No. 24-1367

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DAVID MEZA,
Plaintiff-Appellant,

v.

UNION PACIFIC RAILROAD CO.,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Nebraska

# BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND IN FAVOR OF REVERSAL

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

**Statutes**



**Rules & Regulations**

**Other Authorities**

## STATEMENT OF INTEREST

Congress charged the Equal Employment Opportunity Commission with interpreting, administering, and enforcing federal laws prohibiting employment discrimination, including Title I of the Americans with Disabilities Act, as amended, 42 U.S.C. §§ 12101-12213. The ADA defines disability to include being regarded as having an impairment. 42 U.S.C. § 12102(1)(C), (3). This case presents important questions about that regarded-as definition of disability, as the district court held that no jury could find the employer regarded the plaintiff as having an impairment when the employer imposed a five-year work restriction because of physiological changes to the plaintiff's neurological system resulting from multiple injuries to his brain. Because the EEOC has a substantial interest in the interpretation and application of the regarded-as definition of disability and the ADA's anti-discrimination provisions, the EEOC offers its views to the Court. *See* Fed. R. App. P. 29(a)(2).

## STATEMENT OF THE ISSUES[1]

1. Could a jury find that Union Pacific imposed work restrictions on Meza because of actual or perceived physiological changes to Meza's neurological system resulting from his brain injuries?

    - 42 U.S.C. § 12102
    - 29 C.F.R. § 1630.2
    - *Morriss v. BNSF Ry. Co.*, 817 F.3d 1104 (8th Cir. 2016)
    - *Brown v. City of Jacksonville*, 711 F.3d 883 (8th Cir. 2013)
    - *EEOC v. UPS Ground Freight, Inc.*, 443 F. Supp. 3d 1270 (D. Kan. 2020)

2. Did Meza provide direct evidence that Union Pacific imposed work restrictions on him on the basis of disability?

    - 42 U.S.C. § 12112
    - *Brown v. City of Jacksonville*, 711 F.3d 883 (8th Cir. 2013)
    - *EEOC v. Dolgencorp, LLC,* 899 F.3d 428 (6th Cir. 2018)

[1] We take no position on any other issue in this appeal.

## STATEMENT OF THE CASE

### A. Statement of the Facts

David Meza worked for Union Pacific for more than two decades. R. Doc. 150-16, at 13:19-14:21. In 2016, he was working as a car inspector for Union Pacific in West Colton, California. *Id.* at 19:11-14; 22:20-23:2. He inspected rail cars, as well as performing maintenance and repair on them. *Id.* at 23:5-24:1; 29:11-24.

Meza was seriously injured in a motorcycle accident in June 2016. R. Doc. 148, at 31. He lost consciousness for about two minutes and initially did not have a pulse. *Id.* at 31-32. Ultimately, he spent more than a week in the hospital, where he received multiple brain imaging scans. *Id.* at 33. During his hospitalization, he was diagnosed with a skull fracture, subdural hematoma, and multiple areas of intracerebral (or intraparenchymal) hemorrhage in his brain.[2] R. Doc. 139, at 4-6; R. Doc. 148, at 46. He also experienced symptoms including dizziness,

[2] Union Pacific's chief medical officer, Dr. John Holland, explained that a subdural hematoma is "bleeding outside the brain. . . between the lining of the skull and a . . . membrane that goes over the brain. Blood pushes the brain to the side." R. Doc. 150-21, at 55:23-56-2. An intracerebral hemorrhage is "bleeding inside the brain tissue." *Id.* at 55:16-20.

memory loss, and vertigo. R. Doc. 139, at 6. The hospital discharged Meza on June 26, 2016. *Id.*

As he recovered, Meza saw a neurologist, a physical therapist, a chiropractor, and a primary care physician. The neurologist, Dr. Robert Klein, ordered an MRI in August 2016 and found "[n]o hemorrhage . . . no mass effect . . . no edema . . . no extra-axial fluid . . . [and] no specific or unusual enhancement." R. Doc. 148, at 35; R. Doc. 150-25, at 19:5-9. Dr. Klein did not recall if he had access to the imaging from the hospital, and it does not appear that he compared Meza's August 2016 MRI to any earlier imaging. R. Doc. 150-25, at 28:7-29:1, 43:25-44:7. Dr. Klein continued to treat Meza, and he recommended that Meza could return to work in February 2017. R. Doc. 148, at 35. Meza's physical therapist and chiropractor, meanwhile, cleared Meza to work in January 2017, R. Doc. 148, at 35-36; R. Doc. 150-16, at 61:19-23, while his physician released him to work in March 2017. R. Doc. 139, at 22.

