NO. 13-6527

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PATRICIA TRAVERS,

Plaintiff – Appellant

v.

CELLCO PARTNERSHIP,

Defendant – Appellee

Appeal from the United States District Court
for the Middle District of Tennessee
No. 3:12-cv-00617

BRIEF OF *AMICUS CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 13-6527 Case Name: Patricia Travers v. Cellco Partnership

Name of counsel: Brian East

Pursuant to 6th Cir. R. 26.1, National Employment Lawyers Association, Amicus Curiae
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on March 3, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Brian East

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

(a) **Parties Required to Make Disclosure**. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed**.

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) Form and Time of Disclosure. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Employment Lawyers Association (NELA) advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Founded in 1985, NELA is the country's largest professional organization comprised exclusively of lawyers who represent individual employees in cases involving labor, employment and civil rights disputes. NELA and its 68 state and local affiliates have more than 3,000 members nationwide committed to working for those who have been illegally treated in the workplace.[1] As part of its advocacy efforts, NELA has filed dozens of *amicus curiae* briefs before this and other federal appellate courts to ensure that the goals of workplace statutes are fully realized, including in the two U.S. Supreme Court cases that the Congress explicitly overturned by enacting the ADA Amendments Act of 2008 (ADAAA), *Toyota Motor Mfg. v. Williams* and *Sutton v. United Airlines*.

In the two years leading up to the signing of the ADA Amendments Act, NELA lawyers played a significant role in moving the legislative process forward. NELA lawyers provided examples of cases involving blatant, intentional, disability-based employment discrimination in which the courts' application of the highly

[1] Pursuant to Fed. R. App. P. 29(c)(5), *amicus curiae* states that: (a) no party's counsel authored this brief in whole or in part; (b) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (c) no person—other than amicus curiae, its members, or its counsel—contributed money intended to fund preparing or submitting this brief.

restrictive definition of "disability" caused the case to be dismissed, absent any consideration whatsoever of the central issues of discrimination. NELA lawyers also advised and assisted the disability-rights attorneys who negotiated with employer stakeholders the text of an ADAAA they would recommend to Congress. The experience of NELA lawyers in courtrooms across the nation proved valuable to negotiators in identifying needed reforms in response to judicial interpretations, and to restoring the broad construction and remedial purposes that Congress originally intended in enacting the ADA.

SUMMARY OF ARGUMENT

The ADA Amendments Act of 2008 (ADAAA) substantially changed the definition of disability under the ADA, taking it from one that was strictly construed to create a demanding standard, to one that is to be as broadly construed as possible. The most dramatic change is in the third, "regarded as" prong of the disability definition. Under the ADAAA, the individual need only show that the defendant took action because of an *impairment*. An impairment is simply a "disorder or condition" that affects "one or more body systems."

Thus, for "regarded as," it no longer matters whether an impairment is limiting. Nor does it matter if the defendant believes an impairment is limiting or not. "Regarded as" is now an *impairment* standard, with no functional analysis required, real or perceived.

Although the District Court began its ADA analysis by reciting the ADAAA's statutory standard for interpreting the "regarded as" prong, it deviated from the required analysis. Its primary reason for rejecting Ms. Travers' ADA claim was that she had not shown a "regarded as" disability, and the basis it gave for that holding betrayed a misunderstanding of the law.

This Court has not yet had an opportunity to write in any detail on the ADAAA's regarded as analysis, and it is critical that the Court correct misunderstandings like that below, in order to help courts avoid the wrong path.

ARGUMENT

I. Disability Interpreted Broadly Under the ADAAA

The ADAAA retained the basic structure and terms of the original definition of disability, but it altered the interpretation of the statutory terms "in fundamental ways." 29 C.F.R. Part 1630 App., § 1630.2(g). *See also Canfield v. Movie Tavern, Inc*., 2013 WL 6506320, at *3 (E.D. Pa. Dec. 12, 2013); *Willoughby v. Connecticut Container C*orp., 2013 WL 6198210, at *8 (D. Conn. Nov. 27, 2013) ("ADAAA has gone far to "expand[] the interpretation of the ADA's three-category definition"); *Mercer v. Arbor E&T*, 2012 WL 1425133, at *6 (S.D. Tex. Apr. 21, 2012) ("Although the ADAAA left the ADA's three-category definition of 'disability' intact, it made significant changes regarding how those categories should be interpreted.").

