletes are 'cut' from the team, in all sports, because they cannot meet the standards, especially of weight. Football, which uses large players, still has standards. Only Sumo wrestlers espouse gross obesity as one of its standards, but these individuals have a significantly shortened life span.

Id. at 3. This led Dr. Lawrence to conclude, "I would encourage this individual to seek medical and psychological help to achieve a better medical condition. At this time, he meets D.O.T. standards, but cannot meet the requirements for his job performance, as provided safely, in my

opinion." *Id*.

D. Watkins' Termination Decision

After he received Dr. Lawrence's June 26, 1996 letter, Koppenhofer placed Mr. Grindle on "safety hold" rather than allowing him to return to work. (Koppenhofer Depo. at 49). During his deposition, Koppenhofer explained, "between Dr. Zancan, you know, not cooperating with us and wouldn't release this employee and a couple of things that appeared in Dr. Lawrence's letter, I put the driver on safety hold." *Id*. Upon further questioning Koppenhofer stated that his only concern with the information provided by Dr. Lawrence was his statement about Mr. Grindle's range of motion. *Id*. at 68-72. Unlike Dr. Lawrence, Koppenhofer did not believe Mr. Grindle needed to lose 200+ pounds to safely perform his job. *Id*. at 72.

When Koppenhofer placed Mr. Grindle on safety hold, he knew that Mr. Grindle had little time remaining under Watkins' 180-day policy. (Koppenhofer Depo. at 53). Koppenhofer testified that Mr. Grindle's knee had to fully recover in order to enable him to return to work, and that he needed "the release from Dr. Zancan, which he did not get." *Id*. at 72. Koppenhofer did not believe or accept Dr. Lawrence's opinion that Mr. Grindle needed to lose 200+ pounds to safely perform his job. *Id*. at 71-72.

Koppenhofer testified that he evaluated Mr. Grindle's situation and reached the decision to place him on safety hold under the standards set forth in Watkins' terminal business manual, which incorporates DOT standards. Koppenhofer also testified that the terminal business manual "speaks specifically that if somebody is out for an injury or an illness, they must have full release from their treating physician as well as the DOT physician." *Id*. at 51. He explains that a full release means not only the DOT's minimum standards are met but also that the

employee is fully released for the particular job at issue. *Id*. at 56. According to Koppenhofer, Watkins' "requirements are more stringent than DOT. Again, we're going back here to the injury of the knee. And he can't get a release from Dr. Zancan, which makes me want to know, you know, why will he not release him...." *Id*. at 73. Although Dr. Zancan had provided an unrestricted return-to-work release, Koppenhofer believed that Dr. Zancan had not done so "with a job demand list." *Id*. at 75. He believed this because Jennings had told him that Dr. Zancan had refused to complete a job demands release. *Id*. at 76.

Like Koppenhofer, Jennings testified that the only reason Mr. Grindle was placed on safety hold was Dr. Lawrence's statement about the limited range of motion of Mr. Grindle's knee. (Jennings Depo. at 70-73). Jennings testified that he was not concerned with Dr. Lawrence's statements about Mr. Grindle's weight. *Id*. at 78, 83.

Koppenhofer wrote in an email, "In view of the examining physician's determination that this driver 'cannot meet the requirements for his job performance, as provided safely,' we are placing this driver on 'hold.' Steven's status will be reviewed at some point in the future upon re-evaluation by the Industrial Medical Center and when the examining physician determines that Steven can perform his job requirements safely." (Koppenhofer Depo., Exh. 3).

In early July 1996 Mr. Grindle spoke with William Thatcher, Watkins' regional human resources manager. Thatcher advised him to get back in the fight with the guys that say he could not do his job. (Thatcher Depo. at 37). Thatcher advised Mr. Grindle that he should see a dietician and run around his house backyard. *Id*. at 39. Thatcher explained, in essence, that by this comment he was merely attempting to help Mr. Grindle understand the importance of losing weight in order to rehabilitate his injured knee. *See id*. at 39-43. Thatcher did not play any role

in the decision to place Mr. Grindle on safety hold. *Id*. at 43. Thatcher testified that he did not make the decision to terminate Mr. Grindle's employment. He further testified that when a termination decision occurs pursuant to Watkins' 180-day policy, his "only input ... is to make sure that there was no disability in place that we should maybe take a look at in order to prevent a termination based on the 180 days and rather apply some reasonable accommodation and extension of time." *Id*. at 32. Thatcher did not see a disability in Mr. Grindle's case; he only considered his knee injury. *Id*. at 32-33.