Union Pacific required Meza to undergo a fitness-for-duty evaluation to determine whether he could return to work. R. Doc. 150-16, at 50:4-23. Dr. John Charbonneau, a Union Pacific Associate Medical Director, oversaw the evaluation, which Union Pacific used "to determine if the

employee's health condition poses a significant safety risk." R. Doc. 139-2, at 15. Dr. Holland, Union Pacific's Chief Medical Officer, reviewed the records and evaluation. R. Doc. 139-2, at ¶ 5; R. Doc. 139, at 15-16. Neither Dr. Charbonneau nor Dr. Holland examined Meza or spoke to his providers. R. Doc. 148, at 39.

Dr. Charbonneau concluded that Union Pacific should impose work restrictions. Relying in part on a 2014 Federal Motor Carrier Safety Administration handbook for evaluating commercial drivers' medical conditions, he reasoned that "[m]oderate to severe traumatic brain injuries with intraparenchymal hemorrhages are associated with an unacceptably high risk of additional neurologic episodes, including seizures, for a period of five years from the onset of the episode." R. Doc. 139, at 14. Dr. Holland reviewed the records and concurred. *Id.* at 15-16.

Dr. Holland later explained that it did not matter that Dr. Klein had observed that the 2016 MRI showed no abnormalities: "It's possible to have significant intracerebral hemorrhage and subarachnoid hemorrhage and . . . after several months have all the swelling and edema and the blood problems resolved, although the damage to the brain is still there." R. Doc. 150-21, at 120:5-10. Describing the effects of Meza's injuries,

Dr. Holland noted that "[t]he damage would still be there, the dead tissue from a variety of causes, the bleeding. There's always lack of arterial oxygen to Support parts of the brain which would have died because of the lack of oxygen." *Id.* at 134:18-23. He continued, "There would also be some death to the brain tissue because of the physical trauma. And also there would be . . . scarring in that part of the brain." *Id.* at 134:23-135:2. Additionally, "the iron pigment called hemosiderin and scarring of the brain tissue called gliosis, both of these things are permanent damage to the brain." *Id.* at 135:5-8. He testified that, for Meza, "those things are undoubtedly there." *Id.* at 135:9-10.

Union Pacific then sent the restrictions to managers at the West Colton railyard where Meza worked. R. Doc. 150-17, at 47:4-48:2. They concluded that Meza could not perform his job duties with those restrictions. R. Doc. 150-17, at 49:12-50:12.

Union Pacific informed Meza of the restrictions in March 2017. R. Doc. 148, at 43. It said Meza could not return to work with those restrictions, which would be in place until June 2021. *Id.* Union Pacific also sent Meza disability benefits paperwork. *Id.* As part of the disability benefits process, Dr. Holland certified that Meza was "disabled from

performing his/her regular occupation" from June 18, 2017, to June 18, 2021. R. Doc. 150-21, at 62:9-19. He later explained that "the results of the traumatic brain injury" were the reason Union Pacific gave Meza work restrictions. *Id.* at 63:20-64:4.

Meza tried to persuade Union Pacific to rescind the restrictions. He saw Dr. Pantea Zohrevand, an epilepsy specialist, in 2017. R. Doc. 148, at 45-46. She reviewed an August 2016 MRI that showed "prior traumatic brain injury with remote right frontal and temporal hemorrhagic contusions and evidence of prior extra-axial hemorrhage." R. Doc. 148, at 46. Dr. Zohrevand ordered a new MRI, and, in June 2017, observed "areas of encephalomalacia with residual hemosiderin" and that "[t]he degree of encephalomalacia is slightly increased from prior study." *Id.* at 47. As Dr. Charbonneau explained, encephalomalacia means that "some areas of his brain were structurally changed . . . [a]nd it's a common finding after people have had traumatic brain injuries, particularly with intraparenchymal bleeding." R. Doc. 150-22, at 117:9-17. Meanwhile, Dr. Zohrevand testified that residual hemosiderin is "a product of the blood" that is "evidence of a prior brain bleed." R. Doc. 150-26, at 43:18-24. Dr. Zohrevand concluded that Meza had an increased risk of seizure

compared to the general population, but she said it was safe for him to drive and released him to work without restriction. R. Doc. 150-26, at 42:12-15, 44:24-45:1.