The Rules of Construction now require that the definition of disability "shall be construed … in favor of broad coverage of individuals … to the maximum extent permitted by the terms of this Act." 42 U.S.C. § 12102(4)(A); 29 C.F.R. § 1630.1(c)(4); *Verhoff v. Time Warner Cable, Inc.*, 299 F. App'x 488, 494 (6th Cir. 2008). *See also* 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(i).

Thus, Congress "mandated that the ADA, as amended, be interpreted as broadly as its text permits." *Summers v. Altarum Institute, Corp*., 740 F.3d 325, 330 (4th Cir. 2014). *See also Rohr v. Salt River Project Agricultural Improvement and*

Power District, 555 F.3d 850, 861 (9th Cir. 2009) ("Beginning in January 2009, "disability" was to be broadly construed and coverage will apply to the 'maximum extent' permitted by the ADA and the ADAAA."); *Thomas v. Werthan Packaging, Inc*., 2011 WL 4915776, at *5 (M.D. Tenn. Oct. 17, 2011) (courts required to apply term "expansively").

The ADA's legislative history is also "replete with references emphasizing this principle." 29 C.F.R. Part 1630 App., § 1630.2(g) (citing that history). *See also* Statement of Sen. Hatch, 154 Cong. Rec. S8354 (Sept. 11, 2008) ("the bill directs that the definition of disability be construed in favor of broad coverage. This reflects what courts have held about civil rights statutes in general"); Statement of Rep. Hoyer, 154 Cong. Rec. H8293 (Sept. 17, 2008) ("By voting for final passage of the ADA Amendments Act, we ensure that the definition of disability will henceforth be construed broadly and fairly.").

Although it does not appear that this Court has had occasion to apply the ADAAA in a reported case, it has repeatedly recognized its expanded breadth in numerous reported and unreported cases.[2]

[2] *See, e.g., Donald v. Sybra, Inc*., 667 F.3d 757, 764 (6th Cir. 2012) ("To broaden the definition of 'disability,' Congress passed the ADA Amendments Act of 2008…."); *Milholland v. Sumner County Bd. of Educ*., 569 F.3d 562, 566 (6th Cir. 2009) ("Congress enacted the ADA Amendments Act in order to 'reinstat[e] a broad scope of protection to be available under the ADA,' and to overrule *Sutton*."); *Bailey v. Real Time Staffing Services, Inc*., ___ F. App'x ___, 2013 WL 5811647, at *2 (6th Cir. Oct. 29, 2013) ("In 2008, Congress broadened the class of ADA-eligible persons

Under the Amendments Act the primary subject in ADA cases "should be whether [covered entities] have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." Pub. L. 110–325, § 2(b)(5), 122 Stat. 3553 (Sep. 25, 2008), 42 U.S.C. § 12101 (Note); 29 C.F.R. § 1630.1(c)(4). "Congress did not intend for the threshold question of disability to be used as a means of excluding individuals from coverage." 29 C.F.R. Part 1630 App., Intro., 76 Fed. Reg. 16978, 17004 (Mar. 25, 2011), *citing* 2008 House Judiciary Committee Report at 5.