The "safety hold" that Watkins instituted continued until July 22, 1996, when Watkins terminated Mr. Grindle's employment. Mike Opatich completed a form on July 22, 1996 stating that Mr. Grindle was "no longer qualified to drive in the Watkins Motor Line System for the following reason(s): ... medically unqualified." (Koppenhofer Depo., Exh. 5). The form further states, "involuntary: failed to report from leave of absence/180 days...." *Id*. Koppenhofer explains that this is a DOT form, not a human resources form; it is kept in a separate record system used to document driver safety. (Koppenhofer Depo. at 66).

III. SUMMARY JUDGMENT STANDARDS

The central issue presented by a Motion for Summary Judgment is a threshold issue – whether the case presents a proper jury question. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). A moving party is entitled to summary judgment in its favor if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson*, 477 U.S. at 247.

"The moving party has the burden of showing the absence of genuine factual disputes

from which a reasonable jury could return a verdict for the plaintiff.... In considering whether summary judgment is appropriate, th[e] court must 'look beyond the pleadings and assess the proof to determine whether there is a genuine need for trial.'" *Hager v. Pike County Bd. of Education*, 286 F.3d 366, 370 (6th Cir. 2002)(citation omitted). Although Rule 56 does not mandate the moving party to support is motion with affidavits or other evidence, "a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 324 (quoting in part Rule 56(c)).

Ultimately, the Court must determine at the summary-judgment stage whether the evidence presents a sufficient disagreement to require submission of a claim to the jury or whether the evidence is so one-sided that the moving party must prevail as a matter of law. *Anderson*, 477 U.S. at 251-52; *Little Caesar Enterprises v. OPPCO*, 219 F.3d 547, 551 (6th Cir. 2000).

IV. DISABILITY DISCRIMINATION

Watkins contends that it is entitled to summary judgment on the EEOC's ADA claim because the EEOC cannot demonstrate a prima facie case of disability discrimination, and because the EEOC cannot demonstrate that Watkins' legitimate non-discriminatory reason for terminating Mr. Grindle's employment was a pretext for disability discrimination.

A. The ADA and the EEOC's Prima Facie Case

The ADA prohibits certain employers, like Watkins, from discriminating against qualified individuals with a disability by terminating their employment because of their disability or by otherwise discriminating against them in regard to the terms and conditions of employment. 42 U.S.C. §12112(a). "The ADA was enacted, in part, to eliminate the sort of stereotyping that allowed employers to see their employees primarily as their disabilities and not as persons differently abled from themselves." *Ross v. Campbell Soup Co.*, 237 F.3d 701, 707 (6th Cir. 2001).

The EEOC bears the burden of proving that Watkins violated Mr. Grindle's rights under the ADA by presenting direct or circumstantial evidence of disability discrimination. *Martin v. Barnesville School Distr. Bd. Of Educ.*, 209 F.3d 931, 934 (6th Cir. 2000). Because the EEOC has not relied on direct evidence to support its ADA claim, it must proceed by relying on circumstantial evidence. *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1185 (6th Cir. 1996). The EEOC must, therefore, turn to the *McDonnell Douglas*[3] burden-shifting approach by first producing affirmative evidence sufficient to supporting a prima facie case of disability discrimination. *Parry v. Mohawk Motors of Michigan, Inc.*, 236 F.3d 299, 310 (6th Cir. 2000); *see Martin*, 209 F.3d at 934; *see also Monette*, 90 F.3d at 1185. To establish a prima facie, the EEOC must produce evidence of the following:

1. Mr. Grindle was 'disabled' within the meaning of the ADA;
2. Mr. Grindle was qualified for the position, with or without an accommodation; and

[3] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973).

3. Mr. Grindle was discriminated against solely because of his disability.

See Mahon v Crowell, 295 F.3d 585, 589 (6th Cir. 2002).

If the EEOC succeeds in this effort, Watkins must proffer or articulate a legitimate, nondiscriminatory reason for its action. *Parry*, 236 F.3d at 310. If Watkins does so, the EEOC must demonstrate that the proffered reason is a pretext – a cover-up – for disability discrimination. *Parry*, 236 F.3d at 310; *see Martin*, 209 F.3d at 934.

Most significantly, the burden-shifting analysis is designed to produce an answer to the ultimate question – in summary-judgment language – whether the record contains sufficient evidence to persuade a reasonable jury that Watkins discriminated against Mr. Grindle because of his disability. *See Texas Dept. Of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981); *Parry*, 236 F.3d at 310; *Monette*, 90 F.3d at 1186-87.