Meza sent Union Pacific the release from Dr. Zohrevand, but Union Pacific did not change his restrictions. R. Doc. 148, at 49; R. Doc. 155, at 8; R. Doc. 150-22, at 115:21-116:4. Dr. Charbonneau explained that the releases did not change "the facts of the injury and previous structural findings." R. Doc. 148, at 50; R. Doc. 155, at 8. When he later reviewed the 2017 MRI, Dr. Charbonneau explained that "encephalomalacia is a common result of somebody who has had a traumatic brain injury and bleeding into the brain tissue" and that "it's a natural result" of those injuries. R. Doc. 150-22, at 120:23-121:4. Dr. Zohrevand similarly testified that "intraparenchymal bleeding carries with it a subsequent risk of seizure" because it can cause encephalomalacia, which "can be either the risk or the cause for the seizure." R. Doc. 150-26, at 26:2-17. And "once you have encephalomalacia, you are forever at an elevated risk of seizures." *Id.* at 26:18-21.

Meza contacted Union Pacific as soon as the restrictions expired in July 2021. R. Doc. 148, at 60. Union Pacific told Meza that he would need to provide a new neurological evaluation to return to work. *Id.* Meza testified

that he did not think he had insurance then and, as a result, he did not get an evaluation. R. Doc. 150-16, at 139:8-17. Union Pacific sent Meza another letter in May 2022, and Meza obtained an evaluation. R. Doc. 159-16, at 140:1-6. Union Pacific then allowed Meza to return to work. *Id.* at 143:10-16.

**B. District Court Decision**

Meza filed this lawsuit and, after discovery, Union Pacific moved for summary judgment. R. Doc. 138. The district court granted Union Pacific's motion. R. Doc. 162. After reviewing the arguments from Meza and Union Pacific, including the parties' arguments about whether the direct or circumstantial evidence framework applied, the district court held that Meza had not introduced sufficient evidence that Union Pacific regarded him as having an impairment. *Id.* at 9-18. The court quoted the regarded-as definition from the ADAAA, but then said that "a person is regarded as disabled if [his] employer mistakenly believes that [he] has a physical impairment that substantially limits one or more major life activities or mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities." R. Doc. 162, at 11-12 (quoting *Canning v. Creighton Univ.*, 995 F.3d 603, 615 (8th Cir. 2021)).

According to the court, "Meza's focus on his intracerebral hemorrhage . . . dooms his case" because "that specific injury itself was no longer an issue when Union Pacific imposed the work restrictions." *Id.* at 17. Meza "never adequately addresse[d] Union Pacific's distinction between a current physical impairment and the potential risk of future health issues." *Id.* The court reasoned that "evidence that Meza faced a greater risk of seizures after his brain injury and that Union Pacific acted based on that risk . . . is not necessarily probative evidence . . . that Union Pacific thought he was disabled when it imposed the work restrictions on him." *Id.* at 17-18 (citing *Morriss v. BNSF Ry. Co.*, 817 F.3d 1104, 1106, 1113 (8th Cir. 2016)). The district court concluded that Meza had not provided "sufficient evidence to show that—at the time it imposed the restrictions on Meza—Union Pacific perceived him to have an existing condition 'that met the definition of physical impairment." *Id.* at 18 (quoting *Morriss*, 817 F.3d at 1113) (internal quotation marks omitted).

## ARGUMENT

### I. A jury could find Meza satisfied the ADAAA's "regarded as" definition of disability.

The district court erred in holding that no jury could find that Union Pacific regarded Meza as having an impairment when it barred him from work for five years because of alleged future safety concerns. Those concerns arose directly from Meza's 2016 brain injuries. The only question remaining for the regarded-as theory is whether those injuries led to an actual or perceived physiological condition or disorder falling within the broad scope of the ADA's definition of an impairment when Union Pacific imposed the work conditions. On this record, a jury could answer that question in the affirmative.

Two legal errors appeared to influence the district court's holding. First, the court relied on *Morriss v. BNSF Ry. Co.*, 817 F.3d 1104 (8th Cir. 2016), in crediting Union Pacific's assertion that it acted only based on future safety concerns. But *Morriss* does not permit an employer to act based on future concerns that arise from current actual or perceived impairments, and a jury could find that Union Pacific's concerns arose from Meza's current actual or perceived impairment. Second, the court

articulated a pre-ADAAA standard in formulating the framework for assessing Meza's impairment, and that standard may have led the court to apply a stricter test than the ADAAA permits.

### A. A jury could find Union Pacific imposed work restrictions on Meza because he had an actual or perceived impairment.

Congress amended the ADA in 2008 in part to expand the regarded-as definition of disability. Americans with Disabilities Act of 2008, Pub. L. No. 110-325, § 2(b)(3), 122 Stat. 3553, 3554 (2008). Before the ADAAA, the regarded-as inquiry looked to whether an individual had, or the employer perceived the individual to have, a substantially limiting impairment. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999). Congress rejected that focus on substantial limitation. ADAAA, Pub. L. No. 110-325, § 2(b)(3), 122 Stat. 3553, 3554 (2008) (stating that the ADAAA "reject[ed] the Supreme Court's reasoning in [*Sutton*] with regard to coverage under the third prong of the definition of disability").