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by amending the law to provide that a person is regarded as disabled if she has an 'actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.'"); *Robbins v. Saturn Corp.*, 532 F. App'x 623, 628 (6th Cir. 2013) ("Congress expressed its intent that the ADA be construed in favor of broad coverage…."); *Greer v. Cleveland Clinic Health System-East Region*, 503 F. App'x 422, 430 (6th Cir. 2012) (ADAAA "defines the term 'disability' more broadly."); *Jones v. Nissan North America, Inc.*, 438 F. App'x 388, 397 n.9 (6th Cir. 2011) ("The ADAAA broadened the definition of disability in § 12102."); *Breen v. Infiltrator Systems*, 417 F. App'x. 483, 486 (6th Cir. 2011) ("Congress recently expanded the definition of "regarded as disabled[]"); *Steward v. New Chrysler*, 415 F. App'x 632, 641 n.8 (6th Cir. 2011) ("We note that the ADA was amended in 2008 to 'broad[en the] scope of protection ... available under the [statute].'"); *Scott v. G & J Pepsi-Cola Bottlers, Inc.*, 391 F. App'x 475, 479 n.3 (6th Cir. 2010) ("intent that the ADA be construed in favor of broad coverage"); *Watts v. United Parcel Service*, 378 F. App'x 520, 525 n.7 (6th Cir. 2010) ("The act broadened the definition of disability in § 12102…."); *Jenkins v. National Bd. of Medical Examiners*, 2009 WL 331638, at *3 (6th Cir. Feb. 11, 2009) (unpublished) ("In the ADA Amendments Act, Congress made clear that it intends for the ADA to give broad protection to persons with disabilities …."); *Verhoff v. Time Warner Cable, Inc.*, 299 F. App'x 488, 494 (6th Cir. 2008) ("But, as previously noted, Congress has recently enacted significant changes to the ADA. … Congress now tells us that '[t]he definition of disability in [the ADA] shall be construed in favor of broad coverage of individuals under this Act.'").

"The primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA." 29 C.F.R. § 1630.1(c)(4). *See also* Statement of Senate Managers, 154 Cong. Rec. S8843 (Sept. 16, 2008) ("We intend that … the sum of these changes will make the threshold definition of disability in the ADA—under which individuals qualify for protection from discrimination—more generous, and will result in the coverage of some individuals who were previously excluded from those protections."); *Moates v. Hamilton County*, ___ F. Supp. 2d ___, 2013 WL 5568723, at *5 (E.D. Tenn. Sept. 4, 2013) ("The ADAAA mandates a broad interpretation of the meaning of the word 'disability,' and imposes a 'non-onerous' burden on a plaintiff at the *prima facie* stage.").

II. Dramatic Changes To "Regarded As" Prong

Ms. Travers is proceeding under the "regarded as" prong of the disability definition.[3] As significant as the ADAAA's changes are to the disability definition in general—going from the old "demanding standard" extreme[4] to one interpreting

[3] Note that as before, an individual may establish coverage under any one or more of the three prongs of the disability definition. 29 C.F.R. § 1630.2(g)(2).

[4] *See Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 197 (2002), which has been rejected by the ADAAA. Pub. L. 110–325, § 2(b)(4), 122 Stat. 3553 (Sept. 25, 2008), 42 U.S.C. § 12101 (Note); *Verhoff v. Time Warner Cable, Inc*., 299 F. App'x 488, 492 n.2 (6th Cir. 2008).

disability as broadly as the terms allow—"regarded as" is the portion of the ADA's disability definition that the ADAAA changed most dramatically.[5]

An individual is now "regarded as" having a disability if the individual is subjected to a prohibited act based on an actual or perceived physical or mental impairment, *whether or not the impairment limits or is perceived to limit a major*