B. Mr. Grindel's Perceived "Disability"

Watkins contends that Mr. Grindle's weight or alleged morbid obesity does not constitute an ADA-covered disability, and as a result, the EEOC's prima facie case fails. The EEOC maintains that Mr. Grindle's morbid obesity constitutes a disability because Watkins regarded Mr. Grindle as suffering from a disability.

1.
"Regarded As"

The ADA defines the term "disability" as follows:

> The term 'disability' means, with respect to the individual –
>
> 1. a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> 2. a record of such an impairment; or

3. being regarded as having such an impairment.

42 U.S.C. §12102(2).

The EEOC states, "This is a 'regarded as' ADA case – the issue is whether Defendant terminated Mr. Grindle because it regarded or perceived his morbid obesity to be a disability." (Doc. #40 at 16).

> [A]n individual may invoke the ADA's protections even if he is not, in fact, disabled. The breadth of the Act's protection is the embodiment of its drafters' will to stamp out the stereotyping of and discrimination against persons with disabilities in all their forms, even when that stereotyping or discrimination is misplaced. Thus, in determining who may invoke the protection of the ADA, we do not always look to the individual claiming discrimination; when that individual seeks to proceed under the 'regarded as' theory, we must look to the state of mind of the employer against whom he makes a claim. Under the 'regarded as' prong of the ADA, membership in the protected class becomes a question of intent. And, ... that question – *i.e.*, the employer's motive – is one rarely susceptible to resolution at the summary judgment stage."

Ross v. Campbell Soup Company, 237 F.3d 701, 706 (6th Cir. 2001)(internal quotation marks omitted).

"To run afoul of the act, then, a covered entity must hold a mistaken belief that ... [Mr. Grindle] is disabled within the meaning of the acts." *Mahon v. Crowell*, 295 F.3d 585, 592 (6th Cir. 2002). There are two apparent ways by which the EEOC may make this showing. First, it may show that Watkins mistakenly believes that Mr. Grindle has a physical impairment that substantially limits one or more major life activities; or second, it may show that Watkins mistakenly believes that an actual, nonlimiting impairment substantially limits one or more of Mr. Grindle's major life activities. *See Mahon*, 295 F.3d at 592 (quoting *Sutton v. United Air Lines Inc.*, 527 U.S. 471, 489 (1999))

2.
Mr. Grindle's Morbid Obesity

Watkins contends, "While [the] EEOC repeatedly labels Grindle as being morbidly obese, and asserts that Watkins perceived Grindle's alleged morbid obesity as being disabling, its factual assertions border on the trifling...." (Doc. #49). Watkins argues that the EEOC's reliance on its expert William Shaw, M.D.'s "2003 diagnosis that Mr. Grindle was morbidly obese has no relevance to a 1996 employment decision. This is so because an employer cannot be held to have discriminated against an employee, based on facts of which it was unaware." (Doc. # 49 at 4).

The record contains sufficient evidence to show that Mr. Grindle suffered from morbid obesity at the time he was terminated in July 1996, and that Watkins knew this when it terminated Mr. Grindle's employment. It is undisputed that Mr. Grindle weighed 450 pounds at the time he was examined by Dr. Lawrence in June 1996. (Doc. #40, Exh. 28). Dr. Lawrence, moreover, described Mr. Grindle's status as "gross exogenous obesity." (Doc. #40, Exh. 28). Whether the phrase "gross exogenous obesity" holds the same medical meaning as "morbid obesity" is not significant because Dr. Lawrence also informed Watkins that Grindle weighed 450.5 pounds, and that he needed "to lose 200+ pounds to perform his job safely." *Id*. Thus, the information in Dr. Lawrence's letter sufficiently informed Watkins in June 1996 that Mr. Grindle's extreme over weight – whether it is characterized as gross exogenous obesity or morbid obesity – prevented him from performing his job duties. *See id*

Watkins' challenge to the relevance of Dr. Shaw's diagnosis need not be resolved at this stage of the litigation because of Dr. Lawrence's letter. The EEOC may rely on Dr. Lawrence's letter and need not rely on Dr. Shaw's diagnosis to show that Watkins knew about Mr. Grindle's

gross exogenous obesity or morbid obesity in June 1996.