Now, a plaintiff need only show "he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity*." 42 U.S.C. § 12102(3) (emphasis added).

An impairment includes "[a]ny physiological disorder or condition . . . or anatomical loss affecting one or more body systems, such as neurological. . . ." 29 C.F.R. §1630.2(h)(1). That definition covers conditions that do not have many, if any, present symptoms. "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." 29 C.F.R. § 1630.2(j)(1)(vii). The EEOC's interpretive guidance explains that it does not matter if "the periods during which an episodic impairment is active" are "brief or occur infrequently." 29 C.F.R. pt. 1630, app. § 1630.2(j)(1)(vii).

Thus, "[c]overage under the 'regarded as' prong of the definition of disability should not be difficult to establish." 29 C.F.R. pt. 1630, app. § 1630.2(l); *see also Brown v. City of Jacksonville*, 711 F.3d 883, 889 (8th Cir. 2013) (holding that the district court erred in relying on "the more restrictive" pre-ADAAA regarded-as definition). And it does not matter "whether or not myths, fears, or stereotypes about disability motivated the employer's decision." 29 C.F.R. pt. 1630, app. § 1630.2(l); *Brasier v. Union Pac. R.R. Co.*, No. 21-CV-00065, 2023 WL 129534, at *5 (D. Ariz. Jan. 9, 2023) ("ADA protection covers more than just those who were discriminated against based on myths or stereotypes"), *report and recommendation adopted*

*in part, rejected in part on other grounds*, No. 21-cv-00065, 2023 WL 2754007 (D. Ariz. Mar. 31, 2023).

Applying that standard, a jury could find that Union Pacific imposed its work restrictions because of the physiological changes resulting from Meza's injuries. The restrictions arose from Dr. Charbonneau's fitness-for-duty memo, which he used "to determine if the employee's *health condition* poses a significant safety risk." R. Doc. 139-2, at 15 (emphasis added). And he relied on an FMCSA Medical Examiner handbook that "directs medical examiners to disqualify a driver who *has a medical condition* that endangers the health and safety of the driver and the public.'" R. Doc. 139, at 10 (quoting FMCSA Handbook at 48) (emphasis added). Dr. Holland meanwhile testified that the restrictions were imposed because of "the results of the traumatic brain injury." R. Doc. 150-21, at 62:11-64:4.

A jury could also find those changes are an impairment under the ADA because they are a physiological condition that affects Meza's neurological function. *See* 29 C.F.R. § 1630.2(h)(1). Indeed, each of Union Pacific's doctors testified to the changes to Meza's brain stemming from his injuries.

Dr. Holland described those changes in detail. Dr. Holland testified that, even after "all the swelling and edema and the blood problems resolved, . . . the damage to the brain is still there." R. Doc. 150-21, at 120:5-10. He explained that Meza's injuries mean there would be "[s]ome death to the brain tissue . . . [and] scarring in that part of the brain." *Id.* at 134:23-135:2. And, as a result, there is "permanent damage to the brain." *Id.* at 135:5-8. He explained that "the bleeding inside the brain . . . creates the risk of seizure." *Id.* at 55:12-14. And he described the limitations that Union Pacific imposed on Meza as "restrictions for his seizure condition." *Id.* at 43:1-3.

Dr. Charbonneau and Union Pacific's expert, Dr. Joel Cotton, similarly described current physiological changes to Meza's neurological system. Dr. Charbonneau told Meza that "the areas where the bleeding occurred were altered chemically and could serve as an area for seizures in the future." R. Doc. 150-5, at 8. And although Dr. Charbonneau had not seen the 2017 MRI showing encephalomalacia when he recommended work restrictions, he testified that encephalomalacia is "a natural result" of Meza's injuries. R. Doc. 150-22, at 120:23-121:4. Union Pacific's expert also testified that Meza "clearly *has a neurological condition* that does not

manifest necessarily as weakness or problems with memory, but rather the potential for a hemorrhage—or a seizure at some point in the future as a result of the multiple brain hemorrhages." R. Doc. 150-23, at 105:16-21 (emphasis added).