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[5] Commentators recognize that the new "regarded as" analysis is the most expansive part of the ADAAA. *See, e.g.*, Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights*, 31 Berkeley J. Emp. & Lab. L. 203, 266 (2010) ("providing nearly universal coverage in the nondiscrimination context, … covering almost any person discriminated against because of an impairment"); Michelle A. Travis, *Impairment As Protected Status: A New Universality for Disability Rights*, 46 Ga. L. Rev. 937, 951 (2012) ("dramatic expansion"); Stephen F. Befort, *Let's Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the "Regarded As" Prong of the Statutory Definition of Disability*, 2010 Utah L. Rev. 993, 994 (2010) ("One of the most significant changes made by the ADAAA … a sweeping overruling of the Sutton decision…."); Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 Nw. U.L. Rev. Colloquy 217, 223 (2008) (One of the most significant changes…."); Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 Wash. & Lee L. Rev. 2027, 2062 (2013) ("The ADAAA's revised treatment of the "regarded as" prong represents the act's most far-reaching expansion in coverage."); Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 Ala. L. Rev. 955, 979 (2012) ("Finally, the most transformative change was the vastly expanded coverage under the 'regarded as' prong."); Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 Wm. & Mary L. Rev. 1483, 1493 (2011) ("Perhaps most significantly, the ADAAA liberalized the definition of being "regarded as" having an impairment."); Kerri Stone, *Substantial Limitations: Reflections on the ADAAA*, 14 N.Y.U. J. Legis. & Pub. Pol'y 509, 541 (2011) ("Most significantly, however, the ADAAA expanded the definition of the term "regarded as" disabled."); Wendy F. Hensel, *Rights Resurgence: The Impact of the ADA Amendments Act on Schools and Universities*, 25 Ga. St. U. L. Rev. 641, 656 (2009) ("Perhaps the most radical change in the statute, however, is the revised interpretation of the regarded as prong of the disability determination.").

life activity. 42 U.S.C. § 12102(3)(A); 29 C.F.R. §§ 1630.2(g)(1)(iii), 1630.2(j)(2), and 1630.2(l)(1); *Milholland v. Sumner County Bd. of Educ*., 569 F.3d 562, 566 (6th Cir. 2009). *See also Brown v. City of Jacksonville*, 711 F.3d 883, 889 (8th Cir. 2013); *Miller v. Illinois Dept. of Transp*., 643 F.3d 190, 195 n.1 (7th Cir. 2011) (listing the new regarded-as standard as one of "many important changes" in the ADAAA); *Dulaney v. Miami–Dade County*, 481 F. App'x 486, 489 n.3 (11th Cir. 2012); *Fleck v. WILMAC Corp*., 2011 WL 1899198, at *6 (E.D. Pa. May 19, 2011) (noting "ADAAA's de-emphasis on an employer's beliefs as to the severity of a perceived impairment"); 29 C.F.R. Part 1630 App., § 1630.2(l) (sufficient to show that employee "treated adversely because of an impairment, without having to establish the covered entity's beliefs concerning the severity of the impairment.").

Thus, the plaintiff is "not required to present evidence of how or to what degree [the employer] believed the impairment affected him." *Hilton v. Wright*, 673 F.3d 120, 129 (2d Cir. 2012). The legislative history is fully consistent.[6]

[6] *See, e.g., Hilton v. Wright*, 673 F.3d 120, 129 (2d Cir. 2012) (citing House Committee Report); Statement of Senate Managers, 154 Cong. Rec. S8840 and S8842 (Sept. 16, 2008) ("Under this bill, the third prong of the disability definition will apply to impairments, not only to disabilities. As such, it does not require a functional test to determine whether an impairment substantially limits a major life activity."); Statement of Sen. Hatch, 154 Cong. Rec. S8354 (Sept. 11, 2008) ("this is a significant step because individuals will no longer have to prove they have a disability or that their impairment limits them in any way.").

The ADAAA's "regarded as" analysis is therefore sometimes referred to as an "impairment standard" because the focus is on impairment rather than on limitations. *Compare Saley v. Caney Fork, LLC*, 886 F. Supp. 2d 837, 849 (M.D. Tenn. 2012) ("Therefore, the relevant inquiry for establishing a disability under the third prong is an examination of whether Defendant regarded Plaintiff as possessing one of the listed impairments."); *Wells v. Cincinnati Children's Hosp. Medical Center*, 860 F. Supp. 2d 469, 478 (S.D. Ohio 2012) ("In contrast to the pre-amendment statute, under the ADAAA, a plaintiff proceeding under the "regarded as" prong only has to prove the existence of an impairment to be covered under the Act….").

Both before and after the ADAAA, an impairment is defined as any "physiological disorder or condition, cosmetic disfigurement, or anatomical loss" affecting one or more "body systems," or any "mental or psychological disorder." *Compare* 29 C.F.R. § 1630.2(h) (2008); 29 C.F.R. § 1630.2(h) (2013). Body systems include neurological and cardiovascular. *Id*.