The Court notes that for concision's sake, Mr. Grindle's condition will be referred to as morbid obesity throughout the remaining discussion. This is not intended as a holding that morbid obesity rather than gross exogenous obesity is the proper nomenclature; it is simply a shorter phrase describing what appears to be the same physical condition, particularly if the record is viewed in the EEOC's favor. The more significant issues relate to whether Watkins regarded Mr. Grindle as suffering from a disability. Resolving these issues next requires analysis of whether morbid obesity is an impairment.

3.
Mr. Grindle's Morbid Obesity was an Impairment

Watkins argues that the EEOC cannot demonstrate that it regarded Mr. Grindle as under a disability because his morbid obesity does not constitute an impairment. Watkins reasons that to show the existence of an impairment, the EEOC must and cannot show that Mr. Grindle's morbid obesity was caused by a physiological disorder. Watkins supports this contention by relying on the Commissioner of the EEOC's Regulations, 29 C.F.R. §1630.2(h), and the Commissioner's Interpretive Guidance to this Regulation. A review of this Regulation and Interpretive Guidance shows that Watkins' contentions lack merit.

a.

The Regulation at issue states in pertinent part:

> Physical or mental impairment means:
>
> (1) 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..., cardiovascular, reproductive, digestive,

> genito-urinary, hemic and lymphatic, skin, and endocrine;....

29 C.F.R. §1630.2(h). The Commissioner of the EEOC's Interpretive Guidance concerning this Regulation explains:

> It is important to distinguish between conditions that are impairments and physical, psychological, environment, cultural and economic characteristics that are not impairments. The definition of the term 'impairment' does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within 'normal' range and are not the result of a physiological disorder.

29 C.F.R. §1630.02(h) (Appendix, Interpretive Guidance to Section 1630) (emphasis added).

The Commissioner's Interpretive Guidance to §1630.02(h) does not speak to the situation presented in this case – namely, an ADA claim involving an individual whose weight is much greater than the normal range. Rather, the plain language of this Interpretive Guidance speaks to the need for a causative physiological disorder only when a person's weight is within the normal range. *Id*. By distinguishing a mere physical characteristic from an impairment in this manner, this Interpretive Guidance reveals that the ADA seeks to protect truly disabled employees who still remain able to work. *See Andrews v. State of Ohio*, 104 F.3d 803, 810 (6th Cir. 1997).

The Regulation, moreover, lists both "physiological disorders" and "conditions" (among others) as equally valid routes to establishing an impairment. *See* 29 C.F.R. §1630.2(h)(1). There is simply no indication in the Regulation itself that all "conditions" must have a physiological disorder as the causative agent in order to constitute impairments. *See id*. The need to combine these requirements arises – as the Interpretive Guidance explains – when the "condition" is a commonly held physical characteristic. *See* 29 C.F.R. §1630.02(h) (Appendix, Interpretive Guidance to Section 1630); *see also Andrews*, 104 F.3d at 810. Consequently, reading this Regulation and its Interpretive Guidance together reveals that it says nothing about

whether a morbidly obese person must show a causative physiological disorder. The Regulation and Interpretive Guidance instead require a causative physiological disorder only when the person's weight is within the normal range.

A progressively more serious and less common "condition" exists the further a person's weight exceeds his or her normal range. The extreme demonstrates the point. If an individual is morbidly obese – that is when his or her body weight exceeds the desirable weight range by 100% or has a body mass index of greater than 40[4] – the concern under the Regulation is whether their morbid obesity affects one or more of the listed body systems. *See* 29 C.F.R. §1630.02(h)(1). Such a case involves a much more serious "condition," because morbid obesity can negatively affect numerous body systems including, such as the musculoskeletal, cardiovascular, respiratory, skin, and endocrine systems. *See* The Merck Manual at 58-61 (17th Ed. 1999). Consequently, under the Regulations, evidence establishing that a person is morbidly obesity, i.e., that he or she suffers from "a condition...," 29 C.F.R. §1630.02(h)(1), plus evidence that the morbid obesity affects one or more of his or her body systems is sufficient to establish that the person suffers from an impairment. *See* 29 C.F.R. §1630.02(h)(1).

Accordingly, under the applicable Regulation and its Interpretive Guidance, the EEOC is not required to show that Mr. Grindle's morbid obesity was caused by a physiological disorder.

b.