Even if a jury were to find that Meza's condition was not an actual impairment, they could still find that Union Pacific perceived Meza to have a current impairment. Along with the evidence above, Union Pacific unambiguously linked its work restrictions to what it saw as the physiological changes caused by Meza's injuries, stating that the restrictions were "due to the nature and severity of [Meza's] traumatic brain injury with intraparenchymal hemorrhagic contusions." R. Doc. 139-2, at 11. Meanwhile, Dr. Holland certified that Meza was "disabled from performing his/her regular occupation" based on the restrictions arising from "the results of the traumatic brain injury." R. Doc. 150-21, at 62:11-64:4.

Other courts have found an employer perceived an impairment on similar facts. For instance, in *Lewis v. City of Union City*, 934 F.3d 1169, 1173 (11th Cir. 2019), the plaintiff had a heart attack, and her cardiologist noted that "people who have had heart attacks tend to be at greater risk for

subsequent heart attacks." Meanwhile, her primary care physician noted some minor conditions that "did not have much effect on her bodily function." *Id.* Still, her doctor recommended that Lewis be excused from trainings involving Tasers or pepper spray. *Id.* at 1174. Her employer responded by placing her on leave and then terminating her because "it feared for her safety in view of her heart condition." *Id.* at 1181. The Eleventh Circuit held this satisfied the regarded-as definition of disability. *Id.* at 1181-82*; see also EEOC v. Staffmark Inv. LLC*, 67 F. Supp. 3d 885, 895 (N.D. Ill. 2014) (holding that employer could regard employee as "having a walking impairment" without knowing she had a prosthetic leg where it terminated her based on alleged safety concerns arising from belief that she "walked in an irregular manner").

Union Pacific's argument to the contrary is self-defeating. The company asserts both that it imposed work restrictions because it believed Meza's injuries created conditions that made it more likely for him to have a seizure and that it did not regard Meza as having an impairment. But an impairment, by definition, includes a physiological condition that affects the neurological system. 29 C.F.R. § 1630.2(h)(1). So, if Union Pacific believed that Meza's brain injuries resulted in changes to his neurological

system that made him more likely to have seizures, the company necessarily believed that Meza had a current impairment. In short, Union Pacific cannot simultaneously assert that it believed Meza's injuries changed his neurological system and that it did not view Meza as having an impairment.

### B. *Morriss* does not change the assessment of Meza's actual or perceived impairment.

The district court relied on *Morriss v. BNSF Ry. Co.*, 817 F.3d 1104 (8th Cir. 2016), in concluding that Meza had not shown that Union Pacific imposed safety restrictions based on his *current* actual or perceived impairment, but, rather, based on its concerns about *future* safety risk. R. Doc. 162, at 17-18. But *Morriss* addressed entirely different circumstances, and it does not permit employers to act based on a potential risk arising from a current impairment, whether actual or perceived.

In *Morriss,* the plaintiff alleged that his employer regarded him as having a disability because of his obesity when it did not hire him because it believed he would develop future medical conditions. *Id.* at 1105, 1107-08. Invoking EEOC regulations and interpretive guidance, this Court held that the plaintiff's obesity was not an impairment because obesity is a

physical characteristic unless it "result[s] from an underlying physiological disorder or condition" that would render it an impairment.[3] *Id.* at 1109.

That distinction between physical characteristics and physical impairments underpins *Morriss*. Had Morriss's condition been an actual or perceived impairment, his employer could not have acted on the basis of that impairment. *See id.* at 1113. This Court held, however, that Morris's obesity was not an actual or perceived impairment. *Id.* at 1112-13. And "the ADA does not prohibit an employer from acting on some other basis, *i.e.,* on its assessment that although *no physical impairment currently exists*, there is an unacceptable risk of a future physical impairment." *Id.* at 1113 (emphasis added). Thus, because the plaintiff's obesity was a physical characteristic, not an impairment, the employer's decision not to hire Morriss because it believed his obesity would lead to future health risks did not satisfy the regarded-as definition of disability. *Id.*

[3] This Court also required that the impairment be present (or be perceived to be present) at the time of the discrimination. *Morriss*, 817 F.3d at 1113. Because a jury could find that Meza either had an impairment or Union Pacific perceived Meza as having an impairment when Union Pacific imposed work restrictions, that is not at issue here.

Union Pacific, like the employer in *Morriss*, argues that it did not regard Meza as having an impairment when it acted based on its perception of future risk, and the district court here appears to have embraced that argument. *See* R. Doc. 162, at 17-18. But the physiological changes to Meza's neurological system resulting from his injuries are fundamentally different from the obesity that the *Morriss* court held was simply a physical characteristic. *See Morriss*, 817 F.3d at 1112. The EEOC guidance that this Court relied on in *Morriss* explains that "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" are not impairments.[4] 29 C.F.R. Pt. 1630, App. § 1630.2(h). The definition of impairment also does not include "characteristic predisposition to illness or disease," *id.*, which refers to situations in which "a person may be predisposed to developing an illness or a disease because of factors such as environmental, economic, cultural, or social conditions." *EEOC Compliance Manual* § 902.2(c)(2),

[4] The guidance also explains that "common personality traits such as poor judgment or a quick temper" are not impairments. 29 C.F.R. Pt. 1630, App. § 1630.2(h).