Thus, for example, it is sufficient that an employer took adverse action because an impairment, even if it is non-limiting, like skin-graft scars, 29 C.F.R. Part 1630 App., § 1630.2(l), or presents no symptoms. *Saley v. Caney Fork, LLC*, 886 F. Supp. 2d 837, 851 (M.D. Tenn. 2012).

Although this case is the first opportunity for this Court to squarely address the issue,[7] several courts within the Circuit have explained the new analysis. *See, e.g., Watson v. Ciena Healthcare Management, Inc*., 2013 WL 5435279, at *6 (E.D. Mich. Aug. 16, 2013) ("Based on her own testimony and that of Gwen Johnson, she was expressly terminated because of her high blood pressure. Under this prong of the statute, it does not matter whether her condition actually limited a major life activity."); *Wright v. Memphis Light, Gas & Water Div*., 2013 WL 2014050, at *11 (W.D. Tenn. May 13, 2013) ("More to the point, a reasonable juror could infer that Glore regarded Plaintiff as disabled because of his stutter, whether or not Glore believed Plaintiff's speech actually impacted a major life activity."); *Jennings v.*

[7] One of this Court's opinions has confusing dicta. The Court properly applied the pre-ADAAA standard and pre-ADAAA case law to a case governed by pre-ADAAA law (i.e., the adverse acts took place prior to 2009), but it mistakenly quoted the post-ADAAA statutory language. *Gecewicz v. Henry Ford Macomb Hospital Corp*., 683 F.3d 316, 321 (6th Cir. 2012). Other courts have made similar statements. *See, e.g., Brown v. City of Jacksonville*, 711 F.3d 883, 889 n.7 (8th Cir. 2013) ("We recognize that at least one of our cases also did not reference the appropriate version of the ADA.").

It is important for this Court to clarify the proper ADAAA analysis before any error gets established. *Compare Lewis v. Humboldt Acquisition Corp., Inc*., 681 F.3d 312, 314–15 (6th Cir. 2012) (en banc) ("For the past seventeen years, our court has required district courts to instruct juries that ADA claimants may win only if they show that their disability was the "sole" reason for any adverse employment action against them. The term crept into our ADA jurisprudence [from the Rehabilitation Act, and] we blurred the distinction between the laws in the first place. … The longer we have stood by this standard, the more out of touch it has become with the standards used by our sister circuits. … Our interpretation of the ADA not only is out of sync with the other circuits, but it also is wrong.").

Dow Corning Corp., 2013 WL 1962333, at *9 (E.D. Mich. May 10, 2013) ("It is enough that an employer took some adverse employment action because of some impairment, whether real or imagined, no matter how insubstantial. This explains why the parties considered it unnecessary to address how Defendant regarded Plaintiff as disabled—Congress no longer considers it relevant. Plaintiff has satisfied his burden under the 'regarded as' prong of the ADA by producing evidence that Defendant did not hire him because of his back and shoulder problems; regardless of whether Defendant viewed those impairments to be substantially limiting.") (footnote omitted).[8]

Because of the breadth of the "regarded as" prong, it is generally unnecessary to prove "actual" or "record of" disability except in failure-to-accommodate claims not applicable here. 29 C.F.R. § 1630.2(g)(3); *Wright v. Memphis Light, Gas & Water Div*., 2013 WL 2014050, at *11 (W.D. Tenn. May 13, 2013).

[8] The only impairments that will not support a "regarded as" claim are those that are both "transitory" and "minor." 42 U.S.C. § 12102(3)(B); 29 C.F.R. § 1630.15(f). But this is a defense that the defendant must plead and prove. 29 C.F.R. § 1630.15(f); *Baier v. Rohr-Mont Motors, Inc*., 2013 WL 2384269, at *6 (N.D. Ill. May 29, 2013); *Mayorga v. Alorica, Inc*., 2012 WL 3043021, at *8 (S.D. Fla. July 25, 2012); *Gaus v. Norfolk Southern Ry. Co*., 2011 WL 4527359, at *17 and 19 (W.D. Pa. Sept. 28, 2011); *Dube v. Texas Health and Human Services Comm'n*, 2011 WL 3902762, at *4–5 (W.D. Tex. Sept. 6, 2011). Cellco has not attempted to raise this defense.