Watkins also relies on *Andrews v. State of Ohio*, 104 F.3d 803, 808-10 (6th Cir. 1997) to support its contention that the EEOC must show the existence of a causative physiological disorder. Watkins basis this contention on the following statement in *Andrews*: "physical

[4] *See* The Merck Manual at 61-62 (17th Ed. 1999); *see also* Taber's Cyclopedic Medical Dictionary at 1427-28 (19th Ed. 2001).

characteristics that are 'not the result of a physiological disorder' are not considered 'impairments' for the purposes of determining either actual or perceived disability." 104 F.3d at 808. Seizing on this language, Watkins contends that in order for morbid obesity to be an impairment, it must be caused by a physiological disorder. Indeed, if Watkins is correct then summary judgment in its favor would be warranted because the record does not contain any evidence showing that Mr. Grindle's morbid obesity was caused by a physiological disorder. However, for several reasons, Watkins' reliance on *Andrews* is misplaced.

First, the sentence from *Andrews* concerning mere physical characteristics does not apply to the instant case where Mr. Grindle's morbid obesity is more than a physical characteristic; it is a "condition" within the meaning of 29 C.F.R. §1630.02(h)(1). As discussed above, this Regulation does not require the EEOC to establish a causative physiological disorder to such conditions.

Next, the Court of Appeals in *Andrews* did not face allegations that the plaintiffs were morbidly obese. Instead, the *Andrews* plaintiffs did "not allege that their weights or their cardiovascular fitness are beyond a normal range...." 104 F.3d at 810. The Court of Appeals in *Andrews* was thus able to resolve the case by recognizing that the plaintiffs presented allegations concerning mere physical characteristics without an allegation of a causative physiological disorder. 104 F.3d at 810. The instant case present a different situation by involving an individual whose weight goes well above the normal range, and consequently, a condition – morbid obesity – is at issue. *Andrews* did not present a similar factual situation. Indeed, the issue in the instant case that was not resolved by *Andrews* is whether an extreme deviation in weight can constitute a disability without a specific showing of a causative physiological

disorder. When, as in the instant case, an individual suffers from an extreme deviation in weight, the difference between a mere physical characteristic and an impairment grows less clear with each pound of excess weight. Thus the fact that *Andrews* did not involve a claim to disability status based on morbid obesity constitutes a significant point of distinction.

Unlike the plaintiffs in *Andrews*, the EEOC in the instant case presents evidence showing that Mr. Grindle's weight of 450 pounds at the time he was examined by Dr. Lawrence was well above normal. In his letter, Dr. Lawrence stated his opinion that Mr. Grindle's needed "to lose 200+ pounds to perform his job safely...," (Doc. #40, Exh. 28), and Dr. Lawrence based his conclusion that Mr. Grindle could not safely perform his job mainly on his concern about Mr. Grindle's weight, *id*. The instant case thus involves an individual whose claimed impairment goes well beyond the plaintiffs' mere physical characteristics at issue in *Andrews*.

Lastly, *Andrews* is distinguished from the instant case because it did not involve any issue of whether the employer mistakenly believed the plaintiffs were under a disability. 104 F.3d at 807-10. In the instant case, one key issue on which resolution of Watkins' Motion for Summary Judgment hinges is whether it mistakenly regarded Mr. Grindle as being under a disability. *Andrews* does not mention the "mistaken" requirement in connection with its holding that the plaintiffs had failed to adequately plead a "regarded as disabled" claim. 104 F.3d at 806-10. Cases more recent than *Andrews* clarify that an ADA plaintiff establishes a "regarded as" claim by demonstrating that the employer held a mistaken belief about the existence of a disability. *See Mahon v. Crowell*, 295 F.3d 585, 592 (6th Cir. 2002)(citing *Sutton v. United Air Lines Inc.*, 527 U.S. 471, 481-89 (1999); *see also Ross v. Campbell Soup Co.*, 237 F.3d 701, 709 (6th Cir. 2001)).

Watkins' reliance on *Andrews* is therefore misplaced.

c.

Accordingly, for the above reasons, in order to establish that Mr. Grindle's morbid obesity constituted an impairment, the EEOC is not required to show that his morbid obesity was caused by a physiological disorder. The EEOC need only show that Mr. Grindle's morbid obesity satisfies the applicable Regulation, which it has accomplished by presenting evidence showing that Mr. Grindle suffered from morbid obesity. *See* 29 C.F.R. §1630.02(h).