2009 WL 4782107 (2009); *see also EEOC v. UPS Ground Freight, Inc.*, 443 F. Supp. 3d 1270, 1283 (D. Kan. 2020) (explaining that the guidance distinguishes "between physiological conditions that create a predisposition to illness or impairment and other types of characteristics, such as weight, that create a predisposition to illness or impairment").

The physiological changes caused by Meza's injuries are neither physical characteristics nor a characteristic predisposition to illness. They reflect actual or perceived changes to his neurological system, rather than qualities like "eye color, hair color, left-handedness, or height." *See* 29 C.F.R. pt. 1630, app. § 1630.2(h); *UPS Ground Freight, Inc.*, 443 F. Supp. 3d at 1283. And, unlike a "characteristic predisposition to illness or disease," 29 C.F.R. Pt. 1630, App. § 1630.2(h), they do not stem from "factors such as environmental, economic, cultural, or social conditions." *EEOC Compliance Manual* § 902.2(c)(2), 2009 WL 4782107 (2009). Instead, as explained above, a jury could find that the physiological changes that Meza's injuries caused either are an impairment or that Union Pacific perceived them to be an impairment.

Consistent with that distinction, other courts have held that a jury could find an employer regarded a plaintiff as having an impairment on

facts similar to those in the record here. A district court in Kansas held that an employer regarded a plaintiff as disabled based on a stroke and "a driving restriction that is based on a heightened risk of stroke recurrence." *UPS Ground Freight, Inc.*, 443 F. Supp. 3d at 1285. It reasoned that a "stroke is not a characteristic that predisposes [the plaintiff] to illness, such as height or weight"; instead, it "is a physical condition that increased his risk for subsequent strokes." *Id.* at 1283. And another court held that "a reasonable jury could find [the employer] regarded [the plaintiff] as disabled and, in fact, no reasonable jury could find otherwise," based on the plaintiff's history of carpel tunnel syndrome and a belief that he "might at some future time develop CTS again and become unable to do the . . . job." *EEOC v. Amsted Rail Co.*, 280 F. Supp. 3d 1141, 1151 (S.D. Ill. 2017). EEOC guidance similarly addresses perceived safety risks, noting that an employer regards an employee as having an impairment if it "terminates an employee with angina from a manufacturing job . . . believing that the employee will pose a safety risk to himself or others if he were suddenly to lose consciousness." 29 C.F.R. pt. 1630, app. § 1630.2(l).

Indeed, courts have held that Union Pacific regarded other plaintiffs as having impairments based on similar facts. A district court in Nebraska

held that Union Pacific regarded another plaintiff as having an impairment because it imposed restrictions "by reason of a risk of sudden incapacitation." *Baker v. Union Pac. R.R. Co.*, 580 F. Supp. 3d 647, 659 (D. Neb. 2022); *see also Woodus v. Union Pac. R.R. Co.*, No. 4:16-CV-00745-BRW, 2018 WL 6340765, at *3 (E.D. Ark. Mar. 7, 2018) (holding that jury could find Union Pacific regarded plaintiff who had had a stroke as having an impairment because it "placed [him] on sudden-incapacitation restrictions for one year"). And a court in Arizona held that a jury could find Union Pacific regarded the plaintiff as having an impairment when it imposed work restrictions because it believed the plaintiff's brain surgery caused "cognitive issues and an increased risk of seizures." *Brasier*, 2023 WL 129534, at *3.

Consequently, nothing in *Morriss* forecloses the conclusion that Union Pacific imposed work restrictions on Meza because of an actual or perceived current impairment—one that the company believed could cause safety concerns in the future. Of course, an employer need not continue to employ someone who in fact poses a direct threat that cannot be reasonably accommodated. *See* 42 U.S.C. §§ 12111(3), 12113(b). But the question here is whether a jury could find Meza satisfied the regarded-as

theory of disability, which the district court recognized was a "threshold matter." R. Doc. 162, at 18 (quoting *Morriss*, 817 F.3d at 1113). Holding that a jury could find Union Pacific regarded Meza as having an impairment would not have been the end of the matter; it would simply have allowed the court to move on to issues including Union Pacific's direct threat defense. *See* 29 C.F.R. , app. § 1630.2(l) (the regarded-as definition "is a separate inquiry" from the direct threat defense).