III. District Court's ADAAA Error

The District Court began by accurately restating the ADAAA's new "regarded as" analysis. 2013 WL 6048177, at *5. But in its paragraph rejecting the "regarded as" claim, the court below betrayed a fundamental misunderstanding of the proper standard. The court stated:

> Plaintiff has not shown that Defendant regarded her as unable to do her job or as being substantially limited in performing the tasks of a senior customer service representative.

Id. As set out above, the employer's belief as to limitations caused by the plaintiff's impairment—whether in the job, the job tasks, major life activities, or anything else—is irrelevant.

The District Court also observed:

> When asked in deposition whether she thought Defendant perceived her as having a disability, Plaintiff replied: "I have no idea how they perceived me, ma'm."

Id. Again, though, the plaintiff no longer needs to get inside the employer's head to establish its perception of the plaintiff's limitations. *See also Jennings v. Dow Corning Corp*., 2013 WL 1962333, at *9 (E.D. Mich. May 10, 2013) ("It is enough that an employer took some adverse employment action because of some impairment, whether real or imagined, no matter how insubstantial. This explains why the parties considered it unnecessary to address how Defendant regarded Plaintiff as disabled—Congress no longer considers it relevant.") (footnote omitted).

The confusion below may have been based in part on Cellco's briefing, which stated, among other things, that Ms. Travers:

> has to show either (1) that Verizon Wireless mistakenly believed she had a limiting impairment when in fact she did not (an argument Plaintiff does not make) or (2) that Verizon Wireless believed she had a limiting impairment when that impairment, in fact, was not so limiting….

PACER Doc. 21, p. 21. Cellco repeated substantially similar language in its Reply Brief. Doc. 36, p. 5. In support Cellco cited *Talley v. Family Dollar Stores of Ohio, Inc*., 542 F.3d 1099, 1106 (6th Cir. 2008). *Id*. But *Talley* was a pre-ADAAA case, and as shown above, its standard is no longer the law.[9]

Pre-ADAAA cases on the issue of disability are now questionable precedent, to say the least. *See, e.g., Summers v. Altarum Institute, Corp*., 740 F.3d 325, 330–331 (4th Cir. 2014) ("In holding that Summers's temporary injury could not constitute a disability as a matter of law, the district court erred not only in relying on pre-ADAAA cases but also in misapplying the ADA disability analysis. … In doing so, Altarum principally relies on pre-ADAAA cases that, as we have explained, the amended Act abrogated."); *Amsel v. Texas Water Development Bd*., 464 F. App'x 395, 399 n.2 (5th Cir. 2012) (observing that "[m]any of the cases cited

[9] *Talley* relied on the regarded-as analysis in *Sutton v. United Air Lines*, 527 U.S. 471, 489 (1999). 542 F.3d at 1106. But one of the ADAAA's expressed purposes was "to reject the Supreme Court's reasoning in *Sutton* … with regard to coverage under the third prong of the definition of disability…." Pub. L. 110–325, § 2(b)(3), 122 Stat. 3553 (Sept. 25, 2008), 42 U.S.C. § 12101 (Note).

in this discussion will be superseded in whole or in part as applied to cases arising under the new law"); *Tate v. Sam's East, Inc.*, 2013 WL 1320634, at *10–11 (E.D. Tenn. Mar. 29, 2013); *Becker v. Elmwood Local School Dist*., 2012 WL 13569, at *9–10 (N.D. Ohio Jan. 4, 2012).