4.
The EEOC's "Regarded As" Evidence

The EEOC contends that Watkins regarded Mr. Grindle's morbid obesity as substantially limiting in a major life activity of working based on the following:

- Dr. Lawrence's projected fears about, and stereotyping of, Mr. Grindle the June 1996 letter to Watkins;
- Watkins' email dated June 28, 1996 expressly pinning the decision to place Mr. Grindle on safety hold based on Dr. Lawrence's letter;
- Thatcher's statement to Mr. Grindle that he needed to satisfy Dr. Lawrence's requirement – which he could do by seeing a dietician, running around his house or yard to lose 200 pounds in thirty days. Also, Thatcher's focus on Mr. Grindle's need to lose this amount of weight – rather than getting his knee injury fully healed – as the precondition he needed to satisfy before he would be taken off safety hold and permitted to return to work;
- Koppenhofer's reliance on Dr. Lawrence's letter and the fact that Koppenhofer acknowledges he never cleared anyone to return to work when Dr. Lawrence said it would be unsafe;
- Watkins' email about Mr. Grindle's workers compensation claim, which stated, 'This man weighs over 400 pounds.'
- Watkins' terminal manager's concern over the impact Mr. Grindle's workers compensation claim would have on Watkins' workers compensation costs;

- Dr. Lawrence's prophecy that Mr. Grindle's weight would prevent him from being able to walk and that he would be confined to a wheelchair;

(Doc. #40 at 24-27).

The EEOC has presented sufficient evidence to show that Watkins' based its termination decision on Mr. Grindle's morbid obesity. Koppenhofer made the decision to place Mr. Grindle on safety hold. He did so based on Dr. Lawrence's letter. Although Koppenhofer testifed during his deposition that he was not concerned with Dr. Lawrence's comments about Mr. Grindle's weight, a reasonable juror could believe otherwise. This is so because the main concern Dr. Lawrence expressed in his letter was about Mr. Grindle's weight. It is, moreover, reasonable to read Dr. Lawrence's conclusion that Mr. Grindle could not safely perform his job based almost entirely on his concern over Mr. Grindle's weight. Consequently, a jury could connect the fact that Koppenhofer relied on this letter with Dr. Lawrence's main concern about Mr. Grindle's morbid obesity to infer that Koppenhofer, despite his testimony to the contrary, placed Mr. Grindle on safety hold because of his morbid obesity.

In addition, once Koppenhofer placed Mr. Grindle on safety hold, he had only a few weeks before his 180-day leave of absence expired. Dr. Lawrence's letter left Mr. Grindle with no avenue by which he could retain his position as a truck driver during this short period of time. This is so because Dr. Lawrence specifically stated in the letter that Mr. Grindle needed "to lose 200+ pounds to perform his job safely." (Doc. #40, Exh. 28). Thatcher confirmed to Mr. Grindle that his weight was at issue when he told him to see a dietician and run around his backyard. (Thatcher Depo. at 39). Koppenhofer, moreover, knew at the time he placed Mr. Grindle on safety hold that his leave of absence had nearly expired. A jury could reasonably

infer from this that at the time he placed Mr. Grindle on safety hold, Koppenhofer knew that Mr. Grindle would be unable to satisfy Dr. Lawrence's concern about his morbid obesity and that his decision was tantamount to a decision to terminate Mr. Grindle's employment. Again, although a jury could also reasonably believe to the contrary – that Koppenhofer was merely concerned about Mr. Grindle's original knee injury and that this was the actual reason for placing Mr. Grindle on safety hold – Koppenhofer's credibility is at issue and cannot be resolved in Watkins' favor at the summary-judgment stage of the case.

The EEOC correctly analogizes the instant case to *Ross v. Campbell Soup Co.*, 237 F.3d 701 (6th Cir. 2001) even though *Ross* involved an employer who allegedly regarded an employee as under a disability due to his back injury or condition. What *Ross* has in common with the instant case is the type of proof the plaintiff presented his support of his "regarded as" claim. The Sixth Circuit in *Ross* reversed a grant of summary judgment in the employer's favor after concluding that the plaintiff had presented sufficient evidence to create a jury issue about whether the employer regarded the plaintiff as disabled. This evidence consisted mainly of a memorandum circulated throughout the company management recommending that the plaintiff not receive a bonus. Ominously, the memo contained a note handwritten by a supervisor stating, "Maureen – When can we bring this problem to a termination status. P.S. – back case." 237 F.3d at 704. The Sixth Circuit recognized that this memo "demonstrates that there is at least a genuine issue of material fact that Campbell Soup Co. regarded Ross through the lens of his medical condition. It is precisely this sort of limited vision that the ADA seeks to eliminate." 237 F.3d at 709. In the instant case, Dr. Lawrence's letter and Koppenhofer's reliance on it constitute similar if not more compelling evidence to support the EEOC's "regarded as"claim.