### C. The district court appeared to apply an overly stringent "regarded as" standard that drew on pre-ADAAA principles.

Congress removed any reliance on the substantial limitation of major life activities from the "regarded as" analysis under the ADAAA, but the district court articulated an antiquated standard that invoked substantial limitation. The court first quoted *Canning v. Creighton University*, 995 F.3d 603, 615 (8th Cir. 2021), for the operative "regarded as" definition under the ADAAA. R. Doc. 162, at 11-12. But it then quoted *Canning* for a pre-ADAAA standard: "a person is regarded as disabled if [his] employer mistakenly believes that [he] has a physical impairment that substantially limits one or more major life activities or mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life

activities." *Id.* at 12 (quoting *Canning*, 995 F.3d at 615, which cited *Brunko v. Mercy Hosp.*, 260 F.3d 939, 942 (8th Cir. 2001)). The Supreme Court set out that standard in *Sutton*, 527 U.S. at 489, and Congress expressly abrogated *Sutton* in the ADAAA. *Adair v. City of Muskogee*, 823 F.3d 1297, 1305 (10th Cir. 2016). Nevertheless, the court quoted *Canning* for that pre-ADAAA standard here.[5] And, to the extent the court relied on it, that was error.

The record suggests that the court may have relied on that pre-ADAAA standard in conducting its regarded-as analysis. The court appeared to consider the magnitude of the effects of Meza's impairment, rather than whether he had a physiological condition that affected his neurological system at all. It held that Union Pacific did not regard Meza as having a disability because Meza's "intracerebral hemorrhage . . . was *no longer an issue* when Union Pacific imposed the work restrictions," and it

[5] Because *Canning* also cited the ADAAA standard and resolved the case before it on other grounds, the pre-ADAAA standard articulated there is dicta. *See* 995 F.3d at 614-15, Even if it were not, *Brown*, 711 F.3d at 889, predated *Canning*, and, "when faced with conflicting panel opinions, the earliest opinion must be followed." *Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc).

cited *Canning* in support of that conclusion. R. Doc. 162, at 17 (emphasis added).

The court did not spell out what it meant by "no longer an issue," but it referred to Meza's work releases and testimony. As Union Pacific argued below, the releases by and large did not address the continuing effects of Meza's intracerebral hemorrhages. *See* R. Doc. 138, at 39-41 (discussing whether the releases addressed the risk of seizure). And, while Meza testified that he did not consider himself "a person with any impairments,"[6] that testimony addressed the effects of his injuries in his daily life. *See* R. Doc. 150-16, at 97:7-9. In the same line of questioning, Meza testified that "I can do everything still," and that his doctors did not "restrict [him] in any day-to-day functions." *Id.* at 97:24-98:9. Those statements are relevant to the "actual" disability prong, which requires "a

[6] Statements like Meza's are "not particularly probative of the determination of whether [he] is disabled under the ADA, which is a legal definition quite distinct from the colloquial meaning of 'disabled.'" *Haley v. Cmty. Mercy Health Partners*, No. 3:11-CV-232, 2013 WL 322493, at *11 (S.D. Ohio Jan. 28, 2013) (discussing plaintiff's testimony that she was not "disabled"); *cf. Steffen v. Donahoe*, 680 F.3d 738, 747 (7th Cir. 2012) (noting "nothing about the context of [the supervisor's] deposition suggests that either she or her questioner was referring to the strict definition of 'disability' found in the ADA").

physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A). But, for the regarded-as definition, all that matters is the impairment's existence—not the extent of its effects. As the First Circuit held, a plaintiff "need plead and prove only that the defendants regarded her as having a physical or mental impairment, no matter the defendants' view of the magnitude of the effect of the perceived impairment on her life activities." *Mercado v. Puerto Rico*, 814 F.3d 581, 588 (1st Cir. 2016) (applying regarded-as definition in case under Title II of the ADA).

## II. Meza provided direct evidence that Union Pacific acted on the basis of disability.

The district court considered Union Pacific's argument that Meza had no direct evidence of discrimination. R. Doc. 162, at 10-11, 17. Though it did not decide the issue, the court characterized direct evidence as "evidence showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding . . . that an illegitimate criterion actually motivated the adverse employment action." *Id.* at 10 (internal quotation marks omitted). If Union Pacific raises the argument that Meza did not present direct evidence again on appeal, the Court

should reject it because Union Pacific based its decision to impose work restrictions on Meza's actual or perceived impairment.