In particular, prior "regarded as" case law is superseded by the ADAAA. *See, e.g., Haley v. Community Mercy Health Partners*, 2013 WL 322493, at *12 (S.D. Ohio Jan. 28, 2013) (defendant's arguments on regarded-as prong "unconvincing because of its basis on overruled authority."); *Snyder v. Livingston*, 2012 WL 1493863, at *7–8 (N.D. Ind. Apr. 27, 2012) ("All these cases, however, apply the pre-amendment ADA, which required the plaintiff show that an actual or perceived impairment was regarded as substantially limiting a major life activity …. Ultimately, Defendants' reliance on case law applying the pre-amendment ADA fails to show that calling Snyder mentally unstable is insufficient as a matter of law to establish that Snyder was not regarded as disabled under the amended, more expansive version of the ADA."); *Becker v. Elmwood Local School Dist.*, 2012 WL 13569, at *10 (N.D. Ohio Jan. 4, 2012) ("Notably, Elmwood's summary judgment motion argues under the pre-amendment version of the ADA …. This Court is not persuaded by Elmwood's arguments. First, notwithstanding any factual similarities, the *Hughes* court relied on the pre-amendment version of the ADA."); *Dube v. Texas Health and Human Services Comm'n*, 2011 WL 3902762, at *4 (W.D. Tex. Sept. 6,

2011) ("Defendant relies upon cases applying the much narrower, pre-ADAAA definition of "regarded as" disabled, which are not relevant."); *Loperena v. Scott*, 2009 WL 1066253, at *12 n.10 (M.D. Fla. Apr. 21, 2009) ("To be clear, the Court recognizes that these cases have been superseded by the ADA Amendments Act of 2008 and are applicable here only because the acts giving rise to the plaintiff's claims occurred before the effective date of the Amendments.").

Cellco also stated below that Travers:

> fails to allege[] in what major life activity Verizon Wireless believed she was substantially limited. Doc. 21, p.20.
>
> still fails to allege in what major life activity Verizon Wireless believed she was substantially limited – a requirement for an ADA "regarded as" claim. Doc. 36. p. 5, *citing Talley*, *supra*.

Once again, that is no longer required, and *Talley* is no longer persuasive on this point.

CONCLUSION

Under the ADAAA "courts will have to address whether an impairment constitutes a disability under the first and second, but not the third, prong of the definition of disability. The functional limitation imposed by an impairment is irrelevant to the third 'regarded as' prong." Statement of Senate Managers, 154 Cong. Rec. S8843 (Sept. 16, 2008). Senator Hatch called this "a significant step because individuals will no longer have to prove they have a disability or that their

impairment limits them in any way." 154 Cong. Rec. S8354 (Sept. 11, 2008) (emphasis added).

In many ways this is the most fundamental change in the ADAAA, and for that reason the most misunderstood.

> Most importantly, the ADAAA clarified that a "regarded as" plaintiff need only prove that an employer made an adverse employment decision because of the plaintiff's real or perceived impairment—not that the employer also regarded the impairment as substantially limiting a major life activity. In doing so, the ADAAA rendered irrelevant any inquiry into the specific motivation behind an employer's impairment-based decision. Under the ADAAA, the "regarded as" prong applies to all adverse employment decisions made because of an individual's real or perceived impairment—regardless of whether the decision was the result of identifiable "myths, fears or stereotypes about disability." The ADAAA thus established that the "regarded as" prong contains neither a functional-limitations component nor a stigma-based test. To the contrary, the "regarded as" prong now protects individuals against nearly all forms of impairment-based discrimination in the workplace.
>
> The ADAAA's expansion of the "regarded as" prong has thus achieved a profound yet largely unheralded result. Rather than merely expanding the definition of disability, the ADAAA is better understood as having elevated impairment to its own protected class status.

Michelle A. Travis, *The Part and Parcel of Impairment Discrimination*, 17 Emp. Rts. & Emp. Pol'y J. 35, 38–39 (2013) (footnotes omitted).

Under the correct ADAAA analysis, this Court should reverse and remand.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 4,540 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word software in Times New Roman 14-point font in text and footnotes.

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CERTIFICATE OF SERVICE

I certify that on this 3rd day of March, 2014, a true and correct copy of the foregoing document was served on all parties or their counsel of record by U.S. Mail, and when filed, will be served through the CM/ECF system.

/s/ Brian East
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