Dr. Lawrence's letter, moreover, contained stereotypical comments concerning overweight athletes and Sumo wrestlers and Mr. Grindle's employment situation. Like the evidence in *Ross*, this letter combined with Koppenhofer's reliance on it create a genuine issue of fact concerning the true reason Mr. Grindle was placed on safety hold and ultimately terminated.

In addition, as previously discussed, in support of its "regarded as" claim the EEOC may show that Watkins mistakenly believes that an actual, nonlimiting impairment substantially limits one or more of Mr. Grindle's major life activities. *See Mahon*, 295 F.3d at 592 (quoting *Sutton v. United Air Lines Inc.*, 527 U.S. 471, 489 (1999)). The EEOC has done so because it was undisputed that Mr. Grindle had always received satisfactory job performance evaluations, i.e, he had always been able to safely perform his job, and because Dr. Zancan cleared Mr. Grindle to return to work. Although Watkins relies on the more job-specific analysis provided by Dr. Lawrence, his analysis included statements that a jury could reasonably view as stereotypical instead of being based on specific physical inabilities caused by Mr. Grindle's morbid obesity at the time.

5.
"Regarded As" Unable to Perform a Broad Class of Jobs

The EEOC contends that Watkins regarded Mr. Grindle as being unable to engage in the major life activity of working.

A limitation of the ability to perform a class of jobs is a limitation to participate in a major life activity. *McKay v. Toyota Motor Manufacturing, U.S.A., Inc*., 110 F.3d 369, 372 (6th Cir. 1997). In order to show that Mr. Grindle is substantially limited in the major life activity of working, the EEOC must show that he was "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average

person having comparable training, skills and abilities." *McKay* , 110 F.3d at 372. "The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *McKay*, 110 F.3d at 372. For the purposes of the ADA, an employer does not perceive an individual as limited in the major life activity of working when the employer perceives the individual as limited in ability to perform only a narrow range of jobs. *McKay* , 110 F.3d at 373.

The EEOC argues that Watkins perceived Mr. Grindle as unable to perform about 8,000 jobs in the Dayton area, and that being unable to perform 8,000 jobs in the Dayton area is tantamount to a limitation on the major life activity of working. These contentions are well taken.

The EEOC presents an expert's (Sisolak's) report stating that Watkins' list of job duties in its written job description applies to more than 8,000 jobs in the Dayton metropolitan area. Because Koppenhofer accepted Dr. Lawrence's conclusion that Mr. Grindle could not safely perform the requirements of the truck driver job, a jury accepting Sisolack's report could reasonably find that Watkins believed that Mr. Grindle was unable to work at any of those 8,000 jobs. This belief that Mr. Grindle is unable to work in a class of 8,000 jobs is tantamount to a perception that Mr. Grindle is limited in his major life activity of working.

6.
Conclusion

For all the above reasons, the record contains sufficient evidence for a juror to reasonably conclude that Watkins regarded Mr. Grindle as limited in a major life activity as defined by the ADA.

C. Watkins' Legitimate Nondiscriminatory Reason and Pretext

Once the EEOC establishes a prima facie case, the burden shifts to the defendant to articulate a non-discriminatory reason for the defendant's action. *Sullivan v. River Valley School District*, 197 F.3d 804, 810 (6th Cir. 1999).

Watkins has articulated a legitimate nondiscriminatory reason for terminating Mr. Grindle's employment – his 180-day leave of absence expired and he was unable to return to work because his knee injury had not fully healed.

The burden therefore shifts to the EEOC to demonstrate that Watkins' articulated reason was a pretext for discrimination. It may do so by one of the following methods:

1. Watkins' reason lacked a factual basis;
2. Watkins' reasons did not actually motivate its termination; or
3. Watkins's reason was insufficient to motivate its decision.

Manzer v. Diamond Shamrock Chems. Co., 29 F.3d 1078, 1084 (6th Cir. 1994).

The first and third methods to show pretext do not apply to this case. As a factual matter, there is no dispute that Watkins had a leave-of-absence policy that resulted in the termination of an employee who is absent more than 180 days, and that Mr. Grindle did not return to work before the 180-day period expired. The EEOC also does not assert that this leave-of-absence policy was insufficient to motivate Watkins' termination decision. The pretext analysis therefore must focus on whether the record contains sufficient evidence for a jury to reasonably infer that Watkins' articulated reason was a pretext for disability discrimination.