The ADA prohibits discrimination "on the basis of disability," which includes limiting an employee in ways that adversely affect his opportunities or status "because of [his] disability." 42 U.S.C. §§ 12112(a), (b)(1). As the Sixth Circuit observed, the statute "speaks in terms of causation, not animus." *EEOC v. Dolgencorp, LLC,* 899 F.3d 428, 436 (6th Cir. 2018). Thus, while evidence that animus motivated an employer might be *sufficient* to establish causation, animus is not *necessary* for liability. *See Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (policy can be explicitly discriminatory under Title VII even in "the absence of a malevolent motive"). As the Supreme Court recently reasoned, "[p]rohibited discrimination occurs when an employer intentionally treats a person worse because of a protected characteristic"; "a lack of animosity is irrelevant to a claim of discrimination." *Murray v. UBS Sec., LLC*, 601 U.S. 23, 34 (2024) (internal quotation marks omitted) (describing discrimination under Title VII).

As a result, "[a]n employer violates the [ADA] whenever it" takes an adverse action against "an employee 'on the basis of disability' (a necessary

requirement for liability), not only when it harbors ill will (a sufficient way of establishing liability)." *Dolgencorp*, 899 F.3d at 436 (quoting 42 U.S.C. § 12112(a)).

This Court has at times spoken in terms of "animus," but it has not engrafted an ill-will requirement onto the statute's plain language, which requires only causation. *See Cushman v. Union Pac. R.R. Co.*, No. 8:23-CV-196, 2024 WL 1094703, at *7 & n.3 (D. Neb. Mar. 12, 2024) (explaining this Court's references to animus refer to intent, not ill will). For instance, in *Brown v. City of Jacksonville*, 711 F.3d 883 (8th Cir. 2013), this Court held that the plaintiff failed to present "direct or indirect evidence showing a *causal link* between the adverse employment action and her disability." *Id.* at 889 (emphasis added); *see also Baker*, 580 F. Supp. 3d at 659 ("The record shows there is direct evidence of discrimination because the defendant admittedly made the decision to remove him from work for a year based on his perceived syncope.").

Thus, when an employer explicitly relies on perceived safety concerns arising from a disability, as defined in the ADA, it serves as direct evidence of discrimination. As one Fifth Circuit judge explained, "[w]hen a concern about the disability's negative impact on workplace safety is the

reason for the adverse action, the 'causation' element of an ADA discrimination claim should be straightforward." *Nall v. BNSF Ry. Co.*, 917 F.3d 335, 350 (5th Cir. 2019) (Costa, J., specially concurring). "An employer cannot have it both ways by arguing that the termination was justified because the disability was dangerous while also maintaining that the safety-threatening disability was not the reason for the firing." *Id.*

Assuming that a jury found that Union Pacific imposed its work conditions because it regarded Meza as having an impairment, no other evidence is necessary to demonstrate causation. Union Pacific used the fitness-for-duty process "to determine if [Meza's] health condition poses a significant safety risk for work." R. Doc. 139-2, at 15. And Union Pacific relied on the FMCSA handbook used for evaluating "medical conditions" to impose restrictions because of the risks it believed arose from Meza's injuries. R. Doc. 139, at 10. Indeed, Dr. Charbonneau explained that he imposed the restrictions "due to the nature and severity of [Meza's] traumatic brain injury with intraparenchymal hemorrhagic contusions." R. Doc. 139-2, at 11. And he later explained to Meza that "the areas where the bleeding occurred were altered chemically and could serve as an area for seizures in the future." R. Doc. 150-5, at 8.

Given this direct evidence, there is no need to apply the *McDonnell Douglas* framework to infer a causal link. *See Rizzo v. Child.'s World Learning Ctrs., Inc.*, 84 F.3d 758, 762 (5th Cir. 1996) (court "need not engage in the *McDonnell Douglas* presumptions in order to infer discrimination" where employer "does not deny that [plaintiff] was removed from driving duties because of her hearing impairment"); *Fulbright v. Union Pac. R.R. Co.*, No. 3:20-CV-2392, 2022 WL 975603, at *7 (N.D. Tex. Mar. 31, 2022) (finding pretext analysis unnecessary because of direct evidence that the employer imposed work restrictions because of the plaintiff's sleep disorder).

## CONCLUSION

For all these reasons, the judgment of the district court should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,160 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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 it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Book Antiqua 14 point.

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## CERTIFICATE OF SERVICE

I certify that on this 24th day of June, 2024, I electronically filed the foregoing brief in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that all counsel of record are registered CM/ECF users, and service will be accomplished via the appellate CM/ECF system.

I further certify that, as required by Eighth Circuit Local Rule 28A(d), ten paper copies of the foregoing brief will be filed with the Court and one paper copy of the foregoing brief will be served on each party.

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