Watkins contends that the EEOC cannot show pretext because it has failed to show that Watkins' sole reason for terminating Mr. Grindle's employment was his morbid obesity. This

contention lacks merit. Although Koppenhofer testified that he did not rely on Dr. Lawrence's statements concerning Mr. Grindle's weight but instead was concerned only about his knee, Dr. Lawrence made little mention of Mr. Grindle's knee injury. Dr. Lawrence instead was much more concerned about Mr. Grindle's weight and how it would impact his ability to safely perform his truck driver job. It is certainly true that a jury may accept Koppenhofer's testimony as establishing that he was were concerned about Mr. Grindle's knee injury. This, however, is a matter of credibility. Because it is undisputed that Koppenhofer relied on Dr. Lawrence's letter – which mainly concerned Mr. Grindle's morbid obesity – a jury could reasonably infer that Watkins based its decision to place Mr. Grindle on safety hold and to ultimately terminate his employment solely because of Mr. Grindle's morbid obesity.

As the EEOC contends, "The die was cast when Dr. Lawrence invented the two hundred pound weight loss requirement for Grindle and made his 'unsafe' determination and Watkins placed Grindle on hold due to the Lawrence letter." (Doc. #40 at 30). Once Watkins accepted Dr. Lawrence letter, there appeared to be little if anything Mr. Grindle could do to retain his job. The letter required him to lose 200 pounds. He could not do so with the very short time remaining in which he had to report to work. Indeed, a jury could view Thatcher's comment at the time – suggesting that Mr. Grindle see a dietician and run around his backyard – as reflecting Watkins' attitude and intent that Mr. Grindle weight presented an insurmountable bar to his continued employment.

Accordingly, the EEOC has produced sufficient evidence to show pretext.

D. Doctrine of Laches

Watkins argues that the EEOC has shown a lack of diligence in filing this suit, and

consequently, the doctrine of laches precludes the EEOC's claim.

"Laches is the 'negligent and unintentional failure to protect one's rights." *Nartron Corp. v. Stmicroelectronics, Inc.*, 305 F.3d 397, 408 (6th Cir. 2002)(quoting *Elvis Preseley Enter., Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889, 894 (6th Cir. 1991). The doctrine of laches applies when the party invoking laches shows "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting it." *Ford Motor Company v. Catalanotte*, 342 F.3d 543, 550 (6th Cir. 2003)(quoting *Herman Miller, Inc. v. Palazzetti Imports & Exports, Inc.*, 270 F.3d 298, 320 (6th Cir. 2001)).

The doctrine of laches does not bar the EEOC's claims even though it waited over seven years to file this case. The EEOC can account for most of that time by pointing to administrative functions and attempts to resolve this case without filing suit in the courts. These activities are required by the ADA and the EEOC therefore did not fail to use diligence with regard to this suit.

Even if Watkins could show a lack diligence, it has not shown that it suffered prejudice by the delay. Watkins argues that the memories of virtually all of the witnesses have faded and that it is therefore prejudiced. This argument is without merit because a review of the witnesses' deposition testimony reveals that their memories did not fade to the point where they were unable to answer many questions.

Watkins further contends that it has suffered prejudice because documents from Con-Way and Viking have been destroyed, making it extremely difficult or impossible to determine whether or not Mr. Grindle has mitigated any damages he may have. This argument is also without merit first because the documents that the parties provided to the court do not make clear

specifically what these documents are. This contention also lacks merit because the EEOC argues that it has many of these documents in its possession and can produce sufficient documents to establish whether or not Mr. Grindle has mitigated any damages he may have had.

Accordingly, Watkins cannot show that the EEOC failed to act diligently or that Watkins has suffered prejudice by a delay in filing, Watkins' assertion of the doctrine of laches fails.

IT IS THEREFORE RECOMMENDED THAT:

Watkins' Motion for Summary Judgment (Doc. #35) be DENIED.

June 15, 2004

s/Sharon L. Ovington
Sharon L. Ovington
United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within ten days after being served with this Report and Recommendations. Pursuant to Fed. R. Civ. P. 6(e), this period is extended to thirteen days (excluding intervening Saturdays, Sundays, and legal holidays) because this Report is being served by mail. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendations are based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within ten days after being served with a copy thereof.

Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See United States v. Walters*, 638 F. 2d 947 (6th Cir. 1981); *Thomas v. Arn,* 474 U.S. 140 (1985).